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ANNOTATED

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VOL. 29

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IN THIS VOLUME.

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1. STREET RAILWAYS (§ I—1)—FRANCHISES—EXCLUSIVENESS UPON TERMINATION OF ANTECEDENT RIGHTS.

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[*Re Toronto R. Co. and Toronto*, 26 D.L.R. 581, 34 O.L.R. 456, affirmed.]

Statement.

APPEAL from the judgment of the Supreme Court of Ontario, 26 D.L.R. 581, 34 O.L.R. 456. Affirmed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—This appeal has arisen out of an application by the respondent company to the Ontario Railway and Municipal Board, under sec. 250 of the Ontario Railway Act of 1914, asking the approval of plans for a proposed extension of a street railway. The Board made an order in favour of the respondent upon this application on September 9, 1915; from this order the present appellants appealed to the Appellate Division of the Supreme Court of Ontario, by whom the order of the Railway Board was confirmed, and the present appeal is against that judgment.

On the original hearing, certain technical objections were taken on behalf of the appellants, but these were summarily overruled by the Railway Board, who regarded them as devoid of substance or merit. Such objections do not admit of elaborate argument, and, although maintained before the Supreme Court and on the hearing of this appeal, it is unnecessary for their Lordships to deal with them further than by saying they are quite satisfied the decisions of the Board and of the Supreme Court were correct.

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The real substance of the dispute depends upon the construction of an agreement made on September 1, 1891, between the appellants and the predecessors in title of the respondents, by which powers were granted for creating street railways over streets within the jurisdiction of the city, and of a statute by which that agreement was confirmed.

The appellants, as the governing body of the City of Toronto, have power to grant rights of running tramways or street railways over all the streets within their jurisdiction, subject to the limitations imposed on their authority by the provisions of the Street Railway Act of 1887, a statute which provided that no municipal council shall grant to a street railway company any such privilege for a longer period than 20 years. The boundaries of the city have from time to time been altered. In 1884 and up to 1887 the northern boundary extended to a line drawn east and west through the junction of a street known as Yonge St. and the Ontario and Quebec railway tracks, now the Canadian Pacific Railway. The roads north of this point were, at this date, vested in the County of York, by whom the powers of granting railway rights over these portions of the roads were enjoyed and exercised. By virtue of two agreements, made respectively in 1884 and 1886 between the County of York and the Metropolitan Street Railway Co. of Toronto, the County of York in exercise of such powers, granted to the Metropolitan Street Railway the right to construct a street railway along Yonge St. northwards from the northern limit of the city boundary as it was then constituted. These rights were subject to forfeiture in certain events, but, unless forfeited or otherwise extinguished, the rights continued until June 25, 1915.

No doubt whatever has arisen as to the power of the County of York to enter into these agreements, or of the extent or validity of the rights obtained by the Metropolitan Street Railway under their terms, and, indeed, the Corporation of the City of Toronto would have had no direct right or interest in the streets at all but for the fact that the municipal boundaries of the city were, in 1887, extended in a northerly direction for an extent of some 1,320 feet. The effect of this was to place the portion of Yonge St. and the other streets lying within this extended area under the jurisdiction of the city, and this portion of the roads was

accordingly conveyed to the appellants by the County of York, but such conveyance was expressly made subject to all existing rights of the public or any person or corporation, and, in particular, to the rights of the Metropolitan Street Railway in respect of the road known as Yonge Street.

In 1891 the appellants determined to offer for sale the right to operate street railways upon its streets; a tender made by the predecessors in title of the respondents for the purchase of these rights was accepted, and the agreement which has caused this dispute was entered into on September 1, 1891, to carry the purchase into effect. By this agreement the corporation granted to the purchasers for a period of 20 years from the date of the agreement, and a further term of 10 years if legislative authority could be obtained for such extension,

> The exclusive right . . . to operate surface street railways in the City of Toronto, excepting on the island and on that portion, if any, of Yonge St. from the Ontario and Quebec Railway tracks to the north city limits, over which the Metropolitan Street Railway claims an exclusive right to operate such railways, and the portion, if any, of Queen St. west (Lake Shore Road) over which any exclusive right to operate surface street railways may have been granted by the Corporation of the County of York, and also the exclusive right for the same term to operate surface street railways over the said portion of Yonge St. and Queen St. west (Lake Shore Road) above indicated, so far as the said corporation can legally grant the same.

This agreement was, as is shown upon its face, in excess of the powers of the corporation, and the necessary statute for its confirmation was obtained on April 14, 1892. On June 25, 1915, the rights of the Metropolitan Street Railway ceased over that portion of Yonge St which was brought within the boundary of the city in 1887, and the respondents accordingly claimed that by virtue of their agreement, they were then entitled, for the residue of the term which such agreement created, to use this portion of the street for the purpose of their railway. The appellants deny that the agreement conferred any such right. They assert that at the date of the agreement the corporation had no power legally to grant any franchise over this portion of Yonge St., and that consequently the only rights that were conferred in respect of this area were those that would have arisen if the grants to the Metropolitan Street Railway, made by the County of York, had for any reason been found to have been invalid and void on September 1, 1891.

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Their Lordships are quite unable to take this view. At the date of the agreement no question whatever existed and no doubt had arisen as to the rights possessed by the Metropolitan Street Railway. Such rights were regarded by all parties as valid and subsisting, capable no doubt of termination in certain events, but, unless those events occurred, continuing on to June 25, 1915. Subject to those rights, whatever they might be, and subject to the restrictions imposed by the Street Railway Act of 1887, the municipal authorities of the City of Toronto had full power to deal with the franchise of these roads in such a manner as they thought would best serve the interests of the inhabitants of the municipality. The agreement that was made granted a term of years beyond the authorised period, but it was intended to apply for legislation authorising this extension, and the agreement must be construed throughout upon the hypothesis that this authority would be, as in fact it was, duly obtained. The grant, therefore, was to run street railways in the City of Toronto for a total period of 30 years, with an absolute exception in respect of the island and a limited exception in respect of those parts of Yonge St. and Queen St. where exclusive rights had been granted by the County of York. So far, however, as the excepted portions of those streets were concerned, a grant for the same period was made by the corporation, so far as they could legally grant the same, that is so far as they could legally grant the same if the agreement was effectively confirmed by a subsequent statute. The only colour of explanation that can be given by the appellants of the distinct grant on the part of the City of Toronto over these excepted portions of the street is that to which reference has already been made, namely, that the grant to the Metropolitan Street Railway might be declared to be void, *ab initio*, or to have ended before September 1, 1891, a contingency which nobody contemplated and which there was no reason or justification to apprehend. The only meaning, in their Lordships' opinion, which this agreement is capable of bearing is that the grant it contained, which was made for good consideration, was a grant which would take effect whenever such antecedent rights were for any reason to cease.

It has been suggested in argument that such a grant would be beyond the powers of the corporation as creating a reversionary interest in the franchise of the roads. No authority whatever was

produced to aid this contention, and their Lordships are unaware of any principle that could be invoked in its support.

It is also said that such a power is open to abuse, and so doubtless are all powers enjoyed by municipal authorities, but it would be a wrong and dangerous method of determining the true limits of such powers to consider the mischief their improper exercise might produce.

Their Lordships consider the terms of the agreement itself do not, when once the facts are understood, present any real difficulty. It is the manner in which these rights have been confirmed by statute which gives rise to the only question of uncertainty in the case. This statute is 55 Viet., ch. 99, sec. 1, 4 (1). Its description, to which reference is permissible for the purpose of determining its construction, is stated to be an Act to incorporate the Toronto Railway Company and to confirm an agreement between the Corporation of the City of Toronto and certain persons called the purchasers. The agreement and the conditions and tenders referred to are set out in the schedule to the statute in the usual way, and are declared to be valid and legal, and binding upon all the parties. So far as the statute sought to validate and confirm the agreement, nothing further than this was required; but, as is not unusual in statutes of this description, the Act proceeded to explain the effect of the agreement, and it is the difference between the terms in which this explanation is given and the terms of the agreement itself which has caused all the confusion in the case. The actual words which give rise to the difficulty are these:—

> It is hereby declared that under the said agreement the purchasers acquired and are entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said City of Toronto, except that portion of Yonge St., north of the Ontario and Quebec Railway and that portion of Queen St (Lake Shore Road) west of Dufferin St.; and that the purchasers acquired and are entitled to such right and privilege (if any) over the said excepted portions of Queen St and Yonge St as the Corporation of the City of Toronto had at the time of the execution of the said agreement power to grant for a surface street railway.

Now, in the first place, it is remarkable that the island, which was totally excepted from the terms of the original grant, is not excepted at all from the description given in the Act of Parliament, and, if the words of the statute were taken to be those which defined and created the rights of the purchasers, they would be

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entitled to use the island for the purpose of their street railway, although it had been carefully excluded from the terms of the purchase.

Their Lordships think that in an Act of this description a provision, of the nature mentioned, is to be regarded rather by way of explanation and identification of the agreement which has been confirmed, than by way of creation of actual and independent rights. But even if they were to be otherwise regarded, in their Lordships' opinion, the statute merely expresses in clumsy and obscure language exactly the same conditions as those expressed in the original agreement. The right and privilege, if any, over the excepted portion of Queen St., which the City of Toronto at the time and execution of the agreement had power to grant, were the rights and privileges which were to commence when the existing franchise ended. It is quite true that if that franchise ran its full length, apart from the Act of Parliament, there would have been no right or privilege which the corporation could grant at all. But the statute must be read in light of the fact that the agreement was thereby validated, and the right and privilege which the corporation had power to grant at the date of the agreement must be construed as meaning the right and privilege which the corporation had power to grant, assuming —for this was the whole basis of the agreement—that the agreement itself was legalised. The appellants urge strongly that this gave no effect to the words "if any," and that due effect can only be given to these by making the assumption that in certain circumstances no such rights or privileges could be enjoyed by the corporation, and this assumption can, they urge, only be satisfied by regarding the grant as one to take effect if the existing grants were void; but if assumptions are to be made for which there is no warrant in the facts, it would be just as reasonable to assume that the period of the existing grant might cover, or be extended so as to cover, the whole period of 30 years, and in that case the words "if any" would have just as sensible a meaning as on the other hypothesis. In truth, the words are often needlessly used by way of caution, and it would be unreasonable to give them such weight as to destroy the obvious meaning of the statute or document in which they are contained.

The view expressed by their Lordships was that taken by the Railway Board, and in the result by the Supreme Court; but

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their Lordships think the appellants were right in urging that the judgment of the Supreme Court did not depend upon any independent investigation of the matter, but that they regarded themselves as bound by a judgment of this Board in a dispute which related to the rights over a portion of Queen St. where a similar question arose, in the case of *Toronto Railway* v. *City of Toronto*, [1906] A.C. 117. In forming this view their Lordships think that the Supreme Court were in error. The judgment referred to did not proceed upon this basis, but upon a ground entirely independent of whether the grant were made subject to the rights over Queen St. or no.

It is unfortunate that, in these circumstances, their Lordships have not the advantage of the considered opinion of the Judges of the Supreme Court in this case, but the judgment of the then Court of Appeal in the case of *City of Toronto* v. *Toronto Railway Co.*, 5 O.W.R. 130, is quite clear upon the kindred question which arises with regard to the portion of Queen St. and with that judgment their Lordships are in entire agreement.

Throughout this judgment reference has only been made to the Yonge St. area, for the question of principle which governs the one governs the other also, and there is no need for separate consideration of the second street. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs. *Appeal dismissed.*

COMMERCIAL CABLE CO. v. GOVERNMENT OF NEWFOUNDLAND.

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor. July 31, 1916.

1. GOVERNOR (§ I—1)—PREROGATIVE POWERS—CONTRACTS.

The Governor of Newfoundland has not full prerogative power of the Crown; his capacity is limited by his commission and instructions, and by the law of the colony; contracts in his public capacity are subject to the constitutional practice of the colony; all contracts by him extending over a period of years and creating a public charge are, by statute, not binding until approved by the House of Assembly.

2. DUTIES (§ I—1)—DISCRETION AS TO REMISSION—VALIDITY OF CONTRACTS AFFECTING.

Under responsible government all grants of public money direct or by prospective remission of duties are in the discretion of the legislature, and no contract is binding unless that discretion has been exercised in some sufficient fashion.

3. DUTIES (§ I—1)—REMISSION OF TOLLS AUTHORIZED BY STATUTE—SUBSIDY CONTRACTS—EXEMPTIONS.

The Audit Act (62 & 63 Vict. ch. 34, sec. 79) which enables the Governor-in-Council to remit any duty or toll payable to the Crown does not authorize a provision in a contract for years granting an annual subsidy and freedom from customs duties on certain imports; the statute grants a remission, the contract aims at exemption.

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APPEAL from the judgment of the Supreme Court of Newfoundland.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—This is an appeal from the conclusion come to by a majority of the Supreme Court of Newfoundland. What has to be determined is whether the appellants, who are an American company incorporated in the State of New York, are entitled to recover two sums of $12,000 and $10,916.13, alleged to be due under an agreement under the Great Seal of Newfoundland, dated February 18, 1909, to which the parties were the appellants and the Governor of Newfoundland in Council.

The agreement was made under the following circumstances. Prior to 1905 the appellants owned and worked five submarine cables laid between Waterville, in Ireland, and Canso, in Nova Scotia. None of these cables reached to Newfoundland. By an agreement dated August 26, 1905, made between the appellants and the Government of Newfoundland, and subsequently confirmed by statute of the Legislature of Newfoundland (6 Edw. VII. ch. 10), to which it was scheduled, the government agreed to grant to the appellants, on certain terms and conditions, the right to land any of its through cables in Newfoundland.

In September, 1905, a cable had been laid by the appellants from Port aux Basques, on the south coast of Newfoundland, to Canso, in Nova Scotia. This cable became the property of the government, who worked it. It was in order to develop the system so brought into existence that the agreement of August 26 was entered into. That agreement provided for the maintenance of the new cable and for exchange of traffic. It also provided that the government should grant to the appellants the right to land any of their through cables in Newfoundland on certain terms and conditions, and for grants of cable stations and wayleaves. The duration of this agreement was to be 10 years.

Later on, in 1909, Sir Robert Bond, who was then Premier of Newfoundland, entered into negotiations with the appellants with a view to the appellants landing one of their transatlantic cables at St. John's, and these negotiations culminated in the agreement of February 18, 1909, now in controversy. By this agreement the appellants contracted to cut one of their trans-

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atlantic cables and extend it to Newfoundland and thence to New York, and also to establish a cable station at St. John's. The duration of the agreement of August 26, 1905, was to be extended to 25 years. The appellants were to pay the government a certain proportion of their receipts for messages. The government were to pay to the company $4,000 annually for the facilities thus to be afforded, and to grant them the right to land the new cable in Newfoundland, as well as lands for cable stations and wayleaves for the cables. The appellants were to have entry duty free for their materials and appliances, and the contract was to last for 25 years.

The appellants selected a landing-place and entered into a contract with a construction company for the manufacture and laying of the new cable. The cable appears to have been made and landed, and some work was done by the appellants towards establishing a cable station at St. John's. The government used the cable on certain occasions, but it appears to their Lordships that this was done under special arrangements, and that it cannot be taken to have amounted to an adoption in itself making the contract binding on the government.

For the purpose of installing the new cable the appellants imported into Newfoundland certain articles which would have been admitted duty free had the contract been carried out by the government. But the government has claimed duty on these articles on the footing that the contract is not binding, and the appellants have paid in respect of duties sums amounting to $10,916.13. This is the second amount claimed, and it is claimed as recoverable by the appellants under their contract. They allege that they are entitled to have it repaid to them, and to receive the first item of $12,000, being the amount for 3 years of the annual subsidy of $4,000.

In 1909 the Government of Sir Robert Bond, who had negotiated the agreement in controversy, went out of office, and a new government came in. The new government was dissatisfied with the agreement, announced that it regarded it as not being binding in the absence of legislative sanction, and declined to recommend it to the House of Assembly for ratification. As a consequence, the Legislature of Newfoundland has not ratified the agreement, as it did in the case of the agreement of 1905.

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There is no doubt that the agreement in controversy was executed with all due solemnities so far as the Governor-in-Council was concerned, and the question is whether it is binding in the absence of sanction from the legislature. With the policy of the new administration in Newfoundland in repudiating it their Lordships have no concern. The administration may have acted harshly or they may have been simply doing a public duty. Such a question is not one for a Court of law, but is a domestic issue for the Government of Newfoundland, and those to whom they are responsible. The only point before this Board is whether the claims of the appellants in proceedings which are analogous to a petition of right ought to succeed as claims valid in point of law. The question turns on whether the then Government of Newfoundland had authority to make a contract, binding apart from legislative sanction, which would entitle the appellants to claim the sums in question under the terms of such a contract. In order to answer this question it is necessary to examine the position of the Governor of Newfoundland when, acting in council, he executed the agreement.

Newfoundland has not had its constitution defined by Imperial statute after the fashion of Canada and the Canadian provinces, but it has for many years possessed not only representative but responsible government. Its elected Chamber has assumed the form of a House of Assembly, which has regulated its own proceedings by rules, made under the authority of one of its own statutes, which precludes alterations of these rules except by a vote of two-thirds of the members. One of these rules is that in all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House. Their Lordships are of opinion that this rule is part of the constitution of Newfoundland, and is binding on the executive, which is responsible to the legislature and which was of course party to the statute under which the rule was made.

There is another statute which was invoked in the argument for the appellants as relating to the subject-matter of the agreement of 1909. It is the Newfoundland statute of 62 and 63 Vict., ch. 34, which, by sec. 79, enables the Governor-in-Council, on the recommendation of the Treasury Board, to remit any

duty or toll payable to the Crown and imposed and authorised to be imposed by an Act of the Colony. But looking at the context of the section, their Lordships do not read the statute as applying to a contract such as that before them, which is dealing not with remission in a particular case, but with an exemption of a prospective and continuing character. Such an exemption would, in their opiniou, require the special sanction of the legislature.

Turning to the position of the Governor, it is plain that, according to well-settled principles, he is not a Viceroy in the sense of being a person to whom the full prerogative power of the Crown has been delegated. His capacity is defined and limited by his commission and instructions. The commission which defines the powers of the Governor is contained in letters patent of March 28, 1876, which enable him, with the advice and consent of the Legislative Council and Assembly of the Colony, to make laws for the public peace, welfare, and good government of the Colony. They authorise him to

> do and execute in due manner all things that shall belong to his said command, and to the trust we have reposed in him, according to the several powers and authorities granted or appointed him by virtue of these present letters patent, and of such commission as may be issued to him under our sign manual and signet, and according to such instructions as may from time to time be given to him under our sign manual and signet, or by our order in our Privy Council, or by us through one of our principal secretaries of state, and according to such laws and ordinances as are or shall hereafter be in force in our said colony.

The letters patent also set up an executive council, to be nominated with the approval of the legislature of the Colony, and a legislative council, not exceeding fifteen in number.

Their Lordships think it clear that the Governor is by these provisions subjected to constitutional restriction, and that any persons dealing with him, whether or not they actually know the character of his authority, must be taken to deal subject to such restriction. No doubt, if he chose in unambiguous language to bind himself by any contract personally, the Governor could do so and take the consequences, but he could not by so doing bind the parliament and the people over whom he is only appointed to exercise authority subject to the constitutional conditions already referred to. And when he makes a contract it is well settled that the presumption is that he contracts in his public

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capacity and subject to the particular restrictions which the constitutional practice of the Colony imposes. These restrictions everyone transacting public business with him must be taken to accept in so transacting, and any contract entered into with him in his public capacity will be presumed, unless the contrary plainly appears, to have been entered into on this footing.

From what has been said it follows that the agreement of February 18, 1909, must be presumed, from the character of its subject-matter, to have been made on the footing that it would be submitted to the legislature of the Colony for its approval, and that it was not to become a binding agreement in the absence of such approval. The agreement must, moreover, be read as a whole, and as it was beyond the power of the executive to make it binding in the points already indicated, it cannot be made binding piecemeal. What view the legislature might have taken had it been properly submitted is a topic into which no Court of law can enter, and no damages can be recovered for breach of any implied promise to so submit it. For all grants of public money, either direct or by way of prospective remission of duties imposed by statute, must be in the discretion of the legislature, and where the system is that of responsible government, there is no contract unless that discretion can be taken to have been exercised in some sufficient fashion. Their Lordships will therefore humbly advise His Majesty that the appeal fails, and should be dismissed with costs. *Appeal dismissed.*

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ST. JOHN LUMBER CO. v. ROY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington Anglin and Brodeur, JJ. May 16, 1916.

1. APPEAL (§ I B—15)—FINALITY OF JUDGMENT—DISMISSAL OF MOTION TO SET ASIDE SERVICE.

As the right to serve a summons out of the jurisdiction is not a substantive right, an order dismissing a motion to set aside the service of a writ of summons out of the jurisdiction is not a final judgment within the Supreme Court Act (R.S.C. 1906, ch. 139, sec. 2(*e*), as amended by 1913, ch. 51, sec. 1) and, therefore, no appeal lies to the Supreme Court of Canada from a judgment refusing to set aside such a service.

Statement.

APPEAL from a judgment of the Supreme Court of New Brunswick affirming the refusal of a Judge to set aside his order for service of the writ out of the jurisdiction.

The respondent moved to quash on the ground that the appeal was not from a final judgment. He claimed, also, that if the

appeal would lie it only related to a matter of procedure and should not be entertained.

J. T. F. Winslow, for appellants.

M. L. Hayward, for respondent.

FITZPATRICK, C.J.:—This is an appeal from a judgment of the Supreme Court of New Brunswick which affirmed an order of a Judge in Chambers who refused to set aside an earlier order made by himself granting leave to serve a writ of summons out of the jurisdiction. Fitzpatrick, C.J.

It seems a point of practice and there is no final judgment. The case of *Martin* v. *Moore*, 18 Can. S.C.R. 634, seems in point. In the later case of *Howland & Co.* v. *Dominion Bank*, 22 Can. S.C.R. 130, the question of jurisdiction of the Supreme Court does not appear to have been considered.

It seems to me the only question here is whether the amendment of the Supreme Court Act 1913 defining a final judgment would cover a case such as this. The amount involved is only $48.

With some hesitation I have come to the conclusion that no appeal lies.

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

IDINGTON, J. (dissenting):—The respondent's motion to quash this appeal should turn upon a consideration first, of the question whether or not the case is covered by the general refusal of this Court in mere matters of procedure to entertain an appeal dependent on procedure as was held under the construction heretofore put upon the Supreme Court Act defining the words "final judgment," and secondly, the substitutionary amendment of that Act in 1913 by the first section of 3 and 4 Geo. V., ch. 51, quoted hereinafter. Idington, J.

The appeal involves the question of the jurisdiction of a New Brunswick Court to try a case brought there against appellant, a foreign corporation. The appellant contends there is none because by the law of New Brunswick there is no power given in the circumstances to serve the appellant as such. We are not concerned in this motion either with the merits of the case, which is for a trifling amount, or with the law relative to the question of jurisdiction.

It so happens that the case may yet be tried on its merits as the judgment appealed from stands. But in principle the converse case might arise any day, of a suitor prosecuting his

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rights being denied justice by an order refusing to exercise the jurisdiction of the Court and he suffering in such a case would, if the holding of the majority herein is maintained, be driven to a foreign Court to prosecute his remedy. It is alleged that is a mere question of procedure. Even so this Court has affirmed in many cases its jurisdiction to hear appeals involving only questions of procedure.

Of these cases, there is the case of *Lambe* v. *Armstrong*, 27 Can. S.C.R. 309, in which the late Mr. Justice Girouard, speaking for the Court, succinctly stated the law as follows:—

> This appeal raises only a question of procedure in the Court below, and consequently the respondent contended that we should not interfere with the judgment appealed from. But questions of practice cannot be ignored by this Court when their decision involves the substantial rights of the litigants, or sanctions a grave injustice. We believe that this is one of those cases.

That case involved a question of procedure in regard to a sheriff's sale and this Court reversed a mere practice order of the Quebec Court of Queen's Bench.

This Court in the case of *Eastern Townships Bank* v. *Swan*, 29 Can. S.C.R. 193, followed that decision in a case involving a mere question of practice as to the making of an *ex parte* order fixing peremptorily a date for the adduction of evidence, and hearing, and again reversed the same Court of Queen's Bench.

In the case of *Price* v. *Fraser*, 31 Can. S.C.R. 505, this Court again entertained an appeal where a mere question of procedure was involved and again reversed the same Court of Queen's Bench which had held that the Court of Review had no jurisdiction to make the order it did respecting the mere inscription of a case.

That case raised in principle exactly that which is raised herein. The facts upon which the question of jurisdiction turned, of course, were not the same as here, but simply raised the question of the jurisdiction of the Court. And the neat point as here was, whether or not the Court of Queen's Bench, in holding the Court below had no jurisdiction, was right or wrong.

In *Finnie* v. *City of Montreal*, 32 Can. S.C.R. 335, this Court affirmed its jurisdiction to review and reverse the Court below on a mere question of practice. I pointed out in the argument of this motion that the law is as laid down in these cases without referring to authority, for the point has been taken so many times and decided that it was no more a question of this Court's

jurisdiction that was involved in the cases of mere procedure but one of expediency generally decided by regard to whether or not there was involved a question of the denial of a right sometimes tested by an appeal to the principles of natural justice.

I know of nothing more grave in the administration of justice than a decision of whether or not a Court presuming to try a case had jurisdiction to do so.

The appellate Court having such power of determination relative to the jurisdiction of an inferior Court, which refuses to assert that power, I most respectfully submit, fails to discharge its duty.

In those cases involving the jurisdiction over foreigners and presuming to assert that which it has not, the question becomes more grave and delicate than when only our own citizens are concerned.

In the case of *Arpin* v. *Merchants Bank of Canada*, 24 Can. S.C.R. 142, the late Chief Justice Strong laid down the law in refusing a new practice appeal, as follows:—

> We have always said that on points of practice like this we will follow the course of the Privy Council, as laid down in the *Mayor of Montreal* v. *Brown and Springle*, 2 App. Cas. 168, and we have already acted on that principle in the cases of *Gladwin* v. *Cummings*, Cass. Dig. 2 ed., 426; *Dawson* v. *Union Bank*, Cass. Dig. 2 ed. 428, and *Scammell* v. *James*, Cass. Dig. 2 ed. 441.

These cases illustrate his meaning and the dictum relied upon in *Brown's* case, 2 App. Cas. 168, is to be found at p. 184 of the report wherein it appears.

I think, therefore, that the motion should be refused and the case heard.

Then let us pass that ground and coming to that involved in the amendment by section 1 of ch. 51 of 3 & 4 Geo. V. which is as follows:—

> Par. (e) of sec. 2 of the Supreme Court Act, ch. 139 of the R.S.C. 1906, is repealed and the following is substituted therefor:—
>
> (e) Save as regards appeals from the Province of Quebec, "final judgment" means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding, and, as regards appeals from the Province of Quebec, "final judgment" means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

A long line of decisions by our predecessors in this Court refusing to hear appeals from judgments and orders, sometimes of an interlocutory character, and at other times determining

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some of the rights of litigants, seemed to bind us, now sitting in this Court, and several decisions were given which seemed within meaning of the Supreme Court Act, so interpreted, to prevent appeals from what in effect were final judgments though not supposed to be such as intended to come here for review. This amendment I have just quoted was designed to furnish a remedy therefor.

It was stated by counsel supporting this motion that the Honourable the Minister of Justice had in effect stated in parliament that the amendment emanated from this Court.

I may be permitted to disclaim any responsibility for it. I declined to take part therein for I conceived another method was desirable and the amendment as framed not unlikely to be productive of undesirable results. I am free, therefore, to interpret and construe it as I should any other new statute enacted to remedy what was considered an obvious evil.

Surely if ever there was a case falling within the scope of legislation such as this, when we have regard to the numerous decisions which gave rise to a need for reform, this case presents it, if the jurisprudence of the Court had not already settled the question as against the view entertained by my brother Judges in proposing to quash this appeal.

If the jurisdiction to try the case brought against a man who disputes that jurisdiction, does not involve the determination of a substantive right of any of the parties to the controversy, I fail to understand what would.

As I have already shewn, this Court has held in the cases I have cited there was perhaps no need for the amendment to give the right of appeal.

Or are we to be told that there was need for an amendment to take the right of appeal away in cases turning upon what may be called procedure though involving substantial questions of justice as in those I have already cited? And I have by no means exhausted the list of cases wherein the like relief has been got here. If the interpretation counsel supporting the motion tried to put upon the words is correct, such would be the effect of the amendment; it would give relief in a few cases and deprive others of the right of relief they have heretofore had.

I am not concerned on which ground the appellant goes.

Whether on the jurisprudence of this Court or the amendment, clearly the appellant is entitled to have its appeal heard.

I therefore think the motion should be dismissed.

ANGLIN, J.:—This is a purely common law action. The subject of appeal must, therefore, be a "final judgment." That an order dismissing a motion to set aside the service of a writ of summons out of the jurisdiction is a final judgment apart from the statutory definition of that term is scarcely arguable. (See cases collected in Snow's Annual Practice, 1916, pp. 1108-9 and 1121-3). That such an order was not a final judgment within the definition of that term in the Supreme Court Act prior to 1913 is settled jurisprudence. *Martin* v. *Moore*, 18 Can. S.C.R. 634. The appellant maintains that the case falls within the amendment of 1913.

In my opinion the right to serve a writ of summons out of the jurisdiction is not "a substantive right of any of the parties in controversy in any action," within the meaning of sec. 2 (*e*) of the Supreme Court Act, as enacted by 3 & 4 Geo. V., ch. 51, sec. 1. It is not "a substantive right" at all; and it is not "a right in controversy in the action" within the meaning of that phrase as used in sec. 2 (*e*).

The question disposed of by the judgment before us is one of remedy rather than of substantive right. The obligation of the contract, which is the substantive right in controversy in the action, *Reg.* v. *Toland*, 22 O. R. 505, at p. 509, is not affected by the giving or withholding of this additional remedy for its enforcement. Cooley's Constitutional Limitations, 5 ed., pp. 346-9. I say additional, because the existence of a remedy in the forum of the domicile of the defendant is unquestioned. No doubt the plaintiff may gain a substantial advantage and the defendant suffer a corresponding detriment as a result of the judgment in appeal—but no more so than may result in many cases where some right of discovery or other purely incidental right of procedure has been accorded the one or denied the other. Nobody would dream of maintaining that a judgment or order dealing with such a matter of procedure had determined a substantive right in controversy in the action. To do so would involve holding that every interlocutory order of the highest provincial Court which materially affects the remedy or prospect of recovery

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is appealable to this Court as a final judgment. No line of exclusion could be drawn. It can scarcely be necessary to state that parliament did not intend to do anything so irrational as to limit the right of appeal to a "final judgment" and then, by a definition of that term, to render the limitation thus imposed useless and absurd. While

> a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except in so far as it may help them in interpreting what the legislature has said (*Cook* v. *Chas. A. Vogeler Co.*, [1901] A.C. 102, at 107), you are not to construe the Act of Parliament so as to reduce it to rank absurdity. . . . You must give it such meaning as will carry out its objects. *The Duke of Buccleuch*, 15 P.D. 86, at 96.

The language should not unnecessarily be applied to something not within the mischief contemplated by the Act if to do so will produce manifest absurdity or inconvenience. *Yates* v. *The Queen*, 14 Q.B.D. 648, at p. 660. In my humble opinion the language used in the definition of "final judgment" given its literal meaning does not lead to any such absurdity. On the contrary, it seems apt to preclude precisely the contention which the appellants present in this case. The right determined must be substantive. The judgment must affect the existence or the enforceability of the obligation sued upon—the right in controversy in the action. That, I take it, means that a judgment appealable to this Court as a "final judgment" must at least in part dispose of the merits of the action. The amendment of 1913 leaves untouched the considerations which led this Court to decline jurisdiction in *Martin* v. *Moore*, 18 Can. S.C.R. 634. In fact it seems designed to make it clear that they are still to prevail.

This amendment was enacted to meet the difficulties exemplified and emphasised by the then recent decisions in *Union Bank of Halifax* v. *Dickie*, 41 Can. S.C.R. 13; *Wenger* v. *Lamont*, 41 Can. S.C.R. 603; *Clarke* v. *Goodall*, 44 Can. S.C.R. 284; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616; and *Hesseltine* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230. In construing it, it is our duty

> to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply.

The Queen v. *Allen*, L.R. 1 C.C.R. 367, at 374; to suppress the mischief and advance the remedy; *Heydon's* case, 3 Coke Rep. 7 (*b*); *Peek* v. *North Staffordshire Ry Co.*, 10 H.L. Cas. 473, at 492;

to find out what the meaning of the legislature is; and to attach a rational and beneficial meaning, if possible, rather than an irrational and injurious meaning. *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, 9 Q.B.D. 648, at 660, in 1882. The mischief which the amendment of 1913 was designed to remedy was the fact that theretofore because no judgment was considered final for purposes of appeal to this Court unless it not only disposed of the rights of the parties in controversy in the action but also concluded the action itself, in a common law action, subject to a few special exceptions, a judgment which conclusively determined that the plaintiff was entitled to the relief he sought was not appealable unless it also finally dealt with and disposed of the quantum of the recovery to which he was entitled. That was the result of the definition of "final judgment" as enacted by 42 Vict., ch. 39, sec. 9—a provision not unreasonable when it was made, but which afterwards became productive of consequences not anticipated owing to the introduction into common law actions of methods of procedure formerly peculiar to courts of equity. *Hesseltine* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230, at 237-8. It was certainly not intended by the amendment of 1913 to make appealable to this Court any judgment purely interlocutory in character. The purpose of confining the right of appeal to judgments determining substantive rights of the parties in controversy in the action was to exclude judgments or orders dealing with matters of remedy and procedure only. The order maintaining the service of the writ is such an order. It does not determine any substantive right in controversy in the action. I am for these reasons of the opinion that the judgment of the Supreme Court of New Brunswick from which the defendant seeks to appeal is not a final judgment appealable to this Court and that this appeal should be quashed.

BRODEUR, J.:—I am in favour of granting the motion to quash because it is not a final judgment. Brodeur, J.

The appellant relied on the 1913 amendment but I am of opinion that the order from which he is appealing does not dispose of a "substantive right" of any of the parties in controversy in the action.

[On a subsequent day His Lordship the Chief Justice delivered the following opinion as to the costs of the appeal.]

FITZPATRICK, C.J.:—This appeal has been quashed for want Fitzpatrick, C.J.

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of jurisdiction. The respondent asks not only for the costs of the motion but also for the general costs of the appeal on the ground that he moved as soon as he could and that by consent of counsel the motion, which was returnable on the first day of the May session, stood over until the appeal came on to be heard on the merits.

R. 4 of the Supreme Court Rules provides for the respondent moving to quash within fifteen days after the security has been approved. R. 5 provides that all proceedings in the appeal shall be stayed after service of the motion to quash until that motion has been disposed of or unless a Judge of the Supreme Court shall otherwise order.

These two rules were adopted when the rules were revised in 1907. Previous to that time it frequently happened that appeals were quashed for want of jurisdiction when they came on to be heard on the merits and when the appellant had expended a very large sum of money in connection with the printing of his appeal book. The rules were devised to save unnecessary expense of this kind.

In the present instance it would appear that the solicitors took it upon themselves to ignore the provisions of R. 5 and proceeded with the printing of the case and factums before the time had expired within which the appellant could move to affirm jurisdiction and the appeal was inscribed for hearing at the present session. This was entirely irregular and if permitted, would nullify the entire object for which the said rules were passed.

Under these circumstances the respondent is certainly not entitled to obtain anything more than the ordinary costs of the motion to quash and what if the rules had been observed would have been the general costs of the appeal up to the date when the motion to quash was served. *Appeal quashed with costs.*

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MALLORY v. WINNIPEG JOINT TERMINALS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ. May 25, 1916.

1. RAILWAYS (§ II D 2—35)—NEGLIGENCE—UNCOVERED SWITCH RODS—INSUFFICIENCY OF FINDINGS.

A finding by a jury of negligence by permitting switch-rods to be uncovered will not be upheld when the evidence is that the practice universally followed on this continent was observed, and no evidence was given that covering was practicable.

[*Mallory* v. *Winnipeg Joint Terminals*, 22 D.L.R. 448, 25 Man. L.R. 456, affirmed.]

APPEAL from the judgment of the Court of Appeal for Manitoba, 22 D.L.R. 448, 25 Man.L.R. 456, reversing the judgment entered at the trial by Prendergast, J., on the findings of the jury, and dismissing the plaintiff's action with costs.

Wallace Nesbitt, K.C., and *McMurray*, for appellant.

O. H. Clark, K.C., for respondents.

FITZPATRICK, C.J.:—I would dismiss this appeal and confirm the judgment below for the reasons given by Perdue, J.

The general principle applicable in negligence cases is expressed by Lord Halsbury in *Wakelin* v. *London and S.W. R. Co.*, 12 App. Cas. 41, at p. 44, in substance as follows:—It is incumbent upon the plaintiff to establish by proof that the death or injury was caused by some negligent act or omission to which the death or injury complained of is attributable. *That is the fact to be proved.* If circumstances are equally consistent with the negligence of the plaintiff or the defendant then the action fails.

At the time of the accident in question the plaintiff was employed by the defendant company as one of a switch-crew of five, and was actually engaged in the terminal yards handling, at the point of intersection of three different lines, a train of four cars one of which, known in these proceedings as Car No. 39112, was to be switched by what is known as a "flying switch" from the track on which it stood to a track known as the "B lead." To do this it was necessary to throw the switch for the latter track and open the knuckle of the coupler on the car. Both of these operations should, to avoid accident, be carried on in that order. The plaintiff was acting in direct co-operation with the switch-foreman, Lait, apparently was directing the movements of the engine attached to the cars and it was his duty to give the signal to the engineer, when he saw by the switch signal that the line was ready, to shunt the car from the track on which it stood to the "B. lead." There is a good deal of evidence as to what occurred between the plaintiff and Lait to which, in my view, no importance attaches because the jury find that the accident was attributable directly to the defective condition of the switch-rod, and that no negligence is attributable to Lait. If plaintiff had done his work in the regular and proper order he should have first adjusted the coupler and then thrown the switch, in which case Lait would not have given the signal to the engine and in all human probability the accident would not have happened.

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Now, as to the negligence found, it is admitted that the car was properly equipped in accordance with the requirements of the statute. The coupler was operated by a lever from the side of the car. The complaint is that the lever was out of order and that the plaintiff was obliged, to adjust the coupler, to go behind the car and shake the coupler loose with his hand. I can see no reason why he should have assumed that risk and, to have attempted to work at the coupler with his back turned towards the moving car, as he did, was in the circumstances highly imprudent. *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62. However, it will not be necessary to say more as to this because I am satisfied that the accident cannot be fairly attributed on the evidence, to the cause assigned by the jury—a defective switch-rod. In the first place, admitting what, in my opinion, is not proved, that the plaintiff slipped on the switch-rods, there is no evidence to support the finding that they were not properly constructed or that they should have been covered. It is admitted by all the witnesses, including the plaintiff, that switch-rods worked from a switch-stand on the level like those in question are always left uncovered. When they are worked from an interlocking tower it is different because of the delicate mechanism of the locking part. It is also said, although not so found by the jury, that the line was badly ballasted and that a vacant space existed between the switch-rod and the ground which was a cause of danger, but I think the weight of evidence is to the effect that the switch-rods were placed and maintained in accordance with good railway construction and the general practice of railways in this country. Further, the Railway Act makes ample provision for the equipment of trains and the construction of road bed, tracks and switches for the general protection of all those who travel or are connected with the operation and maintenance of railways, and it has not been suggested here that the respondent company in any way failed to observe the requirements of the statute. Sec. 280 of the Railway Act, which deals with switches, contains no provision relating to the covering of switch-rods and no order or regulation has been made by the Board under the general powers conferred by sec. 30 of the Act, nor has the inspecting engineer made any order under sec. 263. The rule applicable to cases like this is well expressed by Pollock in his work on Torts

(10th ed.) p. 476, referring to the case of *Crafter* v. *Metropolitan Ry. Co.*, L.R. 1 C.P. 300:—

> A staircase . . . cannot be pronounced dangerous and defective merely because the plaintiff has slipped on it, and somebody can be found to suggest improvements.

This is an analogous case. Here the switch-rod is proved to have been constructed in the usual way, according to the system generally adopted in this country. If it is left to the jury to decide what improvements ought to be made in the interests of good railway construction then we will have custom or local usage set up as a test of negligence. The standard of care is a legal one and the question for the jury is whether the master or the servant, as the case may be, has lived up to it. If it is for the jury to decide as to the proper railway construction in view of the provisions of our Railway Act, then we will have juries in Manitoba deciding differently from juries in Ontario on the same state of facts with respect to the same railway. I agree absolutely with Mr. Justice Perdue:

> The question as to whether all switch-rods should be covered for the protection of the railway employees is one of very great importance. The form of the protection to be adopted, if protection is to be made obligatory, would necessitate the assistance and advice of experts and the most careful consideration by the legislature or body possessing the power to compel the adoption of the device. Should it be left to a jury to say that defendants were negligent because they adopted the course followed by every railway company in Canada, and left the switch-rods uncovered? It appears to me that the matter is essentially one to be dealt with by Parliament or the Railway Board, so that the device to be adopted will be put in general use by all railways, and it will not be left to the conjecture of a jury to pronounce upon the necessity for, or the sufficiency of, the protection in each case.

The appeal should be dismissed with costs.

DAVIES, J.:—This was an action brought by the appellant, a switchman in defendants' employ, to recover damages for injuries sustained by him while in the performance of his duties as switchman in defendants' yard or station. The accident happened in broad daylight. A "flying switch" had been made and the plaintiff had cut off two cars which had moved to their proper place. Plaintiff then set the switch so that another car might be pushed to another track. The setting of the switch automatically moved the switch-signal so that the switch-foreman, Lait, who was standing by ready to signal the engineer when to back up, seeing the switch was thrown for the "B lead" and Mallory

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was standing by it, walked towards the engine and gave the signal to "shunt the car," which was done.

It appears from his evidence that Mallory after turning the switch, walked over towards the car to be switched and noticed that the knuckle of the coupler in the end of the car was not open. He crossed the track and tried with the lever to open it but for some reason it would not open. Mallory then stepped on the track between the rails and with his back to the car and with one hand on the lever and another on the coupler, tried to open the knuckle. He knew that the opening of the switch by himself a few moments before was the signal for the engineer to "shunt the car." He put himself in this very dangerous position with knowledge that he could not be seen by the engineer and that the train would, in all human probability, immediately move towards him to shunt the car. As he ought to have expected, the car did move with the result that he was knocked down and injured.

The jury properly found that Lait, the signalman, was not guilty of negligence in giving the signal to the engineer to shunt and they also found that Mallory was not guilty of contributory negligence in placing himself where he did with his back to the end of the car to be shunted with one hand upon the lever and one upon the coupler. I must say I think this finding is contrary to the evidence. I do not propose, however, to base my judgment upon that conclusion.

The jury further found that the defendants were guilty of negligence "in not properly covering the switch-rods" and that the "exposed condition of the switch-rods" constituted "negligence on the part of the defendants" and that the tripping of the defendant was "due to the exposed condition of the switch-rods."

I have very great doubts whether the evidence was such as justified the finding that the plaintiff tripped on the switch-rods. Plaintiff does not say so himself. He says he does not know what he tripped on, whether the switch-rods or a stone or something else. Mr. Nesbitt suggested that there was a space below the switch-rods in which plaintiff's foot may have caught and that the defendants' negligence consisted in their leaving that open space there; but that is all pure speculation. The jury have not so found. They have specially found that the defendants' negligence consisted in "leaving the switch-rods uncovered and exposed" and this is the only negligence found.

The question therefore is fairly and squarely raised whether leaving these switch-rods uncovered was negligence.

It was not contended that the Railway Act required them to be covered or that the Railway Board had ever made any order to that effect. It was proved beyond doubt that, except in the case of an interlocking plant which for some special reasons called for a covering of the switch-rods, it was the universal railway practice in Canada and always had been to leave the switch-rods uncovered—that it was good railway practice and that the same practice prevailed universally throughout the United States. As is stated by Perdue, J.,

the question on these facts is one to be dealt with by Parliament or the Railway Board.

To that body Parliament had delegated the amplest powers in such a matter as this. The Board is a body of men specially experienced in dealing with such matters and is assisted by skilled experts. In my judgment, unless parliament expressly dealt with such an important matter of universal railway practice the Board was the proper tribunal to do so and it having seen fit by its silence to sanction this practice, it is not open to a jury, at any rate in the absence of some evidence that the practice of leaving the switch-rods uncovered was bad and negligent, to hold that it is so.

Parliament did expressly deal in part with the subject by making provision, in sec. 288 of the Railway Act, requiring packing of the fixed rails at switches. That Act vests in the Railway Board power to make regulations respecting the appliances, devices, structures and works to be used on a railway for the protection of the company's employees (secs. 50 and 269). It was conceded that the Board, in the many orders it has made since it was established, has not made any order or regulation requiring the covering of switches. I am not qualified to give an opinion on the subject, neither, I venture to say, are juries so qualified, at any rate in the absence of proper evidence. To pronounce an opinion upon the subject condemning the universal practice in Canada would require much knowledge of the actual working of our Canadian railways under our climatic conditions and much expert knowledge.

In the case before us there was no evidence that the existing practice and one which has always prevailed in Canada, was

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other than good railway practice, except that of Mr. Haddow, whose knowledge on the point was confined to Great Britain. The findings of the jury that the uncovered switch-rods was in itself negligence and that such negligence caused the damage, cannot be upheld.

For these reasons, I think the appeal should be dismissed.

IDINGTON, J. (dissenting):—I think there was evidence to submit to the jury on all the points upon which their findings have been questioned.

As to the question of whether or not the appellant was justified in making the effort he did to serve his masters by stepping behind a car liable to be put in motion, there is abundant uncontradicted evidence that it is usual for men engaged in the service he was, to do the like, to perform the like service, and the respondent no doubt expected it to be done or the prohibition embodied in the contract the appellant signed would have been extended so as to include the doing so.

As to the fact of the appellant having tripped upon the exposed switch-rods there was evidence reasonably applied justifying that inference.

And as to the negligence involved in leaving the switch-rods exposed that would seem to be rather patent so long as men engaged as appellant was, were expected to do their work under such circumstances as he did and travel over said rods.

It is idle to talk of what is done on other roads so long as the uses to which that part of the track on other roads is put, or permitted to be put, is not (as it was not herein) shewn to have been used in the like dangerous condition, by men employed in and about their work, in the same manner and liable to the same risks as appellant had to encounter in serving respondents.

No matter how dangerous a track may be so long as men have not to walk upon it. When men are invited and expected to do so in order to save the employers' property, it is negligence to fail to cover as in other cases mentioned.

The law imposes upon the employer the duty to furnish a reasonably safe place for his men to work. The respondent did not do so in the case in question.

We are told these rods are covered at interlocking switches to protect the mechanical device. The cost of repairing the me-

chanical device makes it worth while protecting the metal, but human flesh and blood come cheaper and therefore needless to bother about that.

Such is the logic by which the railwayman reaches the prudent conclusion we are asked to accept as a conclusive answer to this charge of negligence to provide a safe place for men to work in.

Again we are pressed with the so-called argument that the legislature has not intervened, though it has in many other cases, to protect workmen. The unfortunate truth is that the oft failure of Courts of justice to maintain the elementary principle of the common law that the safe place to work in should be provided, so far as reasonably possible, has rendered it necessary for the legislature time and again to step in and address itself to specific results of failure on the part of the Courts.

But in doing so it has not abrogated the common law but added new sanctions thereto and in one instance cited in appellant's factum has declared no inference is to be drawn therefrom.

I think the appeal should be allowed with costs.

ANGLIN, J.:—I am not disposed to disturb the finding negativing contributory negligence and I think that there was evidence to support the finding that the plaintiff tripped upon the switch-rods. The only negligence found against the defendants was "the exposed condition of the switch-rods."

Anglin, J.

While I attach little weight to the argument that the only duties incumbent upon railway companies in regard to the construction, maintenance and operation of their undertakings are those specifically prescribed by Parliament and the Board of Railway Commissioners, and that the fact that neither the Railway Act nor any order of the Board has imposed an obligation to pack or cover railway switch-rods, affords a conclusive answer to this action, with the Chief Justice of Manitoba, upon the evidence in this record, I am not prepared to say that "where the ordinary switch-rods universally used in Canada and the United States are not covered, a jury may infer negligence against a railway company." There is no evidence from any person qualified to speak upon the subject that, having regard to climatic and other conditions in this country, it is practicable to cover ordinary switch-rods, as is suggested, or that so covered they

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would not be a greater menace and source of danger and inconvenience than in their present condition. Without such evidence I think it is not within the province of a jury to condemn as negligent a practice universally observed on this continent. *Jackson* v. *G.T.R. Co.*, 32 Can. S.C.R. 245; *Zuvelt* v. *C.P.R. Co.*, 23 O.L.R. 602; *Phelan* v. *G.T.P.R. Co.*, 23 D.L.R. 90, 51 Can. S.C.R. 113.

The fact that interlocking switches are covered is referred to. But the necessity for protecting the delicate mechanism of these switches may make the covering of them indispensable although attended by risks and inconvenience which would render unjustifiable the covering of ordinary switches where such a necessity does not exist.

In the alternative the plaintiff asks a new trial because the learned trial Judge refused to submit the condition of the coupler to the jury as a ground of negligence. There was no evidence of any lack of proper inspection—no evidence of any defect in the coupler which such inspection would have disclosed; and, upon the evidence, any defective condition of the coupler that may have existed could not properly have been found to be a proximate cause of the accident.

The appeal, in my opinion, fails.

Brodeur, J.

BRODEUR, J. (dissenting):—The plaintiff appellant, was in the respondents' employ and, when in the discharge of his duties, he was injured. He claims that the accident is due to the negligence of the company.

The jury found in his favour in declaring that the exposed condition of the switch-rods in the yard constituted an act of negligence.

It was suggested that some other obstruction might have been the cause of the accident and some evidence to that effect was adduced, but the jury believed the facts as told by the appellant and then we have to accept their verdict in that regard, so that the only question that remains is whether the railway companies in failing to cover their switch-rods between the tracks or in exposing those rods as is proved in this case are guilty of negligence.

It is in evidence that in England switch-rods are covered and in our country semaphore and signal wires of the interlocking systems in the yards are also covered.

The evidence does not shew the reason why the covering is made in the case of interlocking plants. But I have reason to believe that it is due to the intervention of the Railway Committee of the Privy Council at first and of the Railway Board after.

Those interlocking plants have been brought into our railway system when the applications for crossing railway tracks were being considered. Specifications of those interlocking plants were supplied by the Government authorities and the railways had to cover those wires. Why the same system was not introduced in the switching apparatus is because the matter was likely never considered by the Railway Board.

It seems to me, however, that in extensive yards like the one under consideration, where employees have to walk on tracks all the time in the discharge of their duties, it is only a reasonable measure of precaution that those dangerous holes in the track should be removed.

The evidence shews that in some cases in Canada those rods are covered. If the Railway Board had passed judgment on the advisability of covering them I might come to a different conclusion. But the fact that the Board has not passed any order would not debar the Courts of justice from inquiring as to whether negligence should be charged or not.

When the risk attendant on some act is larger than in some other cases, special precautions should be taken and the degree of care is proportionately larger. *Grant* v. *Great Western Ry. Co.*, 14 Times L.R. 174.

The question of negligence with regard to those rods was properly left to the jury. No objection had been made to that procedure.

For these reasons the appeal should be allowed with costs of this Court and of the Court below and the verdict of the jury should be sustained. *Appeal dismissed.*

COTTONWOOD TIMBER CO. v. MOLSONS BANK.

British Columbia Supreme Court, Murphy, J. June 9, 1916.

1. EVIDENCE (§ VII—568)—MORTGAGE—INTENTION AS TO AFTER-ACQUIRED PROPERTY.

Where an agreement for the sale of land and other property provides for a "mortgage back" to secure an unpaid portion of the purchase price, parol evidence is not admissible to prove that a clause in the mort-

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gage by which it was made to cover "after-acquired" property was not intended to be inserted therein.

[*Campbell* v. *Edwards*, 24 Gr. 152; *Clarke* v. *Joselin*, 16 O.R. 68, applied.]

ACTION for rectification of a mortgage.

E. V. Bodwell, K.C., for plaintiff.

S. S. Taylor, K.C., and *Housser*, for defendant.

MURPHY, J.:—To succeed, plaintiff must shew that, by a mistake, mutual and common to both parties, the "after-acquired" clause was inserted in the mortgage. The evidence to establish this must be proof which leaves no shadow of doubt upon the mind of the Court: *Campbell* v. *Edwards* (1876), 24 Gr. 152 at 171, and authorities therein cited. The Court is entitled to consider all the circumstances surrounding the making of the instrument and whether it accords with what would reasonably and probably have been the agreement between the parties: *Clarke* v. *Joselin* (1888), 16 O.R. 68 at 78.

As to the mortgage itself, it is, in my opinion, not open to the Court on the record to hold that the bank at any rate did not intend and indeed insist that the "after-acquired" clause should be inserted. But it is argued that as the mortgage was executed in pursuance of the agreement of July 15, 1912, if it can be shewn that that agreement does not contemplate such a clause in the mortgage therein provided for, plaintiff is entitled to succeed. I think this position correct, subject to what is hereinafter stated as to its being inequitable on the facts of this case to give effect to it, but in my opinion, bearing in mind the principles above cited, the necessary proof has not been adduced. I agree that no evidence as to intention is admissible, and that the agreement being in writing must be interpreted within its four corners in the light of surrounding circumstances and probabilities to be gleaned therefrom. The agreement provides for a mortgage back as security. By what I regard as admissible evidence it was proved that the real purchaser was to be a company to be incorporated by Scanlon & Wilson. No discussion apparently took place as to the proposed capital or possible resources of this company. The bank was to get no cash or consideration other than the mortgage for a property the purchase price of which was $77,500. This figure is arrived at by excluding from the purchase price set out in the agreement the price agreed upon for the logs and lumber then on hand, immediate release of which was effected

by the agreement. The property sold was *inter alia* a saw-mill, machinery, timber etc. Timber in the agreement, I think, means standing timber as logs and lumber are also mentioned, and I consider refer to logs and lumber then on hand. The words "mortgage back" are in my opinion not sufficient to constitute the "irrefragable evidence" required by the authorities. In order to be so I think the words "only on the property hereinbefore enumerated" or words of like import would have to be interpolated. The agreement was drawn hurriedly by a layman and the expression "mortgage back" may well have meant, and in my opinion was intended to mean, if thought was given to its meaning at all, that such mortgage was to be given to the bank contemporaneously with the formal transfer. At any rate its use under the circumstances, and considering the nature of the property sold, falls far short in my opinion of being proof that leaves no shadow of doubt upon the mind that it was meant to exclude the after-acquired clause. The document itself shews as above stated the bank was getting nothing for its property except this mortgage from a proposed company, as to the resources of which it had no idea. The mill as operated by its previous owners had been a failure. Wilson and Scanlon were experienced operators of saw-mills in a large way. Would not extensive changes of plant, such as actually took place, be reasonably anticipated, and if they were, would not the bank require an after-acquired clause to make sure their security would not be impaired? Again, by the terms of the agreement, the logs and lumber then in existence were excluded from the security. Would the bank without any consideration other than the mortgage transfer the timber limits to a proposed company of which it knew nothing, giving it thereby power to destroy their value entirely by depletion, and yet not retain at any rate some power or control in connection therewith? The terms of payment were spread over a period of 3½ years, and the later payments aggregate by far the larger part of the purchase price. In the nature of things the mill machinery, etc., must deteriorate and call for considerable replacement in that length of time. Would the bank not reasonably be expected to stipulate for a charge on such replacement? It might well be the timber limits would be exhausted before these later payments became due, leaving the company with no standing timber, and if no replacement of machinery took place, with a

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plant depreciated by years of wear and tear as possibly the only assets wherewith to meet same. Evidence which I think was admissible was given that in such deals as this mortgages invariably contain the after-acquired clause. All these considerations instead of establishing beyond a reasonable doubt in my mind plaintiffs' contention, raise a presumption against such contention. I therefore hold the plaintiff fails to bring itself within the above cited legal principles.

Further, having regard to the evidence of McKim, which I unreservedly accept, the bank changed its position on the strength of this after-acquired clause being in the mortgage by paying out several thousand dollars. This being so, it would, I think, be inequitable to now strike it out. *Action dismissed.*

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WILTSE v. EXCELSIOR LIFE INS. CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. June 30, 1916.

1. MORTGAGE (§ VII A—146)—WITHHOLDING DISCHARGE—BREACH OF COVENANT TO PAY INSURANCE PREMIUMS—RIGHTS OF ASSIGNEE.

Where an owner of property obtains from an insurance company a loan upon mortgage thereon, and is required by the company to take out and keep paid up a policy of insurance upon his life, which he assigns to the company as collateral security for the due repayment of the loan, and the mortgage contains a covenant by the mortgagor to pay the premiums, with a clause that if they are not paid by the mortgagor they may be charged upon the land and added to the amount due under the mortgage, the company may rightly refuse to give a discharge of the mortgage until such premiums charged have been paid in addition to the mortgage amount. Such a transaction does not involve a clog upon the equity of redemption. A transferee or assignee by purchase of the lands can have no higher right than the mortgagor himself.

Statement.

APPEAL from a judgment of the Chief Justice granting an application that a mortgage be declared discharged. Reversed.

McKinnon & Matheson, for respondent.

McDonald & Tighe, for appellant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff, who was the owner of certain premises upon which a previous owner had given a mortgage to the defendant company, applied by originating notice for a declaration that he was entitled to a discharge of the mortgage. The Chief Justice who heard the application held that the plaintiff was entitled to the relief asked for. The defendant now appeals.

The original owner and mortgagor had obtained a loan for $800 from the defendant which was to be fully repaid at the end of 6 years. He also secured from the defendant an insurance

policy on his own life for $1000 and in the mortgage he assigned this policy as collateral security for the repayment of the loan. The mortgage provided

> that all moneys for premiums of insurance or otherwise requisite for keeping such insurance in force shall be a charge upon the said lands,

and the mortgagor entered into a covenant to pay the premiums. It appears that he never paid any of the premiums except the first but that the insurance department of the defendant company charged the mortgage department of the company with the premiums for three following years and then this practice was dropped and the policy allowed to lapse. Afterwards the mortgagee sold and transferred the land to the present plaintiff subject to the mortgage. There is no dispute as to the amount that is due upon the mortgage except with regard to the three annual premiums upon the insurance policy above referred to. The defendant insists that these must be paid before it is bound to give a discharge. The plaintiff insists that he is not bound to pay them. The special provisions of the mortgage were set forth in the reasons for the judgment appealed from and it is unnecessary to repeat them here.

It is desirable in the first place to make some observations as to the real nature of the contract entered into by means of the mortgage. That document speaks of the mortgagor "assigning" the insurance policy to the mortgagees "as collateral security." But the mortgagees were also the insurers. What the mortgagor did was to assign to a person who might contingently, *i.e.*, on his, the mortgagor's death, become his debtor, the very debt which that person would upon the occurrence of the contingency become liable to pay him. It is said that there was something unlawful in that but no reason is given for the suggestion. In effect I think the agreement was that upon the occurrence of the contingency, *i.e.*, the mortgagor's death, upon which the mortgagees would become indebted to him or his estate they might, instead of paying him the debt, *set it off at once* against his debt to them although the latter had not yet entirely fallen due and then remain liable to pay only the balance of the policy.

Now, ordinarily, a person does not covenant to pay premiums on a life insurance policy. The agreement merely is that if he pays the annual premium the insurer will pay so much in case

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he dies during the following year. But he is never bound to pay premiums or liable to be sued for them in the ordinary case. Here, however, the mortgagor came to the insurance company for a loan of $800. They agreed to lend him the money if he would mortgage certain lands to secure the repayment *and* if he would take from them an insurance policy on his life, assign it to them as collateral security, *i.e.*, agree to the set-off above mentioned and bind himself to pay the premiums. He did covenant to pay the premiums and in order to secure the performance of that covenant he made the premiums a charge upon the lands mortgaged.

Now, it is suggested that by this action the company were getting some collateral advantage out of the necessities of the borrower, a thing which has been undoubtedly discountenanced by Courts of Equity. But I would have thought that the criticism would only be properly made if the lender alone were getting some advantage. Here, however, the borrower was also getting an advantage. He had $1,000 insurance on his life. If he had died next day or at any time during the 4 years during which the premiums were kept up the collateral advantage to the company would not have been very apparent. His debt would have been paid, his land discharged and his estate would perhaps have had a little to the good coming to it from the company. The case was argued before us, I think, upon the assumption that if the mortgagor had died while the company was charging up the insurance against him his estate could have claimed payment of the policy. If the facts have been correctly stated to us I think the policy would have had to be paid. See *Morland* v. *Isaac*, 20 Beav. 389, (52 E.R. 653). The estate could have said "you charged these premiums to the deceased's account, you treated them as a charge on the land, you could have sued him upon his covenant to pay the premiums, therefore he is entitled to the amount of the policy less the charges against it."

Surely in such circumstances the company ought not to be charged with having acted oppressively and with getting some collateral advantage out of the necessities of the borrower. The suggestion can only be made in forgetfulness of the benefits of life insurance which are recognised at least by a vast number of people.

Then it is contended that the charging of these premiums

on the land constituted a clog on the equity of redemption. I am unable to agree with this contention. The mortgage does indeed furnish us an excellent example of what would be really a clog on the equity of redemption if the company had attempted to enforce it. The mortgagor covenants to pay the insurance premiums on the policy and that covenant is not restricted to the period of the currency of the mortgage. If the company were to attempt to say that the mortgagor had mortgaged his land to secure the payment of these premiums continuously up to his death even when the loan and all charges had been repaid that would have been a real attempt to clog the equity of redemption. The true principle of the equitable doctrine against clogging the equity of redemption was laid down in *Noakes & Co.* v. *Rice*, [1902] A.C. 24, and in *Bradley* v. *Carritt*, [1903] A.C. 253. In the former case in a mortgage of a leasehold public-house by a licensed victualler to brewers the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not, during the continuance of the term (*i.e.* the leasehold term) and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees. This was held to be a clog. Lord Halsbury quoted the words of Lord Lindley in *Santley* v. *Wilde*, [1899] 2 Ch. 474, as "an authoritative exposition of the rule" as follows:—

> The principle is this; that a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that "once a mortgage always a mortgage," but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured is a clog or fetter within the rule.

Lord Halsbury added:—

> It is and must be in each case a question of the particular thing which is advanced as a clog or fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down one can reduce it to something like an absurdity by taking an extreme case.

In *Bradley* v. *Carritt*, *supra*, a holder of shares in a tea company

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mortgaged the shares to secure a loan and agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker and in the event of any of the company's teas being sold otherwise than through the mortgagee to pay him the amount of the commission he would have earned if the teas had been sold through him. The House of Lords held, but only by three to two, that there was here a "clog," reversing the Court of Appeal which had said there was not. The action had been merely for damages for breach of the agreement after the loan had been paid off. The difference of opinion seems to have arisen because of the nature of the action and because the mortgage did not really in terms pledge the shares as a security for the payment of the commission.

Lord Macnaghten said:—

> In the first place it is observed in the judgment of the Court of Appeal that it has never been laid down that it is essential for the validity of what are called, not very happily, I think, collateral stipulations, that they should cease to operate on redemption. That is perfectly true. But it may be said with equal truth that, putting aside the case of *Santley* v. *Wilde*, there is no case to be found in the books from the earliest times to the present day in which a mortgagee, after redemption, ever attempted to keep on foot the benefit of a collateral stipulation which was part and parcel of the mortgage transaction.

He held that if the plaintiff could succeed in his action for damages then there had been no real and complete redemption of the mortgage of the shares.

I think the words just quoted from Lord Macnaghten suggest the true test to apply in the present case. The mortgagees are not in my opinion attempting here to keep alive after redemption and payment of the mortgage money a collateral stipulation. If they were insisting that the insurance should be kept up continuously even after redemption until the mortgagor's death they certainly would be imposing a clog on the equity of redemption. But what they are doing is merely saying this: "You are of course entitled to redeem and to get rid at once of the mortgage finally but here is a sum of money which the mortgagor owed us, which he covenanted to pay us in the mortgage, the payment of which was secured by the mortgage. You must pay that sum of money to us before you can redeem." There is no question in that of a clog upon the right to redeem. It is only a question (1) whether the money was due and owing, (2) whether it was secured by the

mortgage. If it was due and was secured by the mortgage all the owner has to do is to pay it and both he and his land are thereafter quite free.

It might no doubt be suggested that as the covenant to pay premiums was not specifically limited to the currency of the mortgage therefore it was binding until death and was therefore a clog and entirely void. But we are dealing with an equitable rule and it is quite sufficient for the purposes of equity to say that the covenant was void after redemption of the mortgage or payment of all debts secured by it. And in any case I think that was all the mortgagor could be really said to have covenanted to do. He had assigned the policy as collateral security for a debt and it was the obvious intention that his obligation to pay the premiums should only continue while the debt remained unpaid.

It was also suggested that the insurance company had kept the policy alive merely for their own benefit and the case of *Foster* v. *Roberts*, 30 L.J. Ch. 666, 670, was referred to. That case however would only be relevant and in point if the transferee of the land, the present plaintiff, had also taken an assignment of the policy subject to the previous assignment, had kept on paying the premiums and had after the death of the insured insisted as against the representatives of the insured that he was entitled to the insurance moneys subject to the mortgage of the defendant. The case cited merely decides that he would be entitled to do so.

In the passage referred to upon the argument in 18 English Ruling Cases, p. 367, it is said:—

> The question has arisen whether the policy belonged to the creditor absolutely, or was redeemable by the representatives of the debtor. The result of the decisions appears to be that if it appears that the insurance was effected as part of the contract for the loan, or if it is to be inferred from the circumstances of the case that the insurance was in fact effected for the purpose of securing the loan, then the policy will be redeemable upon payment to the mortgagee of what is due to him for principal, interest, premiums paid for keeping up the policy and costs, though the mortgage deed contains no proviso to that effect or even contains a proviso to the contrary.

This is evidently dealing with a question with which we are not concerned here, viz: the right to the proceeds of the policy where the insured mortgagor has died. But it certainly indicates that the Courts have never taken the view that there was anything improper in a lender taking an assignment of a life insurance policy as collateral security or in insisting that a policy be taken

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out and assigned as a condition of the advance or in charging the premiums where paid by the lender as part of the moneys secured by the mortgage. Nor do I see that the circumstance that the lender and the insurer are the same person can make any difference.

In my opinion therefore the result depends entirely upon the correct view to be taken of the question chiefly discussed in the judgment below as to whether the premiums were really secured by the mortgage.

It seems to me that the moment each premium fell due it became a debt due by the mortgagor to the company. He had, as I have pointed out, covenanted to pay the premiums in order to keep the policy alive as a collateral security. He was of course indebted to the company in the sum of $800, the amount advanced and interest. But as each premium fell due he became indebted under his covenant in that additional sum. It was anticipated apparently that he might make default in paying these additional sums so he agreed that the land mortgaged as security for the repayment of the $800 and interest should also be charged as security for the repayment of these additional debts as they accrued due.

I am unable upon consideration to see any reason why these moneys in future to become due and payable for insurance premiums are not properly included in the expression "other charges *and moneys* hereby secured" for the securing of the repayment of which the land was mortgaged. Reading the words of the mortgage in their broad and most obvious sense I think it is quite clear that the mortgagor was mortgaging his land to secure repayment not merely of the money loaned him at the start but also the repayment of moneys which he covenanted for a good consideration to pay in the future and which the company treated as having been paid to the extent of keeping the policy alive and being liable to pay his estate the amount of it if he had died. For myself I can see no objection to securing, by one mortgage, debts or pecuniary obligations of a different nature or arising from different causes provided none of the different obligations are of such a continuing nature that the possibility of redemption is "clogged."

So far the matter has been discussed as if the original mortgagor were the applicant for redemption. His assignee can have no higher rights. The rights of the mortgagee cannot be cut

down by a transfer of the land by the mortgagor to which it was not a party. It may be that the transferee miscalculated the amount for which the mortgage was security. But he could have ascertained this from the mortgagee and if he had acted on information so given the mortgagee would have been bound. Apparently he made no inquiry of the mortgagee and so must suffer the consequences.

I think therefore the appeal should be allowed with costs and it should be declared that the mortgagees are not bound to sign a discharge until the amount of the insurance premiums for the years during which the policy was kept alive, and interest thereon, as agreed is paid to them as well as the costs of the appeal and of the proceedings below.

In view of the possibility that the plaintiff, the present owner, may have not, as no doubt he did not, allow for these premiums when he purchased the property I think the defendants should be directed, upon the above payments being made, not only to execute a discharge but also an assignment of all their rights under the covenants contained in the mortgage so that the transferee may still proceed, if so advised, to enforce payment of the premiums in question by the mortgagor. If the policy had been kept alive he could have required an assignment of it as well but he is at any rate entitled to an assignment of the covenant to pay the premiums.

Appeal allowed.

Re JOHNSON CAVEAT.

Saskatchewan Supreme Court, Newlands, Lamont and Elwood, JJ.
July 14, 1916.

1. LAND TITLES (§ IV—40)—CAVEAT ORDERS—BY WHOM SIGNED.

An order continuing a caveat under the provisions of the Land Titles Act (R.S.S. 1909, ch. 41) made by the Master in Chambers, cannot be signed by the Chambers Clerk. The Master in Chambers, being *persona designata* under the Act, cannot delegate his duties to anyone else.

Statement.

APPEAL from an order under the Land Titles Act (R.S.S. 1909, ch. 41). Affirmed.

H. F. Thomson, for appellant.

No one *contra*.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The question in this appeal is: whether an order made by the Master in Chambers continuing a caveat under the Land Titles Act can be signed by the chambers clerk.

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Such an order was refused registration by the registrar for the Moosomin Land Registration District, and on appeal to the Master of Titles, his refusal was approved. I agree with the reasons given by the Master of Titles, and am of the opinion that such orders cannot be signed by the chambers clerk, who is an officer of the Supreme Court. Such orders are not matters in Court. The Master in Chambers acts as *persona designata* under the Land Titles Act. He has, therefore, no power to delegate his duties to anyone else. The same reasons apply to such an order made by a Judge of the Supreme Court.

It is unnecessary for me to decide in this appeal whether the orders of a Master in Chambers come under an Act Respecting Judges' Orders in Matters not in Court, R.S.S. ch. 55, because, by that Act, such orders do not become orders of the Court until they are filed with the local registrar. To be filed, an order must be in writing, and, as no one has authority to sign such an order but the person designated, it follows that it must in the first instance be signed by the party making the same. On its being filed it becomes an order of the Court, and afterwards a certified copy or exemplification under the seal of the Court would be sufficient. If not so made an order of the Court an original signed by the person designated in the Act to make the same must be used. *Appeal dismissed.*

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RUDY v. SONMORE.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. July 14, 1916.

1. LIENS (§ I—2a)—THRESHER SEIZING GRAIN—RIGHT TO SELL.

A thresher taking grain to satisfy his lien under the provisions of the Threshers' Lien Act (R.S.S. 1909, ch. 152, sec. 1, amended by Acts 1913, ch. 67, sec. 24), becomes a "purchaser for value" of the grain so taken, and, as such, has a right to sell the grain to satisfy his claim.

[*Prinneveau* v. *Morden et al.*, 11 D.L.R. 272, 6 A.L.R. 52, referred to.]

Statement.

APPEAL from the judgment in an action under the Threshers' Lien Act (R.S.S. 1909, ch. 152). Affirmed except as to costs.

H. Y. MacDonald, K.C., for respondent.

Brown, J.

BROWN, J.:—In this case there is no dispute as to the facts. The only question to be considered is as to the right of the thresher to sell the grain taken under his thresher's lien. It is contended by the plaintiff that there is no right of sale under the Threshers' Lien Act apart from the amendments of 1916, and, in support of

this contention, the case of *Prinneveau* v. *Morden et al*, 11 D.L.R. 272, 6 A.L.R. 52, decided by Stuart, J., of the Supreme Court of Alberta, is referred to. After a careful examination of the Act, I find myself unable to follow that decision. The Act states that the thresher shall be deemed "a purchaser for value" of the grain which he takes under his lien. There is no limitation on the meaning of these words, and certainly one of the incidents of being a "purchaser for value" is the right to sell the article purchased. Moreover, the quantity of grain which the thresher can take in order to satisfy his claim is regulated under the Act by the market price at the time; after allowing, at a fixed rate, for the expenses of marketing. In view of the changing conditions of the market of grain, it was surely not intended to limit the thresher to a quantity fixed by present market values, and, at the same time, compel him to run the risk of a depressed market before he could realise on the grain. On the contrary, the Act in my opinion contemplates a complete remedy.

I am of opinion, therefore, that the decision of the trial Judge was right, and that this appeal should be dismissed.

The plaintiff having recovered judgment for $21.85, I am of opinion that he should be allowed his costs of action in accordance with the provisions of Rule 18 of the Rules of the District Court, and I would amend the judgment of the trial Judge to that extent. Under the circumstances there should be no costs of appeal to either party.

McKAY, J., concurred.

McKay, J.

NEWLANDS, J.:—The only question raised on this appeal is the right for the thresher to sell grain taken by him under his thresher's lien. This Act provides that:

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> The lien shall have priority over all writs of execution against the owner thereof, or chattel mortgages, bills of sale or conveyances made by him, and over all right of distress for rent reserved upon the land upon which the grain is grown, and the person performing such work of threshing or procuring the same to be done shall be deemed a purchaser for value of the grain which he takes by virtue of this Act.

The later provision is the one which it is contended gives him the right to sell. I agree with this contention. This provision was not put in to protect the grain taken from the creditors of the owner, because the lien is expressly given priority over all creditors, secured or otherwise, and the provision that he is to be deemed a purchaser for value would have no meaning if it

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was not to give him the incidents belonging to ownership, one of which is the right to sell.

The trial Judge found the sum of $21.85 due plaintiff, but he gave the defendant all the costs. I think this part of the judgment should be amended by giving the defendant the costs of the action and plaintiff the costs of the issue on which he was successful, on the small debt scale with a set-off. Appeal dismissed without costs. *Appeal dismissed.*

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DICK v. LAMBERT.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Elwood and McKay, JJ. July 17, 1916.

1. JUDGMENT (§ II E 5—180)—CONCLUSIVENESS AGAINST PARTIES—PRINCIPAL AND AGENT—HUSBAND AND WIFE.

Where a husband acting as agent for an undisclosed principal, his wife, in an exchange of lands, gives to the vendor as part payment for his wife's purchase two promissory notes signed by himself alone, a judgment against the husband upon the notes, which was not satisfied, is no bar to a subsequent action for a personal judgment against the wife for the unpaid purchase-money represented thereby.

2. VENDOR AND PURCHASER (§ II—31)—VENDOR'S LIEN—NOTE NO WAIVER OF.

The taking of the notes by the vendor cannot be construed as conclusive evidence of his intention to abandon his lien for the unpaid purchase-money; the presumption is that the lien exists, and the taking of notes, whether of the purchaser or of a third person, will not displace that presumption, so long as the reasonable inference from all the circumstances is that the notes were only taken on condition that they would be paid.

[ED. NOTE.—The Court was equally divided on the first proposition, and the decision of the trial Judge (25 D.L.R. 730) was, therefore, maintained.]

Statement.

APPEAL from the judgment of Newlands, J., in favour of plaintiff, 25 D.L.R. 730.

H. V. Bigelow, K.C., for appellant.

T. J. Blain, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—I have had the opportunity of looking over the judgment of my brother Lamont in this case, and agree with him that the plaintiff is entitled to a judgment enforcing his vendor's lien. But I do not agree that the plaintiff is entitled to a personal judgment against the defendant Sadie Beatrice Lambert for the balance of the purchase-money.

On the latter point I think that the principle of the decision in *Kendall* v. *Hamilton*, 4 App. Cas. 504, applies. In that case it is clearly decided that:—

Where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but if he sues the agent and recovers judgment he cannot afterwards

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sue the principal even though the judgment does not result in satisfaction of the debt.

The principle is not that there has been an election, but that the judgment is for the same debt or cause of action.

As between the plaintiff and William Lambert, the judgment on the notes was an extinguishment of the original debt, for a judgment recovered between the same parties on a bill operates as an extinguishment of the original debt, the bill being merged in the judgment. If William Lambert had been the principal, instead of an agent, the judgment on the notes would have been a bar to any other proceedings against him on the original agreement, except proceedings to enforce the vendor's lien as hereafter mentioned.

Although I agree in the result arrived at by my brother Lamont, I am not prepared to go so far as to agree that the judgment obtained by Dick against William Lambert would not be a bar to any action by Dick against Mrs. Lambert for the balance of the purchase-money, *i.e.*, for a purely pecuniary judgment. I think, however, that the plaintiff's right of action to enforce his vendor's lien is not affected by the judgment against William Lambert. A vendor's lien is a purely equitable remedy belonging to the exclusive jurisdiction of the Court of Chancery. Although the relief in the end is pecuniary, it does not take the form of a pecuniary judgment that is a decree for sale of the land and payment to the vendor of the amount of his unpaid purchase-money out of the proceeds. The lien, unless waived, attaches on the land for the purchase-money or any part of it *until actually paid*.

In *Flint* v. *Smith* (1860), 8 Gr. 339, it was decided that:—

The lien of a vendor for unpaid purchase money is not waived by the fact of his suing and recovering judgment for the amount.

In *Barker* v. *Smark* (1840), 3 Beav. 64:—

A vendor conveyed his estate to a purchaser and took a bond for the purchase-money. He afterwards sued at law on the bond, and in equity insisting on his equitable lien.

The defendant Smark after putting in his answer, obtained, *ex parte*, an order that the plaintiffs should elect within 8 days in which Court they would proceed.

On a motion to discharge the order, Lord Langdale, M.R., decided,

that although a mortgagee was entitled to pursue all his remedies concurrently, yet in this case where the vendor had taken a bond to secure the purchase-

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money, he could not be permitted to sue at law and in equity at the same time: that this order to elect would not prejudice the plaintiff, for if he failed in one remedy he might resort to the other.

Haultain, C.J.

Referring to this case, Dart on Vendors and Purchasers, 7th ed., p. 739, says:—

> This decision seems, however, to be open to question, on the ground that there is no distinction in principle between a vendor seeking to enforce his lien and a mortgagee who may pursue both his remedies concurrently.

I think, therefore, that the plaintiff's right of a vendor's lien is not affected by the judgment against William Lambert, and that he is entitled to its enforcement in respect of all purchase-money still actually unpaid.

That portion of the judgment, therefore, giving personal judgment against the defendant Sadie Lambert should be reversed, and the respondent should pay the appellant her costs of this appeal.

Elwood, J.

ELWOOD, J., concurred.

Lamont, J.

LAMONT, J.:—In this appeal we have to determine whether or not the plaintiff is entitled to a vendor's lien on the N.½-21-14-31-W.1st.

In his statement of claim the plaintiff alleges that by an agreement in writing dated March 25, 1913, made between the defendant William M. Lambert and himself, he agreed to sell the above described lands to the said William M. Lambert, who, in payment thereof, agreed to convey to him lots 1 and 2, in block 30 in the city of Lethbridge, and to pay in addition the sum of $2,000. He then purports to set out two provisions of the agreement, by the first of which Lambert was to transfer to the plaintiff the said lots and deliver to him two promissory notes made to the plaintiff's order for $1,000 each, payable 3 months after date; and by the second, the plaintiff was to transfer to said Sadie Lambert, wife of the said William M. Lambert, the said half-section. These allegations are all denied by Sadie Lambert in her statement of defence.

At the trial, the only evidence offered of the written agreement was an unsigned copy of what the plaintiff supposed the agreement to have been; which, he said, he had received from the solicitor who acted for both parties. The reception of this copy was objected to by Mr. Bigelow. The agreement, in my opinion, was not sufficiently proved to justify its admission as evidence, but it is not very material whether we admit it or not.

The transaction as carried out was an exchange by the plaintiff of his farm for the Lethbridge lots and two notes of Wm. M. Lambert for $1,000 each. The property was transferred and the notes given. The notes were not paid; the plaintiff sued Wm. M. Lambert in the Manitoba Courts and recovered judgment on the notes, but has obtained nothing thereon.

In his statement of claim the plaintiff alleged that the defendant Sadie Lambert was a trustee of the farm for William M. Lambert. At the trial an amendment was allowed setting up that she was the real purchaser, and this the trial Judge found to be the fact. The Lethbridge property was hers, although standing in the name of her banker. The trial Judge also found that the plaintiff did not know that he was dealing with Sadie Lambert at all, but believed William M. Lambert to be the principal in the transaction, and he gave judgment in favour of the plaintiff against Sadie Lambert for the $2,000 and interest, and declared the plaintiff to have a lien upon the half-section for the amount, and also for certain taxes on the Lethbridge lots, which, under the agreement, Lambert was to pay. From this judgment Sadie Lambert now appeals.

In my opinion, the evidence warrants the findings of the trial Judge. In the argument before us it was strongly contended that the plaintiff by taking judgment against W. M. Lambert on the notes was now precluded from proceeding against Sadie Lambert, on the principle that where a creditor takes judgment against an agent on a contract entered into by that agent he cannot subsequently sue the undisclosed principal. This rule of law is stated by Cairns, L.C., in *Kendall* v. *Hamilton*, 4 App. Cas., at p. 514, in the following words:—

> "Now I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt.

In that case, the firm of Wilson & McLay borrowed money for the purposes of their partnership by means of bills of exchange. The bills not being paid, the plaintiff sued Wilson & McLay and obtained judgment which remained unsatisfied. Subsequently he discovered that Hamilton was a partner and brought action against him as a principal. It was held that the judgment against Wilson & McLay was a bar to the action against Hamilton.

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The principle upon which the Court acted is stated by Lord Cairns, at p. 515, as follows:—

In the present case I think that when the appellants sued Wilson & McLay, and obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson & McLay could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on *the same facts* against another person.

In the same case Lord Blackburn, at p. 542, after stating that it was immaterial at what time the plaintiff discovered Hamilton was a partner, went on to say:—

If the principle on which *King* v. *Hoare*, 13 M. & W. 494, was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it (the time) would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King* v. *Hoare* proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatem*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for *the same cause of action*. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.

The judgments delivered in this case, and in fact the judgments in the subsequent cases in which the rule was applied, including *McLeod* v. *Power*, [1898] 2 Ch. D. 295, 299, show clearly that the rule has its foundation in the fact: (1) That the cause of action in the second suit is the same as in the suit in which judgment had been recovered, and (2) That the plaintiff had the legal right to make the defendant in the second suit a defendant in the first, either in the alternative (as where the defendant in the first suit was an agent) or jointly (as where the defendant in the first suit was co-contractor). The rule as applicable to principal and agent is succinctly stated by Lord Halsbury in *Morel* v. *Westmoreland*, [1904] A.C. 11, as follows:—

The plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two.

To be an alternative remedy the plaintiff must have had the

right to make either the agent or the undisclosed principal a defendant in the action in which judgment was obtained. As I read the authorities, it is only where he has that right that the rule has any application. If this conclusion is correct, then it is clear that the rule cannot be invoked in the case at bar. The judgment recovered by the plaintiff was against the agent on two promissory notes. The notes were the cause of action. By no process whatever could he have sued Sadie Lambert on these notes; she could not have been made a defendant in that action. His cause of action against her is for unpaid purchase money on her implied covenant. This is an entirely different cause of action from the suit on the notes.

That it is different seems to be established by *Wegg Prosser* v. *Evans*, [1895] 1 Q.B. 108.

In that case two persons guaranteed to the plaintiff the payment of rent by his tenant. When the rent became in arrear one of these joint contractors gave the plaintiff his cheque for the rent. The cheque was dishonoured and the plaintiff sued upon it and got judgment. The judgment remaining unsatisfied, the plaintiff then sued the other guarantor on his guarantee. It was held that he was liable; that the cause of action on the guarantee was not the same as on the cheque, and that the principle of *Kendall* v. *Hamilton* did not apply. In giving judgment, Esher M.R. said, p. 112:—

> It is no doubt the law that if the plaintiff had sued Thomas alone on the guarantee and not on the cheque, and had recovered judgment against him, he could not afterwards have sued the present defendant. If that had been the case here I should have been bound by a technical rule of law, which has existed so long that I must bow to it. But in the present case the plaintiff did not sue Thomas on the guarantee, but on the cheque.

I am, therefore, of opinion that the taking of judgment against William M. Lambert on the notes constitutes no bar to the present action against Sadie Lambert.

Then, is the plaintiff entitled to a vendor's lien? There is no doubt about the right of a vendor to his lien when a portion of the purchase-money remains unpaid, unless he abandons that lien. McCaul on Vendors and Purchasers, p. 4. Two questions therefore arise: (1) Were the notes taken in full payment of the purchase-money, irrespective of whether they would be paid or not, and (2) If not, did the taking of the notes evidence an intention to abandon the lien. In view of the findings of fact by

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the trial Judge we must determine these questions on the footing that the transaction was an exchange of lands between Sadie Lambert and the plaintiff, in which she gave the Lethbridge lots and her husband's promissory notes and the plaintiff gave his farm. In her examination for discovery she admitted that the farm, for the purposes of the exchange, was taken at a valuation of $9,000, and the Lethbridge lots at $7,000. She further said that her husband gave his notes because "he had used some of her money which he was to turn in to her again." The gist of the transaction was that William M. Lambert owed the $2,000 to his wife, and, instead of paying it to her, he agreed to pay on her behalf that sum to the plaintiff.

Whether the plaintiff accepted the notes in full satisfaction of the debt is a question of fact, and on this point the trial Judge has found in favour of the plaintiff. I agree with that finding. There is nothing in the evidence which would lead me to the conclusion that he was accepting the notes as payment irrespective of whether they would be paid or not. Certain portions of his testimony were cited wherein he admitted that he did not take any security because Lambert wanted the farm free of encumbrance. The plaintiff intended to give Sadie Lambert a transfer of the land free of encumbrance in the ordinary acceptation of the term, that is, she would have a clear certificate of title, but that is as far as the evidence goes. I am of opinion, therefore, that the notes were not accepted in full satisfaction of the purchase-money; and that being so, they operated only as collateral security.

In *Drake* v. *Mitchell*, 3 East, 251, one of three joint covenanters gave a bill of exchange for part of a debt secured by the covenant of the three. Judgment was recovered on the bill, and the plaintiff then brought his action on the covenant against the three. In giving judgment, Grose, J., at p. 259, said:—

> The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security; and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant.

When Sadie Lambert took over the plaintiff's farm at $9,000, there was an implied covenant on her part to pay that sum. As to $7,000 she paid by transferring the Lethbridge lots, which the plaintiff accepted at that figure. The balance she still owes and judgment was properly entered against her for the amount.

The only remaining question is: Did the taking of the notes by the plaintiff evidence an intention on his part to abandon his lien?

In Dart on Vendors and Purchasers, 7th ed. vol. 2, at p. 733, the author says:—

Whether the vendor has abandoned his lien is in all cases a question of intention and construction; the test being whether the vendor has taken some other security, in substitution for the ordinary lien; and the burden rests on those who deny the existence of the lien to make out their case. . .

Primâ facie, the taking of a mere personal security for the purchase-money, *e.g.*, a promissory note, or a bill of exchange, even though it is negotiated, or a bond, is not evidence of an intention to abandon the lien. Nor will the joining of a surety in a note or bill of exchange make any difference, since these are considered merely as modes of payment. But whether this would be so where a bond or covenant is taken from a third person has not been actually decided.

Under this authority, the presumption is in favour of the existence of the lien, and the onus of shewing that it has been abandoned is on the party attempting to escape from it.

Had William Lambert been the real purchaser, the taking of the notes by the plaintiff would not have evidenced an intention on his part to abandon the lien; that being so, and the trial Judge having found that at the time the transaction was completed the plaintiff believed Lambert was the debtor, the taking of the notes cannot be evidence against him of an intention different from what would have been drawn had Lambert been the purchaser. No intention to abandon can, therefore, be drawn from the taking of the notes by the plaintiff.

Even if the notes are to be considered as the notes of a third party the same result, so far as this case is concerned, would, in my opinion, follow. Whether a vendor intended to abandon his lien in any particular case must depend upon the facts and circumstances of the case, and precedents are not of much value.

As was pointed out by Beck, J., in *High River Meat Market* v. *Routledge*, 1 A.L.R. 405, a given set of facts which, at one time and under the conditions and methods of business then prevailing, would justify a certain conclusion as to a vendor's intention, would not be conclusive evidence of the same intention at another time and under other conditions and methods of business.

The more recent cases seem to me to lean more strongly in favour of the existence of the lien than did the older authorities. In the case above mentioned, the vendee was to pay for the property purchased by assuming a mortgage then upon the

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property, by giving $1,000 in cash and a note for $2,000 and a mortgage to the plaintiff for the balance of the purchase-money. It was held that he had not lost his lien for the amount of the note, notwithstanding the taking of the mortgage, as both parties believed the note could be paid at maturity, and that the parties really looked upon it as part of a cash payment.

In *Wilson* v. *Kelland*, [1910] 2 Ch. 306, the vendor agreed to sell certain property for £5,350. It was a term of the agreement that £3,000 should remain on a mortgage of the property, which was freehold. In September, 1904, the vendor executed a conveyance in favour of the purchasers, but the mortgage back to secure the £3,000 was not executed until January, 1905. In 1901 the purchasers had executed a trust deed to secure mortgage debentures on all their property, present and *future*. In a foreclosure action by the vendor it was argued on behalf of the debenture holders that the vendor, by taking the mortgage of 1905, had abandoned his lien and that the property became a security to the debenture holders from the execution of the conveyance by the vendor. It was, however, held that the equity of the unpaid vendor was superior to that of the debenture holders and that the mortgage had priority.

These cases would seem to indicate that the taking of security is not conclusive evidence of the abandonment of the lien; the presumption is that the lien exists. It would therefore seem to me that the taking of notes of a third party will not displace that presumption as long as the reasonable inference from all the circumstances is that the notes were taken on the condition that they would be paid. See *Re Albert Life Assurance Co.*, 11 Eq., at p. 178.

That the plaintiff expected the notes would be paid when he took them, I think is clear, and I see nothing in the evidence or the circumstances that would lead me to believe that the Lamberts did not also expect that they would be paid on their due date. Neither do I find anything to justify the conclusion that the plaintiff agreed to take the notes other than on condition of their being paid. The plaintiff is, therefore, entitled to his lien for the unpaid purchase-money, and also for the taxes which Lambert agreed to pay on the Lethbridge lots.

The appeal, in my opinion, should be dismissed with costs.

McKAY, J., concurred. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Magee, JJ.A. and Riddell, J. March 21, 1916.

1. MECHANICS' LIENS (§ III—13)—PRIORITY OVER MORTGAGE—STATEMENTS OF CLAIM.

It is not essential to the preservation of a lien against a prior mortgagee, under sec. 8 (3) of the Mechanics and Wage Earners Lien Acts (R.S.O. 1914, ch. 140), that it shall be stated in the registered claim that it is against the mortgagee, inclusively or otherwise.

Statement.

APPEAL by the plaintiff from the judgment of NEVILLE, Official Referee, in an action to enforce a mechanic's lien. Reversed.

The reasons for the judgment of the learned Referee, in which the facts are stated, were given as follows:—

November 16, 1915. NEVILLE, Official Referee:—The plaintiff is a carpenter and builder, and was employed by the defendant Linnenbank to alter and improve buildings on the land in question, which was and is owned by Linnenbank, subject to two prior mortgages to the defendants Martin and Bowman.

The case comes within sub-sec. 1 of sec. 22 of the Mechanics and Wage-Earners Lien Act, and the time for filing the lien was limited to 30 days after the performance of the work. The action is an ordinary one for enforcing a mechanic's lien under that Act, with a claim for priority upon the increased selling value as against the prior mortgagees.

The last work was done on the 13th May, 1915; the claim was registered on the 9th June, 1915; and the statement of claim was filed with the Clerk of Records and Writs on the 9th August, 1915.

When the trial was concluded, I held that the plaintiff's claim of lien was valid, and disposed of all questions arising at the trial except the question of priority over the mortgages upon the increased selling value by reason of the work and materials done and furnished by the plaintiff. As to this I found that there was an increase of selling value to the extent of $500.

Judgment was reserved only for the purpose of considering the objection raised by counsel for the mortgagees that no claim against them or for priority over their mortgages was made till after the 30 days allowed by the Act for filing the lien. The claim of lien filed in the registry office "claims a lien upon the estate of Charles W. Linnenbank, of the city of Toronto, in the county of York, on the undermentioned lands" etc. Nothing is said

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of the mortgages, and mortgagees are not mentioned. The claim against them was first made when the statement of claim was filed, which was after the 30 days limited for filing the lien, but within the 90 days limited by sec. 24 of the Act for bringing the action and filing a *lis pendens*.

I have come to the conclusion that the mortgagees' objection must prevail. It is true that the Act says nothing about a time-limit for determining questions of priority between lien-holders and prior incumbrancers. One might logically conclude that it would be permissible for a claimant to establish his lien first, and to claim priority afterwards. If he should fail in his claim of lien, that would end the matter. If he should succeed, he could then make his claim to priority as against the mortgagees. This reasoning applies equally to the 90 days limited by sec. 24 and to the 30 days limited for registering under sec. 22, or commencing action to prevent the lien being lost under sec. 23. It will be noted that, by sub-sec. 1 of sec. 8, the lien attaches upon the estate or interest of the owner. No lien is given upon the mortgagee's interest; but, by sub-sec. 3 of sec. 8, the lien is to have priority upon the increased selling value, if any.

Section 17 states what a registered claim of lien shall set out, and forms are provided in the appendix. There is no reference here to mortgagees or their interests, and I imagine that the section was not intended to apply to a claim of priority over mortgagees. Such a claim is apart from the claim of lien for which the section provides a form.

Section 19 (1) provides that a substantial compliance with sec. 17 shall be sufficient, and a lien shall not be invalidated by failure to comply with the requisites of that section, unless, in the opinion of the Court, Judge, or officer who tries the action, "the owner, contractor or sub-contractor, mortgagee, or other person, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced."

But it was never intended by this section that a fundamental part of the claim should be omitted, and in the case in hand the claim against the prior mortgagees to priority upon the increased value cannot be considered unsubstantial. So far as they are concerned, it is the whole claim. The section becomes irrelevant as to them when no claim is made against them. Subsequent

mortgagees are in a different position, but they are not made parties till the case comes into the Master's office, though they are given notice of trial and are entitled to be present at the hearing.

As I interpret the Act:—

1. A claimant may begin an action and file a *lis pendens* within the time limited by sec. 22 (see sec. 23); and, if he claims priority upon the increased value over a prior mortgage, the prior mortgagee must be made a defendant and the claim against him set up. See *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592. There Mr. Justice Osler remarked, at p. 598, that the plaintiff is at liberty to confine his action to the owner, and to take a decree for sale of the owner's interest, subject to the mortgage. But, if he wishes to any extent to displace the priority of the mortgagee, he must make both owner and mortgagee parties; and on p. 599: "I think the plain intention of the Act is, that proceedings shall be taken within the limited time against every one who can be affected by the lien." The other learned Judges concurred, giving reasons also.

2. A claimant may register under sec. 22. In that case, the lien shall absolutely cease, according to the terms of sec. 24, at the expiration of the time-limits therein mentioned (which would be 90 days in the case in hand), unless in the meantime an action is commenced to realise the claim and a *lis pendens* registered. To realise what claim? I should say the one made in the registered document; and, if in that there is only a claim against the owner of the equity of redemption, that is all that can be realised in the action begun after the 30 days have expired.

The case I cited above was to enforce a registered lien, but it shews that an action is not properly constituted to displace a mortgagee's priority unless he is made a defendant. If then an action is brought to enforce an unregistered lien, the mortgagee's position must be attacked (if at all) within the time-limit set by sec. 22, which (in cases like the one in hand) is 30 days. It follows that it must be attacked within 30 days if a claim of lien is registered, unless he is to be let out in 30 days in one case, and held for 90 days in the other. The "owner" is not so treated. His interest must be attacked by registration or action within the same time-limit in all cases.

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I believe in interpreting the Act liberally in the interest of a lien-holder; but it is no hardship to ask him when he registers his claim—any more than it is a hardship to ask him when he begins his action—to say whether he claims priority over a prior mortgage. He has notice of the mortgage when he registers, and requires only to insert a few additional words in his claim. And I think a mortgagee is as fairly entitled to know, within the time-limit named in the statute, whether his security is attacked, as the "owner" is to know, within that time-limit, whether his equity of redemption is incumbered or clouded by a claim of lien. The mortgagee may wish to deal with his security, and it should not be kept under a cloud any longer than is fairly necessary. He is no party to the building operations, is often ignorant of what is done, and his dealings even with the mortgagor might be affected by the lien-holder's claim.

I conclude that the plaintiff in this case was required to exercise his option to go against the equity of redemption only, or to claim against it and the mortgage security also, within the period of 30 days, and that, when he registered his claim against the equity only, and took no step and made no claim within the 30 days against the mortgagees, he must abide by his election and let the mortgagees go free.

J. Y. Murdoch, for appellant.

V. H. Hattin, for defendants Martin and Bowman, respondents.

J. F. Boland, for defendant Linnenbank, respondent.

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 dated the 16th November, 1915, which was pronounced by an Official Referee (Neville) after the trial of the action before him.

The action is brought under the Mechanics and Wage-Earners Lien Act to realise a lien claimed by the appellant for work done and material supplied by him in the construction of a building on the lands in question which belonged to the respondent Linnenbank, subject to a mortgage to the respondents Martin and Bowman, and the lien is claimed as against the mortgagees only upon the increased selling value of the land by reason of the

work done and material supplied by the appellant, which the Referee found to be $500.

Notwithstanding this finding, the action was dismissed on the ground that the appellant's lien ceased to exist at the expiration of thirty days from the completion of the work and the furnishing or placing of the last material furnished or placed by the appellant, although he had within that period registered a claim for the lien in the form prescribed by the Act and containing everything which sec. 17 of the Act requires to be set out in the claim, and had brought this action to realise his claim in due time. The view of the Referee was that where a lien is claimed against a prior mortgagee under sub-sec. 3 of sec. 8, it is essential that it must be so stated in the registered claim in order to preserve the lien as against the mortgagee.

We are of opinion that the ruling of the Referee was erroneous and that the registration of the claim of the appellant was effectual to preserve his lien as against the respondents Martin and Bowman.

As I have said, the claim set forth everything which sec. 17 requires to be set forth, and was in the form prescribed by the Act. The appellant had therefore complied with everything which the Act requires to be done by him in order to preserve his lien. Section 23 provides that "every lien for which a claim is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless . . ."

The lien having been registered, as it was, in strict compliance with the provisions of the Act, sec. 23 cannot be invoked against the appellant.

The judgment of the Referee must therefore be reversed, unless, as the respondents contend, the finding that the selling value of the land has been increased by the work done and the materials supplied by the appellant cannot be supported.

An inquiry of that nature, the result depending, as it always must, upon opinion evidence, is always a difficult one, and was especially so in this case owing to the character of the building that has been erected. There was a conflict of evidence, some of the witnesses being of opinion that not only had the selling value of the property not been increased by the erection of the building, but that it had been lessened. On the other hand,

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there was evidence that the selling value had been increased by more than $500. The Referee, who saw and heard the witnesses, was in a better position to judge as to the weight which should be attached to their evidence than we are, and I am unable to say that the conclusion to which he came was wrong.

The result is that, in my opinion, the appeal should be allowed with costs, and the judgment of the Referee as to the matters in question on the appeal be reversed, and that there should be substituted for it a declaration that the selling value of the land in question was increased by the work done and materials supplied by the appellant, by the sum of $500, and an adjudication and order that the appellant's lien attaches upon such increased selling value in priority to the mortgages of the respondents.

Appeal allowed.

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LAMBERT v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. March 17, 1916.

1. CONTRACTS (§ II D 1—152)—INDEMNITY AGAINST LIABILITY FOR DAMAGES —NEGLIGENCE.

A contract by a company to indemnify a corporation against any action and any loss or damage through the imperfect execution of the company's works does not render the company liable to the corporation for the result of the corporation's own negligence which causes the imperfection complained of.

2. MASTER AND SERVANT (§ II A 3—50)—NEGLIGENCE OF THIRD PARTY— FAILURE TO WARN—LIABILITY.

A corporation is liable to a workman of a company for damage caused by the corporation's own negligence through interference with works which it has permitted the company to construct, in addition to any liability of the company itself to the workman for the negligence of a foreman in not warning the workman of the danger caused by the corporation.

Statement.

APPEALS by the two defendants, the Corporation of the City of Toronto and the Interurban Electric Company, from the judgment of MULOCK, C.J.Ex., of the 8th November, 1915, in favour of the plaintiff against both defendants, upon the findings of the jury at the trial at Toronto, in an action brought by Ada Lambert, mother of Kenneth Lambert, to recover $10,000 damages under the Fatal Accidents Act and the Workmen's Compensation for Injuries Act, for the death of her said son, caused by coming in contact with the electric wires of the defendants, on the 13th March, 1914.

The judgment appealed from awarded the plaintiff $2,700 damages and costs of the action; claims for indemnity made by each defendant against the other were dismissed without costs.

The city corporation appealed against the judgment dismissing its claim for indemnity over against its co-defendant.

C. M. Colquhoun, for the appellant city corporation.

D. Inglis Grant, for the appellant company.

B. N. Davis, for the plaintiff, respondent.

RIDDELL, J.:—This is an appeal by the City of Toronto and the Interurban Electric Company against a judgment in favour of the plaintiff for $2,700 and costs: and by the city against a judgment dismissing its claim for indemnity over against the Interurban Electric Company—the case having been tried before the Chief Justice of the Exchequer and a jury at the Toronto Assizes.

The jury answered certain relevant questions, and it is not disputed—nor can it be—that there is evidence upon which the jury could so find. Adopting then the answers of the jury as to the facts in dispute, the case is as follows.

The predecessors in title, &c., of the Interurban Electric Company had a contract with the predecessors in title, &c., of the city, under which they erected a pole not far from the north-west corner of Bathurst street and St. Clair avenue. This pole and its brethren were to support a wire or wires for the carriage of electricity of high tension; and, in the nature of things, it would be necessary for employees of the electric company to mount the pole to examine, adjust, repair, &c., the wires.

The city absorbed the street on which this pole was placed, and, on the 9th November, 1912, required the Interurban Electric Company to move it some feet back and behind the kerb—and this was done.

After this, the city itself erected a pole not far from that of the Interurban Electric Company—guyed it by a guy-wire running close to the Interurban pole and wound round the city's pole. With unaccountable negligence, this guy-wire was wound round the city's pole in contact with a lightning-arrester, i.e., a wire running down the pole longitudinally into the earth—a wholly improper and dangerous arrangement, and one which could have been avoided by the very common practice of inserting wooden blocks between the two wires.

Even this dangerous arrangement might have been rendered innocuous (so far as the Interurban was concerned) by the introduction of an insulator close to the city's pole. There was an insulator on the guy-wire, but it was not between the two poles.

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On the day in question, the 13th March, 1914, the deceased Lambert, a young man in the employ of the Interurban Electric Company, was directed by his foreman, Cameron, to mount the Interurban pole and "release" certain wires. He did so, cut an Interurban wire in which there was a high-tension current, and, his body coming near the city's guy-wire, a grounding was effected through his body, the guy-wire, and the lightning-arrester — the current passed through him, and he was killed. His mother brought an action under Lord Campbell's Act and the Workmen's Compensation for Injuries Act, the city claimed indemnity, and the case came on for trial before the Chief Justice of the Exchequer, with a jury in the plaintiff's case, without a jury on the question of indemnity.

The following are the questions and answers:—

"1. What was the cause of the accident? A. The accident was caused by Lambert's left heel coming in contact with the Interurban wire, and his left side touching the guy-wire, which was in contact with the ground-wire on the Hydro-Electric pole.

"2. Was the Corporation of the City of Toronto guilty of any negligence which caused the accident? A. Yes.

"3. If yes, in what did such negligence consist? A. By not having the strain insulators nearer the Hydro-Electric pole, and by not insulating the point of contact between the guy-wire and the ground-wire or lightning arrester on the Hydro pole.

"4. Was the Interurban Electric Company guilty of any negligence which caused the accident? A. Yes.

"5. If yes, in what did such negligence consist? A. Before sending Lambert up the pol., the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position, and, that being so, should have directed his attention to the possibility of the guy-wire being in contact with the ground-wire on Hydro pole.

"6. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

"7. If yes, in what did such negligence consist? (No answer).

"8. What damages, if any, do you award the plaintiff? A. $2,700, $1,800 to be borne by the Hydro-Electric Company and $900 by the Interurban Electric Company.

(This was changed by the jury to a simple statement of the amount, $2,700).

"9. What do you estimate to be the amount of the earnings during the three years preceding the accident of a person in the same grade as that of the deceased in the like employment within the Province of Ontario? A. $2,700.

"10. Was the Interurban pole erected before or after the Hydro guy-wires were carried from the Hydro pole to the anchor post on the east side of Bathurst street? A. Yes. The Interurban pole was erected first. (This was in reference to a contention by the city that the city pole was in position before that of the Interurban Electric Company).

So far as the Interurban is concerned, I think the jury was amply justified in finding negligence against it, through its foreman, Cameron. He himself says that the arrangement of wires, &c., was a trap; the reason he did not warn Lambert was that he did not see it himself and his not seeing it was "an overlook."

As regards the city, the Interurban Electric Company, at the request of the city, placed its pole at a certain point of the city's property—the pole remaining the Interurban Electric Company's personal property—the consent to the company's men going up the pole for all necessary purposes was implied, if indeed such consent was needed for the company to have its own men mount its own pole for its necessary work. The condition of affairs is perfectly safe, when the city, for it own purposes, throws a wire across near to the pole and creates a situation of danger for all persons mounting the pole and doing certain of the company's necessary work: and does this, knowing that persons are to be expected to do such work. I cannot see why the city is not to be held liable to the workman.

It is argued that the right of the workman is not higher than that of the company, and that the company could not have sued, by reason of its contract of indemnity.

Assuming, without admitting, that the workman's rights must be limited to those of the company, and that he must be barred if the company could not sue, how does the case stand?

The clause reads: "7. The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting of any of the privileges hereinbefore mentioned to the company, and all costs and expenses incurred thereby, and also against all loss, damages,

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costs, charges, and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay, by reason of the improper or imperfect execution of their works or any of them, or by reason of the said works becoming unsafe or out of repair, or by reason of the neglect, failure, or omission of the company to do or permit anything herein agreed to be done or permitted, or by reason of any act, default, or omission of the company or otherwise howsoever."

The city is made liable in this action, not by reason of anything done or left undone by the company, but by reason of the city's own negligence in changing a safe arrangement into an unsafe one; as it seems to me, the city might as well claim an indemnity if its men were negligently to chop down one of the company's poles with a man on it.

I agree with the Chief Justice of the Exchequer that this case does not come within the indemnity clause: therefore, in any case, the city has no answer against the claim of the plaintiff.

The same considerations apply to the claim of the city against the Interurban Electric Company.

I am of opinion that the appeals should be dismissed with costs.

Lennox, J.

LENNOX, J.:—The questions to be determined upon the appeals and cross-appeal are:—

(a) Is the plaintiff entitled to judgment against both or either of the defendants?

(b) Is either defendant entitled to be indemnified by the other?

Each of the defendants maintained an electric pole at the north-west corner of St. Clair avenue and Bathurst street, in this city. The Hydro pole, that is, the one maintained by the city, was west of the Interurban pole. The guy-wire from the Hydro pole extended easterly across Bathurst street and quite close to the Interurban pole. This guy-wire was fastened to the Hydro pole in a way to come in direct contact with its ground-wire. There were insulators upon the guy-wire, but none between the Interurban pole and the Hydro-Electric pole. The jury exonerated the plaintiff's husband from negligence. [The learned Judge then set out some of the questions put to the jury and their answers, already stated by RIDDELL, J., *supra*.]

It is difficult to see how the city can claim either exoneration from liability or indemnity—the city is the primary wrong-doer

The Hydro-Electric had to place its poles where directed by the city, and in this instance had to move the pole to this point from where it formerly stood. After the pole was put in the position assigned, the city was guilty of the grossest kind of negligence, not only in fastening its guy-wire so as to come in contact with the ground-wire, but in running it almost in contact with the cross-arms of the other system, and failing to insulate it properly. I do not agree with the argument that the company's foreman should have apprehended danger from the position of the strain insulators. The insulators were for the purpose of intercepting a current from an overhead wire falling upon the guy-wire. I would not have thought that the foreman could properly be charged with negligence in failing to discover that the guy-wire was placed in direct contact with the ground-wire; and this was the direct cause of the man's death. No one would expect to find such an astonishing piece of improper and negligent construction.

But negligence is a question for the jury, and they have found against both defendants. Both defendants are liable.

Subject to the question of the effect of the contract between the defendants, the question of contribution or indemnity is settled by *Sutton* v. *Town of Dundas*, 17 O.L.R. 556 (C.A.) On the finding of the jury, they were both wrong-doers. There was an agreement to indemnify the municipality in the *Sutton* case, too, and I think as broad and general as the one here; but, short of practical identity, each case is to be decided on its own facts.

There are two things covered by the agreement: (a) To indemnify the city against loss occasioned by granting the privileges of the agreement to the company. There has been no loss under this head. (b) Loss occasioned to the city by imperfect execution of the company's works, or their becoming unsafe or out of repair, or by reason of the company failing to do something they agreed to do or permitting something they were not to permit —or otherwise howsoever. The "or otherwise" carries the guaranty no further than the provisions preceding it.

The company has not broken its agreement under this part of paragraph 7. Its works have not been shewn to have been imperfectly executed or out of repair. True they became unsafe through the direct misconduct of the city's servants This cannot be pleaded for the advantage of the city.

The appeals should be dismissed with costs.

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MASTEN, J., concurred.

MEREDITH, C.J.C.P.:—Some of the most significant circumstances of this case seem to have been passed over at the trial unobserved, or, if observed, without being commented upon. The case seems to have been treated there as if one of joint wrongdoing on the part of the two defendants; and so much so that the jury's verdict, for a different amount against each, was added together, and, without any concurrence of the jury, was entered as if against the defendants alike in the whole amount. There the case was treated as if there were liability in both of the defendants at common law, and the questions were framed accordingly, with the exception of one question relating to the amount of damages, though the judgment against the defendant the Interurban Electric Company can be supported only under the Workmen s Compensation for Injuries enactment. And, that which may be a circumstance of the greatest importance, the fact that neither the defendant the Interurban Electric Company, nor any of its employees, had any right to be at the place where the accident happened, engaged in the work they were doing when it happened, except by the leave of the defendant the municipal corporation—that without such leave they would be but trespassers there, and that they were there under such leave granted, not only upon the terms that the defendant the municipal corporation should not be liable to the company for any damages, but that the company should indemnify the municipal corporation against any action or claim brought or made by the granting of such leave to the company, or by reason of any act, default, or omission of the company or otherwise howsoever—seems to have been quite overlooked or ignored.

Bearing these things in mind, let us now see what facts the jury have found, and what liability, if any, can be based upon them. The jury have found that the defendant the municipal corporation was negligent in leaving one of its stay or "guy" wires resting upon the lightning-rod of one of its line of transmission poles, and that the accident was caused by reason of the "strain insulator" of the stay-wire being outside the transmission pole of the defendant the Interurban company, upon which the accident happened, instead of between it and the other pole: but that that negligence would have been harmless except for the negligence of the defendant the Interurban company, through its foreman in

charge of the work being done, in not observing the danger and warning the man who was killed of it: or, as it would probably have been put had it been observed, that there could be recovery against the defendant the Interurban company under the Workmen's Compensation for Injuries enactment only: the negligence of a person in the service of this defendant, to whose orders the man was bound to conform and did conform; the injury resulting from his having so conformed.

Upon these findings, quite apart from the leave, and the terms upon which it was granted, it is quite obvious that the defendant the Interurban company could have no cause of action against its co-defendant. Its negligence was the immediate cause of the man's death: its act in sending him into danger without warning him, as the jury have found. The passive negligence of the defendant the municipal corporation was harmless to those taking due care. Then can a servant of the defendant the Interurban company, so injured, have any higher right against its co-defendant than his master had—having regard to the fact that he was there under and upon the conditions of the leave granted, and otherwise would have been a mere trespasser without any right of action for any such negligence as the jury have found: though he doubtless would have a good cause of action against his employer under the Workmen's Compensation for Injuries enactment? See *G.T.R.W. Co.* v. *Robinson*, [1915] A.C. 740; 22 D.L.R. 1, *Jones* v. *Morton Co. Limited* (1907), 14 O.L.R. 402, at p. 414; and *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640.

Now let us look at the material facts of the case, those upon which the jury were questioned, as well as those upon which they were not. The plaintiff's earnest efforts to aggravate the character of the negligence of the defendant the municipal corporation, is something in the nature of a two-edged sword—the grosser it was, the less excuse there can be for not avoiding it. But, whatever its character may have been, it was far removed from such negligence as that which places in the reach of the innocent and ignorant a dangerous weapon or instrument. The wire in question was at the top of the pole of the defendant the Interurban company, entirely beyond the reach of every one but skilled line-men going there to perform their duties in connection with electric street wiring, duties performed at or near the top of such poles and in a net-work of wires carrying electricity, a place and a work

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necessarily dangerous to any one not taking all the precaution his trade and experience had taught him that he could take for his own safety. The taller pole, of the defendant the municipal corporation, and the shorter one, of its co-defendant, were quite near to one another: the taller pole carried a lightning-rod—a "lightning-arrester," as the men engaged in such work prefer to call it: but, by whatever name it may be called, it was simply and plainly a lightning-rod, running all the way down the pole, and into the ground, on the side of the pole towards the sidewalk: in contact with this lightning-rod was the stay-wire in question, and the near insulation in it was just the other side of the shorter pole: the effect of that being that the "lightning-arrester" was extended so that it protected both poles; if lightning were attracted to the taller pole, it would, instead of doing injury, be carried down the lightning-rod into the ground: if attracted to the smaller pole, instead of striking it and doing injury, it would be carried by the stay-wire to the lightning-rod and down that rod to the ground harmlessly. And, apart from nature's interference, in thunder-storms, the rod and the wire were perfectly dead and harmless, unless by some human agency they were brought in contact with some electric current, and on that being done would carry the current safely and harmlessly into the ground. The "lightning-arrester" was a needful safety appliance properly placed for the protection of these transmission wires, as well as of the public making lawful use of the highway: in order that that safeguard might be had, it was necessary that the poles upon which it was placed should be more dangerous to careless workmen upon them than if there were no such general safety device: and it is quite obvious that the danger would have been greater to a careless workman on the pole of the defendant the municipal corporation, than on the pole of its co-defendant, because the "ground-wire" or "lightning-arrester" ran all the way down the former pole, whilst the extension of it, by means of the stay-wire, merely passed by the top of the other pole. All of which means, that the man was working under obvious and ordinary conditions, and could not have been injured except by making himself a connection between some live wire and this dead ground-wire or the pole or some of the other wires upon it. I have said "obvious conditions," and they were so obvious that the jury found the foreman guilty of negligence causing the man's

death, because, although standing on the ground, not up the pole or otherwise nearer the stay-wire, he did not warn the workman of the danger. The condition of affairs was made more obvious by the strain insulator, a very conspicuous thing, so conspicuous and so placed that none but the quite blind could help seeing it; and seeing that it afforded no protection from the side towards the longer pole, which was only a few feet away from the shorter one. As the jury put it, the "wrong position" of the strain insulator should have been noticed and should have been a warning of possible danger from the longer pole. And, that being so, how is it possible to exculpate the workman from negligence, causing the accident, except upon the ground, acted upon in the House of Lords in the case of *Smith* v. *Baker & Sons*, [1891] A.C. 325, that the man was acting not voluntarily but under the compulsion of his service; or, as put in the Workmen's Compensation for Injuries enactments, he was conforming to orders to which his service compelled him to conform?

Then, proceeding a step further, what was it that really caused the accident? The man cut, in pursuance of his orders, the two heavy transmission wires, carrying an electric current of 2,200 volts, 110 volts being the power ordinarily in use for all household purposes: he cut, and left exposed, these exceedingly dangerous live wires, wires attached to the lower cross-arm upon the shorter pole, some distance below the stay-wire at the top of this pole. The man's obvious main duty was to keep quite clear of these high power wires, which he had thus exposed and left exposed. Any kind of contact with them involved danger: the pole itself upon which the man stood might be in such a condition as to cause the man's death if, necessarily being in contact with it, he should touch the live wire: it is said that the pole was dry and would not have been a sufficient conductor to have caused serious injury: but it was in the month of March, and no one knows; and it was the man's duty to avoid any chances, and doubtless he meant to avoid them. Then he was in the midst of wires, some of which might have been as deadly as the ground-wire if the man unfortunately made of his body a connecting link between it and one of the live wires which he had exposed and left exposed—they were the sole starting-point of danger: the man knew, as every one knows, that no insulator can be always perfect,

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and that this applies especially to strain insulators. By some terrible mishap, the man seems to have brought one of his feet in contact with one of the wires he had exposed, at the same time having some part of his body in contact with the stay-wire, and so made of his body the connecting link through which the 2,200 volt current or some part of it passed, killing him. At all events that is the finding, and it was the most probable cause; though there can be no direct evidence of it, and it is possible that the current passed down the pole he was on, or through some other wire with which he was in contact. That touching the live wire was the one thing the man should have avoided, and doubtless meant to avoid, is manifest. In some unaccountable way he failed in his purpose, and consequently met his death: a thing improbable, in the same circumstances, even once in a thousand times I have no doubt: but it happened this time.

Now, in these circumstances, what duty did the defendant the municipal corporation owe to this man? My answer is: only that which is covered by its contract with his master: and that is nothing, the obligation is altogether on the part of his master: and, as I have said, except under that contract the man would be a trespasser where he was. And, there being this expressed obligation, can there be any other? The plaintiff cannot contradict or vary it.

If it be not so, then upon what ground can the plaintiff recover against the defendant the municipal corporation? Not on the ground that if one place a loaded weapon where any fool may take it and do mischief with it he is answerable for mischief so done; because no such instrument is involved in this case; and, if there were, it was placed where none but experienced men could come in reach of it, and it was openly and obviously as dangerous as it could in any circumstances be. The experienced man, on the shorter pole, was within a few feet of the strain insulator, on one side of him, and of the longer pole and its lightning-rod, with stay-wire necessarily embedded, to some extent, in it, by the strain, and unnecessarily in contact with the lightning-rod, on the other side; so near to each that unless he closed his eyes he could not avoid seeing and understanding the actual, and the whole, condition of affairs. The loaded weapon principle is quite out of the question.

Then does the principle of a duty arising from an invitation

apply? How can it when the invitation is in writing and lays down its own terms? Besides, if an invitation, it was an invitation to a place of danger; and the danger was open and seen, or else not seen because of gross negligence—going to a place of danger and shutting the eyes whilst in it.

Nor is the principle given effect to in such cases as *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, or the mischievous animals cases, at all involved in such a case as this. Both defendants were engaged in supplying the public with what may now be called one of the necessaries of life; and supplying it by means which are quite safe, generally speaking; safer than many other public needs, such, for instance, as rapid traffic. And there was no outbreak of a dangerous element or a wild nature; the man who was injured made the danger, and then needlessly stepped into it.

It is quite difficult to extract from such cases as, on the one hand, *Earl* v. *Lubbock*, [1905] 1 K.B. 253, and *Winterbottom* v. *Wright* (1842), 10 M. & W. 109, and, on the other, *Langridge* v. *Levy* (1837), 2 M. & W. 519, *Levy* v. *Langridge* (1838), 4 M. & W. 337, and *Parry* v. *Smith* (1879), 4 C.P.D. 325—see also *Burrows* v. *March Gas and Coke Co.* (1870-2), L.R. 5 Ex. 67, and L.R. 7 Ex 96—any clearly defined principle easily applied to every case; nor is there any need, for the purposes of this case, to attempt to do so; all of such cases being the very opposite of this case. In all of them there was a contract on the part of the defendant, and a contract broken by him, and a breach which was the direct cause of the plaintiff's injury. In those cases in which there was held to be liability to a person not a party to the contract, the liability was based upon the fact that a known to the defendant dangerous thing was, knowingly, placed by him in the hands of an innocent person ignorant of the danger. Pigott, B., in the case of *George* v. *Skivington* (1869), L.R. 5 Ex. 1, put it in this plain manner: "The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, the chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable." The subject is also dealt with in his usual full and clear

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manner by Parke, B., delivering the considered judgment of the Court of Exchequer in the case of *Longmeid* v. *Holliday* (1851), 6 Ex. 761.

In the case of *Parry* v. *Smith*, 4 C.P.D. 325, which I have been unable to trace further than its trial, Lopes, J., said (p. 327): "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance It is a misfeasance independent of contract."

But the case the learned Judge was dealing with was one of a contract, a breach of which caused injury to the servant of the other party to the contract, who would, undoubtedly, have had a right of action under the contract for the injury done to him in injuring his servant; and much of the opinion I have quoted conflicts with what is said in other cases of higher authority. And of course the claim in the case of *Parry* v. *Smith* could be easily sustained on narrow grounds: if the plumber had not only let the gas escape, but had exploded it too, he would obviously have been liable for the injury done; and the mere fact that he did not himself apply the light which caused the explosion could make no great difference, that light being applied without any kind of negligence, but in the ordinary course of the duty of the man who carried it; and, the explosion being the very thing that was likely to happen, it is difficult to understand why the plaintiff might not recover. If the plumber had puffed tobacco fumes in the man's face, he would have done to him a wrong; the more so puffing—in either case intentionally or unintentionally—explosive gas all around him; and the explosion and injury were direct consequences which the plumber must have known would be likely to follow upon his wrongful act.

One of the later cases was also a case of explosion of gas—*Dominion Natural Gas Co.* v. *Collins*, to which I have already referred. That too was a case of contract to do work; and a breach of that contract resulting in explosion, a human death, and bodily

injury. The defendants the Dominion Natural Gas Company had contracted with the masters of the man who was killed and of the man who was injured, to bring into a building of the masters, in which men worked, and in which there was an exposed fire, natural gas to be used for power, heat, and light in that building, contracted to do the work and supply the gas in a workmanlike and proper manner; but, in breach of that contract, left the work in such a manner that an apparently necessary provision for the discharge of an overflow of gas was made in the building, where it might possibly be disastrous, instead of spending a few shillings in extending the discharge pipe to the outside of the building. The jury found that this breach of contract caused the accident, and that there was no contributory negligence on the part of the men. So far a simple and plain case: but the jury also found that the masters were also guilty of negligence in having tampered with the appliances through which the gas escaped, and that that negligence was the cause of the accident. By some process of reasoning, in which I could not agree, but which I cannot from memory recall, and the case does not seem to have been reported here, the provincial Courts gave effect to the jury's findings against the Dominion Natural Gas Company, but overruled, or disregarded, their findings against the masters, and no appeal was taken against the dismissal of the action as against them, so that, when the case reached the Judicial Committee of the Privy Council it was one of "Hobson's choice:" sustain the judgment against the Dominion Natural Gas Company, or else let the unfortunate plaintiffs go without anything, because of error in the provincial Courts, though the plaintiffs were plainly entitled to relief against one or other, if not both. The Judicial Committee proved themselves able to rise to the occasion, sustaining the judgment against the Dominion Natural Gas Company, by in effect reversing the verdict of the jury against their co-defendants, though there plainly was evidence upon which reasonable men could find as the jury had on this branch of the case. As put by the Judicial Committee, the question was whether the proximate cause of the accident was the negligence of the Dominion Natural Gas Company, in providing for escape of gas inside, instead of outside, the building, or was it the "conscious act of another volition," or, to come to the point more pointedly, was it the tampering with

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the gas plant by the men of the masters, permitted by the masters? Notwithstanding the findings of the jury, the Judicial Committee considered that that question was left in doubt, and that the onus of proof of it was upon the Dominion Natural Gas Company, and so they did not escape. Let me read their own words upon this branch of the case ([1909] A.C. at p. 647): "That being so"—the Dominion Natural Gas Company having been found guilty of negligence—"have" they "been able to shew affirmatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's"—the masters'—"workmen?" The jury had very plainly said, yes; the Judicial Committee said, not proven. And it was a case of trial by jury. There is no appeal in the Courts of this Province from the jury to any Judge or Court: trial by jury is a statutory right.

As I have said, none of these cases is at all analogous to this case; but, if the last one were, the jury in this case have found as reasonable men not only could find, but could not help finding, that the accident was caused by the "conscious act of another volition," or, in other words, another act caused by human will; the negligent order of the foreman to the workman to do that which was done, in the open face of the whole danger which the defendant the municipal corporation had created, not on the property of another, but upon property vested in it and of which it was the conservator—a highway.

But it all comes back to the starting-point: the workman had a right to be where he was only upon the leave granted to his master by its co-defendant: and that leave was not only conditional upon no liability being incurred by the one who granted it, but also that it should be indemnified against any claims arising out of the granting of it.

I decline to waste time discussing cases in which the defendant the municipal corporation would be obviously a wrong-doer and the only wrong-doer: no one has any right wilfully to harm even a trespasser: no one has a right to lay traps: but such things are quite out of the question in this case: there was nothing like a trap; the whole condition of affairs was open and plain; no one could mistake it; that is, no one who had any right to climb these poles and go among these highly charged electric wires.

Although the workman may be excused, and may not have been guilty of contributory negligence towards his master, because of the compulsion of his service, no such excuse can be raised in his behalf as to the other defendant, because he was under no order and no compulsion from it; his action must fail as against it on this ground also—his negligence, his causing of the whole trouble; the finding in his favour in that respect is doubtless good as to his master, but not as to its co-defendant; if it were intended to apply to it, the question should have been put plainly as to each, and the difference between a master's and a stranger's position have been plainly pointed out.

I am therefore of opinion that the judgment against the defendant the municipal corporation cannot stand: because (1) it owed no duty to the workman who was killed; and (2), if it did, the breach of it was not, but the negligence of the foreman of the man's master was, the proximate cause of the accident; and also (3) because the man was plainly guilty of contributory negligence as against this defendant.

And I am of opinion that the judgment against the other defendant is right, and should stand, not only on the ground upon which the jury put it, but also because the workman's master, which was bound to take reasonable care for him in its employment, instead of doing so, entered into an agreement with the defendant the municipal corporation exempting it from liability to it and its workmen acting under that agreement; and, that being so, what more does the plaintiff need?

And, if the defendant the municipal corporation should be held to be liable to the plaintiff, I am of opinion that its co-defendant is bound to indemnify it against such liability, for the reasons I have already given: and I am quite sure that the case of *Sutton* v. *Town of Dundas*, 17 O.L.R. 556, does not stand in the way of giving such relief. That case was the opposite of this case: the defendants seeking indemnity there were the "prime wrong-doers;" it was doubtful indeed if their co-defendants were really blameable for the accident: and there is no kind of likeness between the contract of indemnity in that case and that in this case. In this case the indemnity is against all claims and actions arising out of the leave granted, the leave to the defendant the Interurban company to be, and to maintain the

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poles and wires, there in the highway vested in its co-defendant; or by reason of any act, default, or omission of that company *or otherwise howsoever*. In the case of *Sutton*, it was said (p. 567) that "the right to relief, under the agreement, is limited to cases in which the damages and expenses are 'incurred by or consequent on the negligence of' their co-defendants: it does not cover, and could never have been intended to cover, cases in which the municipal corporation's negligence is the direct and prime cause of the injury . . . and expenses." This case is very much more like such cases as *Pyman Steamship Co.* v. *Hull and Barnsley R.W. Co.*, [1915] 2 K.B. 729; *Travers & Sons Limited* v. *Cooper*, [1915] 1 K. B. 73; and *Manchester Sheffield and Lincolnshire R.W. Co.* v. *Brown* (1883), 8 App. Cas. 703: and, in the face of these decisions, and indeed without them, how can it be said that the words "any act, default, or omission of the company *or otherwise howsoever*," do not mean that which they so plainly say: quite apart from the other very broad words of the indemnity contract which I have more than once read, and which also plainly, as it seems to me, give the right of indemnity claimed by the defendant the municipal corporation against the prime sinner in, and direct causer of, this accident, its co-defendant?

But the other members of the Court are of a different opinion, and consequently the appeals must be dismissed on all grounds.

Appeals dismissed; MEREDITH, C.J.C.P., *dissenting in part.*

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CLELAND v. BERBERICK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Magee, JJ.A., and Riddell, J. March 21, 1916.

1. ADJOINING OWNERS (§ I—3)—RIGHT TO LATERAL SUPPORT—WRONGFUL INTERFERENCE—LIABILITY.

What amounts to a wrongful interference with a land-owner's right to lateral support depends upon the nature of the soil; it is none the less a wrongful interference if the damage is caused in part by the action of wind and waves, if the defendant's act has made the damage possible. [*Cleland* v. *Berberick*, 25 D.L.R. 583, 34 O.L.R. 636, affirmed.]

Statement.

APPEAL by the defendant from the judgment of MIDDLETON' J., 25 D.L.R. 583, 34 O.L.R. 636. Affirmed.

J. M. Ferguson, for appellant.

F. F. Treleaven, for plaintiff, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The parties own adjoining lots on the shore of Lake Ontario, that of the appellant lying to the south of the respondent's lot.

The respondent's complaint is, that, in consequence of the appellant having removed the sand from his own lot, the sand which formed a smooth, sloping beach on the respondent's lot, had been carried away from it and into the excavation which was made in the appellant's lot by the removal of the sand, with the result that the respondent's beach had been destroyed and his land much depreciated in value.

The learned trial Judge found that this complaint was well-founded, and determined that what the appellant had done was an actionable wrong; and he directed that judgment should be entered for the respondent for $750, at which sum the damages were assessed.

The learned trial Judge was of opinion that what the appellant had done was an interference with the right which the respondent had to the lateral support of his lot by the appellant's land, and that it was none the less a wrongful interference with that right because the carrying away of the sand from the respondent's beach was not caused solely by the removal by the appellant of the sand from his lot, but by that act combined with the action of the wind and waves upon the sandy beach.

What amounts to a wrongful interference with a land-owner's right to the lateral support of his neighbour's land must necessarily vary according to the nature of the soil.

Dealing with the question in *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D. 284, 289, the Master of the Rolls (Jessel) said: "Now, what is this right of the adjoining owner? . . . It is to the support of his land in its natural state—support by whom? The Judges have said 'Support by his neighbour.' What does that mean? Who is his neighbour? It was contended that all the land-owners in England, however distant, were neighbours for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring land-owner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbour for this purpose. There might be land of so solid a character, consisting

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of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbour's land whose support you are entitled to. Beyond that it would appear to me you have no rights." Upon appeal these views were approved.

The observation of the Master of the Rolls that "there might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it," is, I think, directly applicable to soil such as that of which the beach was composed. It is manifest from the nature of it that an excavation in his neighbour's lot was likely to take away from the respondent's lot the natural support which it had from the soil of the appellant's lot; and that, while the excavation which the appellant made could not have affected injuriously the support which his lot afforded to the respondent's lot, if the soil of both had been clay or any other solid substance, it did, owing to the friable and shifting nature of the sand of which the beach was formed, materially and injuriously affect it.

I can see no difference in principle between the application of the law as to lateral support as it was applied in the cases of *Jordeson* v. *Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, and *Trinidad Asphalt Co.* v. *Ambard*, [1899] A.C. 594, and the application of it on the facts to the case at bar.

The result of the excavation was in the *Jordeson* case that the "running silt" which underlay the plaintiff's land ran from it into the excavation, causing the surface to subside, and in the *Trinidad* case that the asphalt or pitch which formed the main ingredient of the plaintiffs' land melted and oozed forth into the defendant's land.

In both cases it was the act of the defendants, combined with the operation of natural laws, that caused the injury, and it was a substratum of the plaintiff's land that was displaced. In the case at bar it was the surface soil that was displaced, and the displacement was the result of the appellant's act, combined with the operation of natural laws—indeed the case at bar seems to be an

à fortiori case for the application of the law as to lateral support, because it was the surface soil that was displaced.

Upon the whole, I am of opinion that the judgment is right and should be affirmed, and the appeal be dismissed with costs.

Appeal dismissed.

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TURNBULL v. RUR. MUN. OF PIPESTONE.

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Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. July 10, 1916.

1. ARBITRATION (§ II—10)—DISQUALIFICATION—RELATIONSHIP.
Bare relationship to one of the parties disqualifies an arbitrator, on the ground of non-indifference.
[*Re Christie and Toronto Junction*, 24 O.R. 443, dissented from; *Turnbull* v. *Pipestone*, 24 D.L.R. 281, affirmed.]

APPEAL from the judgment of Curran, J., 24 D.L.R. 281, affirmed. Statement.

J. H. Chalmers, for appellant.

H. E. Henderson, K.C., for respondent.

RICHARDS, J.A.:—I concur in dismissing the appeal, but do so only on the ground that Mrs. Turnbull's brother was, because of his relationship to her, disqualified as arbitrator. The fact that nothing in the evidence shews that he acted improperly makes no difference. I express no opinion as to the other grounds taken. Richards, J.A.

I would dismiss the appeal, but because the reeve suggested as arbitrator a resident of the municipality who was appointed in consequence of such suggestion, I would allow no costs of the appeal.

CAMERON, J.A.:—In *Vineberg* v. *Guardian Fire & Life Assce. Co.*, 19 A.R. (Ont.) 293, Hagarty, C.J., of the Ontario Court of Appeal examined the principles upon which the Courts have acted in dealing with objections based upon the alleged "non-indifference" of an arbitrator. The relation there to the insurance company of the arbitrator whose qualification was impeached, was that of a canvasser for insurance risks, some of which he placed with the insurance company named, he getting a share of the commission of the company's regular agent. He (the arbitrator) was not bound to place them with that company, and the amount received by him from it was insignificant. Yet he was held disqualified. "Certainly," said the Chief Justice, "those relations would naturally suggest, perhaps unjustly, a presumption of 'non-indifference.'" Cameron, J.A.

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I refer to *Conmee* v. *Canadian Pacific R. Co.*, 16 O.R. 639, where Rose, J., reviewed the authorities at length and held that "the facts fairly raised doubt in the minds of the plaintiffs as to the impartiality of the tribunal making the finding complained of," p. 652.

It is not altogether easy to reconcile the decisions in those cases with that of Rose, J., in *Re Christie & Toronto Junction*, 24 O.R. 443, where an arbitrator was held not disqualified though he had acted as counsel for the solicitor of the corporation in matters which apparently affected the corporation. This view of the case was dealt with by Meredith, J., in *Township of Burford* v. *Chambers*, 25 O.R. 663. But he held himself bound by the unanimous decisions of the Court of Appeal in the *Vineberg* cause. He states thus the effect of the rule: "The rule adopted here appears to be that an arbitrator is unfit to act in any case in which he might be suspected of a bias in favour of or against one of the parties."

Rose, J., in *Conmee* v. *Canadian Pacific R. Co.*, *supra*, refers to the dicta of Lord Denman in *Dobson* v. *Groves*, 6 Q.B. (A. & E., N.S. 1844) 637. Stuart, V.C., in *Kemp* v. *Rose*, 1 Giff. 258, and Erle, C.J., in *Proctor* v. *Williams*, 8 C.B.N.S. 386.

The cases seem to go far and it may be that the rule appears to be founded rather on sentiment than on considerations of practical utility as suggested by Meredith, J., in *Township of Burford* v. *Chambers*, *supra*. But it is impossible to measure the effect that such a bias as that dealt with by the authorities may produce and the decisions of authoritative tribunals appear to uphold a severe application of the principle involved.

It is impossible to deny, as Curran, J., points out in his judgment, that the relation between the arbitrator Gahan and his sister Mrs. Turnbull, was one which was likely to produce a bias in his mind.

The municipality was not precluded from taking this objection as a protest was made at the opening of the arbitration. I concur, therefore, with the conclusion reached by Curran, J., on this point.

I do not consider it necessary to deal with the other objection, viz.: that the Lieutenant-Governor-in-Council had no authority to appoint a resident of the municipality. That provision was evidently intended for the benefit of the municipality. It is a matter quite beyond the control of the owner affected. It is an

act of the Crown and my own inclination would be to read the provision of the statute as directory merely. But in view of the conclusion I have reached on the first branch of the case, I do not wish to state an opinion as to the second.

In my opinion, though it is a case that from the standpoint of Mrs. Turnbull presents some hardship, the appeal must be dismissed, but in the circumstances, without costs.

HAGGART, J.A.:—I would affirm the order of Curran, J., and dismiss the appeal for the reasons he has given, but as the municipality was in a measure responsible for the appointment of Peter Macdonald, who is a resident of the municipality and who is ineligible by the provisions of sec. 699 of the Municipal Act which enacts that the nominee of the Lieutenant-Governor-in-Council shall be a "person resident without the limits of the municipality interested," I would refuse to allow the municipality costs.

HOWELL, C.J.M., and PERDUE, J.A., concurred in the dismissal of the appeal. *Appeal dismissed.*

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Haggart, J.A.

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

INTERNATIONAL SECURITIES CO. LTD. v. GERARD.

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Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. July 10, 1916.

1. BILLS AND NOTES (§ V A 1—112*a*)—RIGHTS OF TRANSFEREE WITHOUT INDORSEMENT—LIABILITY OF MAKER—HOW DETERMINED.

Where the holder of a promissory note delivers the note without indorsement to a third party as collateral security for a debt, the latter cannot sue the original maker on the note, in the absence of the indorsement. The Court of King's Bench (Man.), may, in a proper case, when the transferor is a party to the suit, direct the indorsement to be made, and then proceed to determine the liability of the maker, but the County Court has no power to do so.

[The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 61, considered. See also *Canada Food Co.* v. *Stanford* (N.S.), 28 D.L.R. 689.]

APPEAL by defendant from a judgment of Paterson, J. Reversed. Statement.

H. F. Tench, for appellant.

A. C. Campbell, for respondent.

The judgment of the Court was delivered by

PERDUE, J.A.:—The defendant Preece made a promissory note for $412.50 payable to the order of the other defendant, Gerard, and delivered it to him. Gerard was indebted to the plaintiffs, who were pressing him for payment and demanding security. He requested time and offered to turn over the above note to the plaintiffs if they would give him time. They agreed Perdue, J.A.

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to this, the note was delivered to the company "as collateral security" and the extension of time was granted. Gerard, however, did not and never has indorsed the note. There is no evidence as to whether he intended to indorse the note or not. The note was presented to Preece for payment and payment was refused. The plaintiffs then commenced the present action in the County Court of Winnipeg to recover the amount. At the time of the trial of the action Gerard was still indebted to the plaintiffs in an amount greater than the amount of the note. The action was tried before Paterson, J., who entered a judgment for the plaintiffs for the full amount. From this judgment the defendant Preece appeals.

By the Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 61, it is enacted as follows:—

> Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferrer.

This is the same as sub-sec. 4 of sec. 31 of the Imperial Act. That clause came up for consideration in *Good* v. *Walker*, 61 L.J.Q.B. 736. In that case a promissory note had been transferred by delivery (but not indorsed) to the plaintiffs by way of pledge to secure repayment of an advance. There was no intention on the part of the transferor to transfer his whole rights in the note. Cave, J., held that according to the old law the plaintiffs could not sue the defendant and that sub-sec. 4 of sec. 31 of the Act did not avail them. He refers to sec. 88 of the Imperial Act (sec. 185 of the Dominion Act) which lays down the liability of a maker of a promissory note as follows:—

> The maker of a promissory note, by making it (a), engages that he will pay it according to its tenor; (b), is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

In accordance with this, Cave, J., points out that the maker had promised to pay the payees or their order, but the action was not brought by them or their indorsee; that the plaintiffs did not fill any of the positions ordinarily filled by persons suing on a note; that the plaintiffs were neither indorsees, payees nor bearers. "Bearer," he goes on to say, "is defined by sec. 2 (sec. 2 (*d*) of Dominion Act) as "the person in possession of a bill or note which is payable to bearer." Nor are they (the plaintiffs) holders, because of the definition in the same section, which is

that, "holder means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof." Here the plaintiffs are neither endorsees, payees, nor bearers; therefore they cannot be holders and therefore do not fall within any of the ordinary categories of persons entitled to sue.

Cave, J., then proceeds to discuss sec. 31, sub-sec. 4. He first refers to sub-sec. 1 of that section, which corresponds to sec. 60 of the Dominion Act, and is as follows:

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

"The transferee," he says,—

may well have such title as the transferor had in the note, and yet not be able to sue on it. There is the ordinary instance of the transfer of a chose in action or of rights under an agreement; but such transfer does not give the transferee a right to sue in his own name, except under special circumstances. I have considerable doubt that those words can be construed as introducing so general a change into the law of bills of exchange as it is contended they do. If the transferee can sue without endorsement, I can see no reason why the words were added giving him the right to have the endorsement of the transferor.

In the Scotch case of *Hood* v. *Stewart*, 17 Court of Sessions Cases, 4th series (Rettie) 749, where the payee of a bill transferred it for value without indorsing it, it was held that the transferee was entitled to recover from the acceptor. But in that case the payee intended to endorse the bill, but omitted to do so by mistake. The decision in this case was questioned by Cave, J., in *Good* v. *Walker*, *supra*.

In *Walters* v. *Neary*, 21 T.L.R. 146, a bill drawn by the drawer to his own order and accepted was negotiated by the acceptor to the plaintiff for value. By mistake the bill was not endorsed by the defendant who was both drawer and payee. It was held, following *Watkins* v. *Maule*, 2 Jac. & W. 237, that the plaintiff was entitled to require the defendant to endorse the bill, and judgment was entered against defendant for the amount of the bill. *Walters* v. *Neary*, the King's Bench Division of the High Court, in which the action was brought, had power both to order the defendant to make the endorsement and, in the same action, to give judgment on the note.

The ordering of a transferor who had not endorsed a bill to make the endorsement was formerly an equitable remedy. See *Watkins* v. *Maule*, *supra*; Ex parte *Greening*, 13 Ves. 206; *Smith* v. *Pickering*, 1 Peake, 69; *Edge* v. *Bumford*, 31 Beav. 247. The

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Court of King's Bench in this Province may in a proper case, where the transferor is a party to the suit, direct the endorsement to be made and then proceed to determine the liability of the maker of the note: K. B. Act, Rules 196-198, 885; Byles on Bills, 17th ed., p. 177. The County Court, however, has no power to order a payee of a note to endorse it in order that the transferee may maintain an action against the maker.

I think the appeal should be allowed with costs and the action be dismissed. *Appeal allowed.*

MAN.

K. B.

UNITED STATES v. FORD & FRARY.

Manitoba King's Bench, Mathers, C.J.K.B. June 22, 1916.

1. EXTRADITION (§ I—7)—PRELIMINARY HEARING—DISCHARGE—RE-ARREST. Under sec. 13 of the Extradition Act (R.S.C. 1906, ch. 155), the Extradition Judge is not to try the fugitive for the offence laid, but merely to conduct a preliminary enquiry in the manner laid down in Part XIV. of the Criminal Code, in order to establish a *primâ facie* case; a discharge of the fugitive is no bar to his subsequent arrest for extradition for the same offence.

2. EXTRADITION (§ I—4)—FORGERY—IDENTIFICATION—COMPARISON OF SIGNATURES.
For the purpose of extradition for the offence of forgery, identity of the person charged may be sufficiently established by a comparison of the signature with a document signed by the accused.
[*Re Smith*, 3 Crim. App. 87, followed.]

3. FORGERY (§ I—1)—PROCURING WOMAN TO JOIN IN DEED AS WIFE—FRAUD ON DOWER—PRINCIPAL AND ACCESSORY.
A deed of conveyance executed by a married man, who procured a woman with whom he cohabited as his common law wife to join therein as his wife, in fraud of the dower rights of his lawful wife, is a "false document" and "forgery" within the meaning of secs. 335 (*j*) and 466 of the Criminal Code; under sec. 69 both are parties to the offence, and extraditable under sec. 18 of the Extradition Act (R.S.C. 1906, ch. 155).

Statement.

EXTRADITION proceedings on an application by the State of Oregon on a charge of forgery.

W. H. Trueman, K.C., for State of Oregon.

A. E. Moore, for prisoners.

Mathers, C.J.K.B.

MATHERS, C.J.K.B. (oral):—In view of the evidence of Mrs. Ford, the question of identity is now disposed of. I had come to the conclusion that there was sufficient evidence of identity apart from her evidence. I have before me the genuine signatures of the accused persons to the deed. There is sufficient evidence that the persons charged with this offence signed that deed. The question is to identify the persons charged in the foreign warrant with the man and woman before me. I have also the bail bond, signed by both of them in my presence. In England in a recent case the Judges in the Court of Criminal Appeal, for

the purpose of identification, compared the signature to a document signed by the person by whom the offence was committed with the signature of the convicted man to the notice of appeal and to a letter written by him after conviction. Upon this evidence the Court arrived at the conclusion that the person convicted was not the person by whom the offence was committed. *Re Thos. Smith*, 3 Crim. App. 87. That, I think, authorised me to look at the signatures to the bail bond made before myself by the man and woman in Court and compare those with the signatures proven to have been made to the deed by the persons accused. Having done so, I have no doubt that they were written by the same hands.

You see, Mr. Moore, that you have lost nothing by calling Mrs. Ford, because I already had come to the conclusion that the evidence of identity was sufficient.

And now as to the other points raised: The application is by the State of Oregon for the extradition of H. N. Ford and Elizabeth G. Frary on a charge of forgery. The warrant upon which the accused were arrested was issued by me on May 30, 1916. Extradition proceedings had previously been taken against the accused before Myers, J., upon the same charge. After investigation, he, on May 26, dismissed them and granted a certificate of dismissal under the seal of the County Court. Why he put the seal of the County Court to the certificate, I am at a loss to understand, because he was not acting as County Court Judge but as Extradition Commissioner.

The objections urged by Mr. Moore for the accused, as I understand them, are as follows:—1. That an application for the extradition of the accused upon the same charge was made to Myers, J., of the County Court, who, after hearing the evidence, refused to commit the accused for extradition, and discharged them from custody. 2. That there is no evidence identifying the persons arrested and now in custody with the persons named in the foreign warrant. 3. That there is no evidence that the female accused is not the lawful wife of the male defendant. 4. That there is no evidence that the land purported to be conveyed was not the property of the female defendant. 5. That there is no evidence that the deed in question is a false document or that any

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person has been prejudiced by its execution. 6. Generally, that the evidence does not establish a *primâ facie* case of forgery.

I do not think there is anything in the first objection. By sec. 13 of The Extradition Act, I am to "hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice of the peace charged with an indictable offence committed in Canada." That is to say, the extradition Judge is not to try the fugitive for the offence laid, but merely to conduct a preliminary inquiry in the manner laid down in part XIV. of the Code, sec. 668 *et seq.* If upon the whole of the evidence the justice is of the opinion that the evidence is sufficient to put the accused on his trial, he shall commit him accordingly, sec. 690; but, otherwise, he shall discharge him, sec. 689. If the justice discharge the accused, either he or another justice may legally re-arrest him upon the same charge; *King* v. *Hannay*, 11 Can. Cr. Cas. 23. This applies only to preliminary inquiries and not to summary convictions or summary trials by justices. In these cases the accused is tried by the justice. If he dismisses the charge in the case of a summary conviction he may give a certificate under sec. 730 and in the case of a summary trial under sec. 791. In either case the certificate is a complete bar to any further or subsequent prosecution for the same offence. (secs. 730, 792.)

There is no authority under the Code empowering a justice who discharges a person before him for preliminary investigation to grant a certificate of such discharge. In this case Myers, J., issued a certificate of discharge, but I fail to see under what authority he did so, or that such a certificate has any force. It is either a complete bar to these proceedings or it is nothing. The view I take is that it is an absolutely futile thing. The inquiry conducted under the Extradition Act is exactly the same character, *i.e.*, the Judge is to see if a *primâ facie* case is made out: In *Re Castioni*, [1891] 1 Q.B. 149, 160.

It was contended, however, that a different rule should be applied to a preliminary inquiry under the Extradition Act, because such a hearing is final in its nature in so far as this jurisdiction is concerned. Such is not the case, because the Act expressly reserves to the fugitive the right to apply for a writ of *habeas corpus* to test the validity of his commitment. On

such an application the Court has the right—not possibly to review the whole decision, but to consider whether from the whole of the circumstances proved by the depositions and other evidence it arrives at the same conclusion as the committing Judge or deliberately arrives at the opposite conclusion: per Hawkins, J., in *Re Castioni*, [1891] 1 Q.B. at 161.

Counsel for the accused relied upon two cases, *Ex parte Seitz* (No. 2), 3 Can. Cr. Cas. 127, and *King* v. *Harsha* (No. 2), 11 Can. Cr. Cas. 62. In the former it was held that a fugitive who had been committed for extradition and discharged upon *habeas corpus* because the committing commissioner had acted without jurisdiction might be legally re-arrested upon the same charge. In the *Harsha* case the fugitive had been committed for extradition but obtained his discharge upon *habeas corpus* because the evidence against him "would not have justified the magistrate in committing the prisoner had the offence been committed in this country." It was held that such discharge was no bar to his subsequent arrest for the same offence. The language of Boyd, C., by whom the judgment was delivered, is entirely opposed to the contention of the accused that the plea of *autrefois acquit* is open to them. He says, at p. 65:—

> The doctrine of *res judicata* or former jeopardy or of *autrefois acquit* is in each particular quite inapplicable to this method of preliminary inquiry.

The question is settled against the contention of the fugitives by *Reg.* v. *Morton et al*, 19 U.C.C.P. 9, where it was held that a second arrest for the same cause upon a new warrant after a discharge at the expiration of a very full investigation was perfectly valid. Hagarty, C.J., disposes of the objection by saying (p. 14):—

> The failure of any one magistrate from mistake or otherwise, to commit persons charged for extradition, cannot, in my opinion, prevent the action of another duly qualified officer from entertaining the charge on the same or on fresh materials.

Wilson, J., used language to the same effect. Referring to the proceedings before the first magistrate, he said, p. 23:—

> Giving them their full weight, they are no bar or answer to the case before us any more than the dismissal of a charge by one magistrate would preclude another from investigating the same charge.

I therefore overrule the first objection.

The question of identity I have already disposed of.

The third objection is that there is no evidence that the female

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accused is not the wife of the male accused, as she assumed to be when the deed was executed. There is satisfactory evidence that H. N. Ford was married to a woman named Caroline Voght who is still living and not divorced, on December 24, 1898. The woman swears that she believed then and still believes that the marriage so solemnized constituted her the legal wife of the man she afterwards lived with. The marriage ceremony was pronounced at Eagle, Alaska, by one J. F. Hobbes, a notary public, before several witnesses. They thereafter lived and cohabited together as man and wife for a period of 10 years, and were, during all that time, recognised by their neighbours and acquaintances as man and wife. Four children were born to them of which three are dead and one, a little girl 11 years old, is now with her mother. Caroline Ford swears that in 1908 her husband said he was tired of her and sent her to California. He has not since lived with her. Up until June 3, 1914, he occasionally visited her and contributed to her support. On that day he wrote her a letter, addressing her as "Mrs. H. N. Ford." In the letter he called her "Carrie," and requested her to "take good care of Alaska," evidently referring to the little girl.

The depositions of several lawyers familiar with the laws of Alaska and Oregon were read. These depositions satisfy me that the marriage ceremony pronounced between Caroline Voght and H. N. Ford on December 24, 1898, consummated as it was and followed by cohabitation under the circumstances detailed in the evidence, constituted a valid marriage and that they have ever since continued to be and are still lawful man and wife, both according to the laws of Alaska and those of Oregon. As the accused man had a lawful wife living at the time the alleged forgery is said to have been committed, viz.: May 12, 1914, the accused woman could not then have been his wife. This disposes of the third objection.

I do not think it necessary to comment upon the evidence given by the accused woman in the box to-day. It may be that she believed, at the time that she went through what she describes as a "contract marriage" with the accused man in 1908, that she was his lawful wife and that by that marriage she became his lawful wife. Long, however, before this deed was executed, she had discovered that he had a wife whom he had previously

married in Alaska. It may be that she accepted as conclusive the advice which she received that that marriage was not a valid one. It is a little difficult to understand why she should come to the conclusion that a marriage by contract made with Caroline Voght was illegal and a marriage made exactly in the same way by herself was legal.

I think the State has made out a *primâ facie* case that the accused man had, at the time this deed was executed by the accused woman, a lawful wife living, and therefore that the accused woman was not his wife and that she must have known it.

The 4th, 5th, and 6th objections are to the effect that the facts given in evidence do not make out a *primâ facie* case of forgery against the accused or either of them according to Canadian law. The depositions of the legal experts examined sufficiently establish that the offence charged is forgery according to the law of the demanding State. But that is not enough. The facts in evidence must be such as would, according to the law of Canada, justify a committal for trial if the crime had been committed in Canada: Extradition Act, sec. 18. It must appear that the offence charged is a crime not only against the law of the demanding State, but also a crime against the law of Canada. *Ex. p. Seitz* (No. 2), 3 Can. Cr. Cas. 127; *Re Staggs* (No. 2), 8 D.L.R. 284, 20 Can. Cr. Cas. 310; *Re Arton* (No. 2), [1896] 1 Q.B. 509; *Ex. p. Stallman*, [1912] 3 K.B. 424, 445.

Forgery (sec. 466 of the Code), is the making of a false document knowing it to be false with the intention that it shall, in any way, be used or acted upon as genuine to the prejudice of any one whether within Canada or not, or that some person should be induced by the belief that it is genuine to do, or refrain from doing, anything, whether within Canada or not.

3. Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended, that any particular person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.

Section 335 (*j*) of the Code defines a "false document" as, amongst other things,

a document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorise the making thereof.

The depositions establish that the accused man and woman, on May 12, 1914, went before a Mr. Cochran, an attorney and notary public in the City of Portland in the State of Oregon, and there executed a warranty deed by way of mortgage of

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certain lands in the State of Oregon to one McKinnon, for the purpose of securing a debt due from the accused H. N. Ford to him, amounting to $1,336.69. In this deed the female prisoner is described as the wife of the male prisoner. By the law of Oregon a wife is entitled to an estate of dower in the lands of her husband. The male prisoner introduced the female prisoner to Mr. Cochran as his wife and then each of them signed the deed in question, the male prisoner signing the name "H. N. Ford," and the female prisoner signing the name "Elizabeth G. Ford." Mr. Cochran inquired of each of them if he or she executed the document freely and voluntarily, and each affirmatively assented that they did. Mr. Cochran, as attorney for Mr. McKinnon, retained the deed and subsequently had it recorded in the office of the recorder of conveyances for the county. The charge is that H. N. Ford, being indebted to McKinnon, the accused executed this deed as security for the debt. The deed covenants that the grantors are seised in fee of the lands granted.

The evidence of the accused woman given in the box to-day makes it clear that the only interest in the lands which she claimed was a dower interest, that she had no other title to the land than such title as she would be entitled to as the wife of H. N. Ford. As she was not the wife she had no interest.

Caroline Ford, the lawful wife of H. N. Ford, had an estate of dower in the lands in so far as H. N. Ford had title thereto. The document was manifestly intended to convey to the grantee this dower estate as well as any other estate which the accused or either of them had in the lands. For the purpose of inducing the grantee to accept this deed as a grant of all that it purported to grant, both the accused falsely represented the female accused to be the wife of the male accused and she executed the deed in that character. At that time she knew H. N. Ford had a wife living and she must have known that she was not his wife. The gist of the offence was the signing the deed with the knowledge that it was false and the intent that it should be accepted as genuine. As soon as that was done the offence was complete. It was not at all necessary to shew that any person had actually been prejudiced by it. She was, therefore, guilty of making a false document knowing it to be false, with the intent that it should be acted upon as genuine. By so doing she committed the offence of forgery according to the law of Canada: *Re Lazier*,

26 A.R. (Ont.) 260. Both by the law of Oregon and of Canada every one is a party to and guilty of an offence who actually commits it, abets any person in the commission of the offence, or counsels or procures any person to commit the offence: Code sec. 69. The male defendant was, therefore, a principal in the offence committed by the female defendant.

In my opinion the evidence against the accused is such as would justify me in committing both of them for trial on a charge of forgery had the offence been committed in Canada, and I remand them for extradition on that charge; but not on the charge laid in the indictment for non-support.

As required by sec. 19 of the Extradition Act, I now inform the accused that they will not be surrendered until after the expiration of 15 days, and that they have a right to apply for a writ of *habeas corpus*.

I have considered this matter with, I think I may say, more than ordinary care, because of the fact that the accused had been dismissed by one extradition Judge. It was due to Myers, J., as well as the accused that I should do so before coming to a conclusion different from the conclusion he had arrived at. Having gone into the matter carefully, read the depositions several times and not only read the cases cited to me but also made considerable research on my own account, I could arrive at no other conclusion than that there was a sufficient *primâ facie* case to warrant me in remanding the accused for extradition.

Accused remanded.

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Quebec Superior Court, Pouliot, J. June 27, 1916.

1. MARRIAGE (§I VB—58) DEGREE OF INSANITY AS GROUND OF ANNULMENT—GENERAL PARESIS.

The degree of insanity as ground for annulment of a marriage need not necessarily be that of interdiction or established by medical authority; a person affected with general paresis at the time of the marriage, the circumstances pointing to the abnormal exercise of his ordinary mental faculties and his general inability to realize the nature and consequences of his acts, is not legally capable of giving valid consent necessary for the formation of a valid marriage.

[Art. 986, C.C. Que., referred to.]

ACTION by the curator to Harris Michalson, interdicted and interned at Verdun Hospital for the Insane, to have the marriage of the said Michalson with the defendant annulled, on the ground

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that at the time of the marriage, although not then interdicted, Harris Michalson was insane.

S. W. Jacobs, K.C., and *G. C. Papineau-Couture*, for plaintiff.

N. K. LaFlamme, K.C., and *F. Callaghan*, for defendant.

POULIOT, J.:—On October 27, 1914, the marriage of Harris Michalson and Ethel Glassford was solemnised at Montreal, in St. George's Church, by the Reverend Paterson-Smyth, the rector thereof.

The present suit is to have this marriage declared non-existent, not on account of the difference in the religious persuasion of the contracting parties, but solely for the reason that the marriage is alleged to be null owing to the lack of valid consent on the part of Harris Michalson.

The defendant on the one hand contends that the marriage having been celebrated according to the forms required by law, the act of civil status attesting the reciprocal consent of the consorts, the marriage is valid, without there being any necessity of having recourse to the application of the rules of the law governing ordinary contracts; that, moreover, as Harris Michalson was not, at that period, interdicted, and as the cause of the interdiction, supposing it did exist, was not notorious, Harris Michalson had the legal capacity of contracting.

The plaintiff, *es qual*, on the other hand, contends that the contract of marriage which carried change of civil status, requires for its legal execution, as any other contract, valid consent of the contracting parties, and that as this consent was vitiated by the state of insanity in which Michalson was on October 24, 1914, it behooves the Court to declare that no marriage ever existed, by reason of the lack of consent of one of the parties.

Moreover, adds plaintiff, the consent given by Harris Michalson was not due to a spontaneous act of aberration on his part, but was extorted from him by the captatious manœuvres to which the defendant had recourse in order to obtain from him a part of his estate.

The whole contest condenses itself into a simple question of fact: Was Harris Michalson sane when he contracted this marriage? In the affirmative the marriage cannot be annulled; in the negative, then this Court must declare the marriage inexistent.

It was argued that even before October 24, 1914, Harris Michalson held and considered the defendant as his natural wife, and that the sole object of the marriage was to regularise a situation up to that date equivocal.

Whatever the motive of one of the contracting parties the marriage ceremony could not have the effect of regularising the situation of the parties and of conferring upon them the civil status of consorts, if there was lack of consent by either of the contracting parties.

Doubtless the celebration of a marriage before a competent official raises the presumption in favour of the capacity of the consorts, but it does not establish it directly. The official called upon to register in the registers of civil status their consent is but the witness of their declarations which he is bound to receive. This presumption, however, may in certain cases be rebutted by contrary evidence.

If it be shewn that the act, in appearance reasonable, is not so in fact; that the person who went through it has not the enjoyment and exercise of his mental faculties, then the act will be annulled. Where there is lack of intelligent will there is no valid consent. Where there is no perfectly free consent there is no marriage. Consequently that consent which is the manifestation of a will effaced by insanity, or expressed as a result of moral violations exercised on a mind the critical faculties of which are atrophied as a result of disease, is valueless.

As presumptions favour the validity of marriage, we have to find whether, in the present case, the first and essential condition of marriage, that is to say, the consent, the very soul of marriage, is present.

The fact that Harris Michalson, on the day of his marriage, had not yet been interdicted judicially is of no import. Interdiction or the notoriety of the causes which may justify it, raises the presumption of the civil incapacity of the person, but does not constitute, *per se*, such incapacity.

The incapacity to contract marriage results from a mental disease which may exist although not declared by judicial authority or recognised by public opinion. Besides, the action of two persons uniting themselves in the bonds of marriage is a contract; of all contracts affecting the person, the property of the consorts,

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the most important, the most solemn, and carrying with it the most serious consequences as regards the security and propagation of families. Therefore it is of the utmost importance that it should not be tainted by any defect which might be a cause of nullity. But, on the contrary, it should possess all the essential elements required for the validity of the contract.

Now, according to art. 986 of the Civil Code, those legally incapable of contracting are not only interdicted persons, but also persons insane, or suffering a temporary derangement of intellect, arising from disease, drunkenness, or other cause, or who, by reason of weakness of understanding, are unable to give a valid consent.

What are we to understand by persons insane? Lunacy or insanity is a derangement of the intellectual faculties. "It is," says Foville, "the gradual obliteration of the intelligence."

Esquirol defines it as a disorder of the ideas, of the affections, of determinations, characterised by the more or less pronounced absorption of all the faculties of the senses, the intellect and the will.

Insanity, according to Pinel, is the abolition of the powers of thought.

In total dementia (says Calmeil, Dictionnaire de médecine), the patients see, hear, feel, but the brain is no longer constituted so as to react energetically against outside influences, and the judgment is not sufficiently sustained by sensations which become too incomplete to be properly appreciated. (265).

There are almost numberless forms of insanity varying in nature and in intensity. It may be temporary or habitual. It is only when insanity constitutes a habitual state of imbecility, dementia or violence that the law, with a view of protecting the patient himself, his family and his property, orders his interdiction.

When insanity is established at the moment of the execution of a contract, although such insanity has not been rendered public by judicial interdiction, a contracting party is incapable of binding himself, and the contract is therefore inexistent.

Demolombe, defines insanity,

un désordre des idées, ce n'est plus la faiblesse, c'est le dérangement des organes dont les fonctions sont altérées. (Vol. 8 p. 291).

Il s'agit, pour les magistrats, de rechercher si la personne conserve encore une entente suffisante des affaires de la vie civile, une aptitude convenable

pour pourvoir au train ordinaire et commun de l'administration d'un patrimoine (p. 295).

Rolland de Vilargues, Verbo Démence, says:—

Insanity is a complete disorder of the intellectual faculties with symptoms or developments more or less grave according to the degree of intensity of the causes producing it.

Insanity (says D'Aguesseau, vol. 3, 2nd plea of Conti, p. 519), is a fact, but a habitual fact, a disposition, a permanent affection of the soul, and as habits are only acquired by reiterated acts, so insanity is only proved by a long series, a continuity, a multiplicity of actions, the certainty of which can only be established by the testimony of those who were the constant spectators thereof.

There is one kind of insanity which, according to the authors, constitutes: "une déchéance généralisée de tout l'être pensant, sentant et voulant:" This is general paresis. It manifests itself by physical and motive symptoms as well as psychic disorders. According to medical authority, the coexistence of these symptoms constitutes one of the fundamental characteristics of paresis which is, of all the diseases known, one of the most insidious.

A great number of physicians were heard in this case, both on behalf of the plaintiff and of the defendant. All agree in holding that Harris Michalson at the time of his marriage was suffering from general paresis. It would even appear that his present state is considered as incurable and that the paralysis has become more and more pronounced since the date of his confinement at Verdun, November 5, 1914.

There is a notable divergence of opinion, however, between the members of the medical faculty as to whether on October 24th, 1914, the date of his marriage, Harris Michalson had sufficient enjoyment of and control over his mental faculties, to know and properly judge of the nature of this act. In the opinion of the doctors examined on behalf of the plaintiff, although Harris Michalson knew that he was contracting marriage, he did not realise the nature and the quality of this act. According to the doctors of the defence he realised perfectly the importance of the act of contracting marriage with the defendant.

Although Lord Shaftesbury in 1859 (before a Royal Commission) gave it as his opinion that medical knowledge was not necessary in deciding whether a person is insane or not:—

The mere judgment of the fact whether a man is in a state of unsound mind and incapable of managing his own affairs and going about the world requires no medical knowledge;

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yet the opinion expressed in *Re Milne*, 11 Gr. 153 at 185, appears to me less exclusive and more acceptable:—

> So far as the testimony of medical men of good intellect, accustomed to think and deal with cases of insanity, furnishes facts shewing certain peculiarities of mind which they have elicited by conversation with the patient or ascertained by observation, it is valuable as providing *indicia* by which to determine or aid in determining soundness or unsoundness of mind . . .
>
> But the mere opinion . . . is not only not evidence, but would be a very unsafe guide to a determination of the question.

For the decision of this case it would be imprudent to confine oneself to the consideration of the external evidence, however imposing it may be by the renown and the number of the medical celebrities who have given their opinion in the box.

"We must," according to the expression of D'Aguesseau,

> penetrate into the interior of the evidence, scrutinize the number and importance of the facts marshalled in support of the opinion expressed on the one general fact which is all the evidence in the case, and the main object of the judgment sought

to wit, the mental state of Harris Michalson.

In *Fraser* v. *Robertson*, 24 O.L.R. 222, a similar case, the opinion was given that the examination of the circumstances preceding and following immediately the act impugned, the physical condition of the person should be taken into account, and in *Boughton et al* v. *Knight et al*, 28 L.T. (N.S.) 562, it was held proper to consider in its *ensemble* the life of the person.

Is the marriage of Harris Michalson with the defendant a well reasoned act of the will or the result of mental aberration? In other words, does it constitute an act of wisdom or of insanity?

The marriage of Harris Michalson occurs between two most striking facts of capital importance. Around each of these major facts particular facts group themselves, each of them a ray of light, and the reunion of all of them sheds an unmistakably clear light on the whole situation.

Of these two major facts, the later in date, uncontradicted, is that Harris Michalson when first interned at Verdun, on November 3, 1914, was suffering from general paresis; that he was suffering from a mental disease to which was added positively undeniable symptoms of a physical disease.

According to the doctors in charge of the institution, who have followed closely the case since the confinement of Michalson, he was, at the time of the hearing of this case, in March, on the verge of dementia, and was a complete physical and intellectual ruin.

That Harris Michalson is insane is therefore certain, but it becomes necessary to fix the precise moment when this insanity made its appearance in Michalson's brain.

The facts disclosed at the hearing regarding the conduct of Michalson since his confinement, shew that his disease, both mental and physical, has never ceased to progress and the disease confirms the opinion of the experts to the effect that when in general paresis the period of establishment has been reached, periods of *remission* may occur, but there never can be any lucid intervals.

"An insane person" says Marc, "de la folie, has remembrances and reminiscences." It is not surprising, therefore, that Michalson, after being confined, wrote letters where allusions to the past are to be found; but in these letters characteristic symptoms of general paresis, according to the doctors, are quite visible: the superscription and the drawing ornamenting the letter written to his wife from the asylum which he calls "hell's place;" the omission of letters in words; repetition and surcharges of incorrect words and words misplaced, illusions, that is to say, the belief in things which had their existence only in the patient's imagination.

Without for the moment determining in what degree Michalson's mind was affected at the time of his internment at Verdun, we can safely conclude that he was then suffering from insanity, at least in a certain degree.

This fact, well established, being kept in mind, let us examine the circumstances of the other capital fact antedating the marriage by a few days.

A man by the name of Kino called at the office of the Michalson firm offering diamonds for sale. Harris Michalson was the president of this company, which did a large business and bore an excellent reputation. The vice-president, Israel Michalson, had been for some time away on a business trip. Two employees, Mittenthal and Miss Robertson, had for several months past administered the affairs of the company, in which Harris Michalson seemed to have lost all interest.

Contrary to the custom of the firm of only buying diamonds on the Amsterdam market, Harris Michalson on this occasion bought of Kino diamonds for a total amount of $4,400 for which

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he gave his cheque. However extraordinary the transaction, Mittenthal did not deem it his duty to make, at the moment, any representation to Michalson. The cheque was prepared and handed to Kino in payment for these diamonds which remained almost entirely on the hands of the firm, so injudicious had been the choice.

Then follows a strange incident: Kino exhibited to Michalson packages of assorted diamonds. The latter picked out from each package the biggest diamonds, made a small pile thereof on the side, and offered therefor a ridiculous price to Kino who naturally refused. Thereupon Michalson opened his desk drawer, pulled out his revolver, placed it on the pile of diamonds which he had chosen, then retakes everything and places in the drawer the package of diamonds and the revolver.

In spite of the reiterated protests of Kino, who demands back his property, Michalson persists in his refusal to hand them back, and Kino leaves the office threatening Michalson with judicial proceedings. Mittenthal, who relates the incident, declares he could not help but manifest his astonishment to Michalson who took no notice of it. The next day or the day after Mittenthal advised Michalson that the bailiff had called at the office to seize the diamonds in question. Michalson pays no attention to these threats.

A lawyer was then retained by Kino to recover these diamonds, and summons Michalson before the Police Magistrate. It is only after a direct order of the lawyer that Michalson enters the Judge's room. He remains there with his hat on his head offering not one word of explanation, and when, after they have left the Court House, Kino's lawyer politely requests Michalson to give him the name of his lawyer, to try to arrive at a settlement, he is rudely insulted by Michalson.

How can the conduct of Harris Michalson in this circumstance be qualified? His action can only be the action of a scoundrel or the action of an insane man. If it was not the action of an insane man, then it must be admitted that Harris Michalson, when he took the diamonds in question and refused to return them to their rightful owner, committed a theft, and became guilty of a criminal offence which might lead him to the penitentiary.

Is it reasonable to suppose that Harris Michalson, president

of such an important firm as that of I. L. Michalson and Sons, Ltd., enjoying public consideration both socially and in the business world, should have, with extraordinary lightness of heart, committed such a theft to the prejudice of Kino, a few minutes after he had given him $4,400 for other merchandise? Can it be presumed that he committed coolly and deliberately such an act in the presence of one of his employees?

Such conduct is so contrary to common sense that we are irresistibly led to the only other hypothesis possible, viz., that Michalson at that moment did not enjoy the full exercise of his mental faculties, and did not realise the nature and consequence of his offence.

When to this fact we add a very large number of special incidents which, taken each of them separately, would certainly not justify a conclusion of insanity, yet by their connexity they disclose the work of disintegration that was slowly but surely eating its way into the brain of the unfortunate Michalson. However latent the period of incubation of general paresis may have been its existence cannot for a moment be doubted.

His disease appears to have had two initial and predisposing causes: a syphiletic affection of many years standing, according to the doctors, and a pathological perturbation resulting from an inordinate passion.

The tone of the correspondence exchanged with the defendant, the morals and dissolute habits of Michalson as described by his most intimate friends, shew that his mind was obsessed with a neurotic mania, which witnesses have expressed by the words "crazy for women." One of the most frequent causes of organic disorder: according to the expression of Celse: *Modica Venus corpus excitat, frequens solvit*, and more particularly the determining cause of general paresis with its characteristic exterior manifestations."

According to D'Aguesseau the dress, the exterior, the speech, the conversation, the demeanour render a public and striking testimony to secret and interior dispositions.

"Demeanour and gesture," says Marc, "are always the expression of our inward and outward sentiments."

Negligence in dress, incoherence of speech, difficulty in walking, forgetting his way and losing his direction, his bursts of fury,

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impatience and moral depression during his trip to New York; his nocturnal visits to the room of his brother-in-law Goldenstein, his taciturnity, his bad manners at table; his frequent drowsy spells; an absolute indifference to all that concerned the business affairs of his firm; his recklessness regarding his property; the absence of any sentiment of decency; does not all this constitute an agglomeration of facts carrying with it the conviction that on October 2, 1914, Michalson's brain was no longer in equilibrium, and that in appropriating to himself, without colour of right and in spite of the protests of Kino, a certain quantity of diamonds, he did not realise he was committing a criminal act.

I have no doubt but on indictment Harris Michalson would have been acquitted on the ground that when he so acted he did not realise he was doing wrong.

If, then, Harris Michalson could not be held criminally responsible for an offence by reason of his mental state, is not this same mental state or insanity an absolute obstacle to entering into a civil contract?

Once it is shewn that a few days before his marriage, Harris Michalson committed a deed which can only be explained on the ground of insanity, that once it is shewn that a few days after the marriage Harris Michalson was confined in an asylum for the insane as suffering from general paresis, there is no escape from this conclusion: the contract which intervened between these two dates is vitiated in its very essence, the marriage itself having been performed in a moment of mental aberration. This conclusion is strengthened by several circumstances.

The defendant contends that for a couple of years her marriage with Michalson had been discussed, that he was always putting it off promising to carry this project into execution as soon as a sister of his would be married. It appears that Michalson had great affection for his family and was extremely kind to his sisters.

Now, on October 24, 1914, his sister was not married. How then explain that Michalson who so strongly wished to see his sister married before he was should suddenly sweep aside this most serious objection all of a sudden, an objection founded on elementary decency, and secretly, without the knowledge of his family, jeopardise the future prospects of his sister by marrying the Glassford woman?

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Is it to be supposed that Harris Michalson, however dissolute he might have been, would have tolerated to the very eve of his marriage, the attentions of George Fairbanks to his future wife, if in truth, in all clearness of mind, he wished to regularise his position by making of Ethel Glassford his legitimate wife?

If Harris Michalson contracted marriage on October 24, in full exercise of his judgment, and with unhampered volition, how can we explain that on the very same day he was ashamed to appear in public beside his wife, and through a feeling of self-respect which no longer had any *raison d'être*, left her in order not to be seen in her company by one of his old friends?

Why should he want to keep the fact of his marriage secret when he had helped the defendant to draft the marriage notices to be published in the Star, with request that other papers copy?

How is it that he denied the fact of his marriage to his brother and his brother-in-law?

Can we suppose that on the morrow of the intimate union of two beings by the holy bonds of matrimony, the husband should abandon his newly acquired wife, and that she should revert to her nocturnal perigrinations instead of remaining next to him who the day before rehabilitated her before the church?

The only explanation of such an unreasonable action is to be found in the fact that Harris Michalson on the day of his marriage was affected by a particular feebleness of the operations of the understanding and of the will, a feebleness which is nothing else than the insanity which carried away from him all ethical sense.

This exaggerated erotic affection to which Michalson was subject had radiated in his brain and produced an intellectual perturbation, all the more serious as the subject thereof already gave evidence of symptoms of general paresis.

Now, if next to the intellectual feebleness of Michalson, who was gradually declining, we place in contrast the bold ascendency which the defendant, who had a great interest in marrying Michalson and sharing his fortune, exercised over him, we can understand how he became the relatively easy prey for the resourceful person which the Glassford woman was.

A continuous line of jurisprudence has recognised that circumstances of fraud and captation must be taken into account in the examination of such an important question, and if it be

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shewn that a mind is too weak to react against this baneful influence to such a point that it is no longer master of the will, then the act accomplished under such conditions will be annulled.

In the case of *Countess of Portsmouth* v. *Earl of Portsmouth* (1828), 1 Hagg, Ecc. 355, it was held that a great feebleness of intellect, circumvented by fraud equally great, vitiates and renders null the act of marriage.

In *Hancock* v. *Peaty*, 16 L.T. (N.S.) 182, it was held that lack of capacity invalidated the marriage which is a contract as well as a religious vow. In this case it was declared that of all contracts a will is the most important as it affects persons and rights to property.

In the present case the contract in which Michalson participated had the primordial importance attaching to wills, since, by the very fact of the marriage, without ante-nuptial contract, Michalson and the defendant fell under the regime of community.

When delusion is shewn to have existed before and after the act impugned, it is to be presumed that it existed between these two periods. (*Hampson* v. *Guy*, 64 L.T. (N.S.) 778).

As stated in *Boughton et al* v. *Knight et al*, 28 L.T. (N.S.) 562, the question of whether a person is insane or not i a question of fact wherein the degree of insanity is to be determined to ascertain whether the individual was merely extravagant or truly demented.

Sir James Hannen, J., says at p. 566:—

If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affections; if judgment and reason are lost and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and lead to a disposition due only to their baneful influence, the condition fails and the will ought not to stand.

In *Earl of Sefton* v. *Hopwood*, 1 F. & F. 578, it is said of the influence required to invalidate the capacity of the contract:—

It must be an influence depriving the party of the exercise of his judgment and of his free action.

The definition of this pernicious influence is given in *Lovett* v. *Lovett*, 1 F. & F. 581:—

The control of another will over that of the testator whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent and has quite succumbed to the power of the controlling will.

The guiding rule was laid down in the case of *Boughton, Marston* v. *Knight* (28 L.T. 562, 565):—

It must be proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, *or, if he did know it, that he did not know he was doing what was wrong.* It is essential he shall not be able to distinguish in the act he was doing, right from wrong.

What is stated by Hannen, J., regarding wills applies to the present case, and we can say: The highest degree of mental soundness was required for Michalson to constitute capacity to contract marriage with the defendant because it involved a larger and wider survey of facts.

It was essential, in order that the marriage might be contracted, that no disorder of the mind should have poisoned his sense of right or prevented the exercise of his natural faculties and that no insane delusions should have influenced his will.

The criterion suggested by Wood Renton, "On Lunacy," p. 252, is to inquire whether the person knew the nature of the act in such a way as to pass reasonable judgment thereon, or to weigh the consequences thereof to himself and others, and whether he acted with a free will.

According to *Re Milne*, 11 Gr. 153, to constitute insanity an aberration of the reason or a belief in facts to which no reasonable person would give credit is required.

In the *M'Naghten* case, 10 Cl. & F. 200, it was held:—

That in order that a person may escape from criminal responsibility on the ground of insanity, the state of mind must be proved to have been a fact, to such a degree that he did not realise the nature and quality of his act, or that he did not know that he did wrong in committing the act.

Can it be reasonable to suppose that Harris Michalson realised that he was doing wrong in appropriating unto himself the Kino diamonds, and that he willfully committed a crime which could land him in the penitentiary?

If on October 22 and 23 Michalson was really insane can we presume that he was not insane the following day, when, with an utter disregard of all sentiment of decency and of propriety to his family he married the Glassford woman?

Under the circumstances just related of what value would have been the testimony of Harris Michalson? Would he have even been allowed to give evidence before a Court of justice.

The succession of a large number of facts demonstrates that Michalson, quite a time before his marriage, had lost all control over his will and reason.

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The fact that he had practically abandoned to assistants the administration of the affairs of an important company of which he was the president, and his loss of interest in it; his drowsiness in his office; his loss of memory as regards persons, things and words to translate his ideas; his hesitancy of speech, the uncertainty of his gait, are as many significant signs of the physical and mental disease from which he was suffering.

It was no wonder that with his mind thus enfeebled and atrophied his will became as soft wax or clay in the hands of the defendant, susceptible of receiving any impressions which her caprice might wish to imprint.

In the case of *Fraser* v. *Robertson*, 24 O.L.R. 222, and 8 D.L.R. 955, 26 O.L.R. 527, it was stated that:—

A Court of justice would fail in an imperious duty if it did not protect victims, unable on account of their feebleness of mind, against the machinations of evil intentioned persons.

In Vol. 3, D'Aguesseau, 2nd plea on the case of the Prince de Conti, we find an instance which has many analogies to the present one, where the great chancellor lays down with his unerring precision the true principles which should guide the Court in a matter of this importance.

Un sage et un insensé, dit-il, peuvent être tous deux maitres de leur conduite, mais l'un use convenablement du pouvoir qu'il a sur lui-même, l'autre en abuse indignement, ou plutôt, l'un se gouverne et l'autre est gouverné; l'un se conduit par la raison, l'autre est entrainé par la démence.

It was objected that Michalson at the time of the celebration of the marriage was perfectly sound of mind, since he himself obtained the necessary authorisation, chose the church where the marriage was to be celebrated, went there himself and signed the register (all of which circumstances would tend to shew that Michalson enjoyed his faculties), but we answer with D'Aguesseau, 616:—

La même folie qui leur inspire le désir de faire cette action, leur donne aussi l'idée de la faire dans toute son intégrité extérieure, et sans en omettre aucune des circonstances qu'ils croient nécessaires pour la perfection de l'action. Une action, dit-il, peut être sage en apparence, sans que l'auteur de cette action le soit réallement.

Now, applying the principle laid down by D'Aguesseau that if a marriage celebrated wisely raises a strong presumption of a wise and well regulated disposition, on the other hand the marriage contracted irreverently and scandalously raises the strongest of the symptoms of insanity, can we not conclude that the strang

circumstances surrounding the marriage of Michalson with the Glassford girl is one of the most striking manifestations of his mental aberration, as well as one of those characteristic manifestations of general paresis in the stage of establishment?

Although Michalson was yet, at that moment, in possession of a certain amount of physical strength, and of a relative intellectual activity, he nevertheless could not govern his judgment, no longer had the free control of his will, and his marriage is but the result of a violent and disordered will which had broken away from all control of his reasoning faculties.

Even although he realised that he was contracting marriage with the defendant, there was not in his mind a sufficient resisting force to counterbalance the cravings and instinctive desires produced incessantly by the disease.

A certain number of witnesses have related rational actions and statements made by Michalson about the time of his marriage.

The doctrine of D'Aguesseau is that of all the doctors:—

That positive facts of insanity outweigh acts of wisdom generally negative, and that two positive witnesses must outweigh a thousand negative witnesses.

It is only by a scrupulous comparison between the particular positive facts and the particular negative facts, and by scrutinising the reasons of the opinions of the medical experts, that the Court can finally decide whether or not a person had the required capacity to contract.

The defendant by the argument established that the burden of proving that Michalson was really insane at the time of the marriage lay on the plaintiff *es qualité*, that as the evidence is contradictory the presumption remains in favour of upholding the contract.

This proposition, acceptable as a general rule, no longer prevails when proof is made establishing insanity before the day of the marriage, and subsequent to the day of the marriage.

In such a case there is an interversion of presumption. As insanity existed before and after the act impugned we must presume that it existed during the interval and at the time of the execution of the contract. Hence the burden of rebutting this presumption lies upon the party upholding the validity of the act and therefore it behooved the defendant to prove that at the very moment of the marriage Michalson was sane.

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Not only, however, is the Court of opinion that such proof has not been made, but, on the contrary, all the evidence shews that on this day Michalson was seriously tainted with insanity; that his will had no longer the strength and reaction necessary to counteract the insidious and captatious manœuvres of the defendant.

As the law declares that:—

Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other cause, or who, by reason of weakness of understanding, are unable to give a valid consent,

this Court cannot do otherwise than declare the marriage of Harris Michalson with the defendant to be inexistent, although this marriage is apparently clothed with the exterior formalities required, and this for the reason already mentioned, to wit, the lack of valid consent which is of the essence of marriage, and the absence of which carried, necessarily, the legal absence of any marriage. *Marriage annulled.*

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CHRISTIAN v. CHRISTIAN.

Nova Scotia Supreme Court, Graham, C.J., and Longley, Harris and Chisholm, JJ. May 13, 1916.

1. FISHERIES (§ I B —5)—VALIDITY OF REGULATIONS—CONFISCATION AND FORFEITURES.

The Fisheries Act (Can. Stats. 1914, ch. 8) provides that the fish caught in violation of the Act or any regulation thereunder shall be confiscated; a regulation providing that the fish may go to certain persons is *ultra vires*; sec. 1037 of the Criminal Code (R.S.C. 1906, ch. 146) does not apply.

2. FISHERIES (§ II—10)—INTERFERENCE WITH RIGHTS—ACTIONABILITY.

A licensee of a fishing berth may maintain an action at common law against a person who unlawfully impedes or intercepts the passage of fish to or towards his berth.

[*Whalen* v. *Hewson*, Ir. R. 6 C.L. 283, followed; *Young* v. *Hitchins*, 6 Q.B. 606, referred to.]

Statement.

APPEAL from the judgment of Russell, J., dismissing an action claiming damages for interference with plaintiff's fishing rights.

V. J. Paton, K.C., and *W. J. O'Hearn*, K.C., for appellant.

H. Mellish, K.C., for respondents.

Graham, C.J.

GRAHAM, C.J.:—Under the Fisheries Act (Can. Stat. 1914, ch. 8), there is in sec. 2 a definition of "fishery" as follows:—

"Fishery" means and includes the area, locality, place, station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located and the area, tract, or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance used in connection therewith.

Then there are provisions for the appointment of fishery

officers with extensive powers for the purpose of regulating the fishing.

Sec. 91. The Governor-in-Council may prescribe the manner in which the proceeds of penalties and the proceeds of the sales of confiscated articles shall be distributed.

Among the regulations passed under this Act are:—

(*a*) From the 1st May to the 15th November . . . no nets or fishing apparatus of any kind other than draw seines shall be set . . . within any established seining district (except during the night between . . . sunset and sunrise) and then not ahead of any seine actually set under license.

(*c*) No one shall sail or row a boat through or over a seine set within the limits of a berth and no one shall disturb the waters within the limits of a berth so as to frighten fish from any portion thereof.

(*d*) In any established seining district no one shall be allowed to fish in the manner known as seine fishing except under a special license from the minister of the naval service. The fee on such license shall be 50 cents.

(*e*) and (*f*) provide for the fishery licenses and the rights under them.

(*g*) Berth licenses shall be numbered. The holder of license No. 1 to be entitled to the first fishing privilege within the limits of the berth named in his license.

Then follow provisions giving second rights or privileges in certain circumstances to other licensees according to priority of number of berths.

Then there is the regulation which requires interpretation and I think it is difficult to interpret it properly.

(*l*) Any fish caught in or between berths by any other than the persons entitled to fish therein where the berth is occupied by the person entitled thereto shall be the property of the licensee.

Further on,

The following districts in the county of Halifax are hereby established as seining districts:—Upper Prospect, to include the waters within half a mile of the coast from Shag Head on the west to midway between the northern and southern entrances of the channel between Shannon's Island and the mainland on the east and of the islands thereon embracing the northern half of Shannon's Island and all of Betty island. . . Norris Island, etc. (a number of islands follow) where the berths shall be . . . No. 59. Delong's Point. From Delong's Point to Boat Cove. No. 60. Shannahan's Flat Rock. From Shannahan's Flat Rock to Norris Island.

No 60 was covered by the plaintiff's license. The defendants had no license in that portion of the district of Upper Prospect and were intruders and fishing with a seine illegally and liable to penalty therefor. There are two kinds of fishing with seines as I understand it. In one case the fishermen with a seine and boat surround a school of mackerel after they see it, called shooting

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the seine, and the other way is to moor the seine in the form of a bowl or trap with leaders at the outer edge, and inner edge, and the fish meeting the obstruction follow along and eventually go in at the entrance to the trap and not readily finding their way out are taken there. In both cases the seine is used within the licensed area. The second mode was that in use here.

The plaintiff claims a breach by catching fish in his berth. Secondly, in the area between it and the next berth, No. 59. And he also contended before us that he was entitled to damages for an injury at common law under the case of *Whalen* v. *Hewson*, Ir. R. 6 C.L. 283.

There is some difficulty in coming to the conclusion that the defendants actually took fish within the limits of the plaintiff's berth. In respect to taking fish between it and the next berth I agree with Harris, J., in his opinion that the place where the fish were taken was between it and the adjacent area.

It will be noticed from the configuration of the shore, almost any shore, that it would be very difficult to set off in the territorial waters along the shore berths with uniform figures, parallelograms contiguous to each other like farms on the land. And it is not attempted. Indeed, it is not worth while. One berth gets a longer distance along a shore than another and there are areas between, because the habits of the fish have to be considered, for although they follow the shore in a given direction, there are islands and windings and so on, and I suppose the idea is to have the berths relatively to each other for the opportunity of meeting fish in their course as nearly as possible of equal value. But the berth is indicated by an imaginary line between points on the shores. The access to the fishery is indicated. There is not, I believe, a back door or entrance to the trap and the front door or entrance is there to meet the fish in their course and when the defendants are said to have placed their seine ahead of or in front of the plaintiff's seine they were in a position to meet the fish first. I cannot silence the words "or between" in that regulation. Of course there are difficulties about giving them effect.

Apparently, as I have indicated, the fish go in one course and there is only one licensee or person entitled who has rights of value; that person with the front of his trap open to receive the

approaching fish. The adjacent licensee or person entitled to the use of the berth next behind will not take those fish with the rear of his trap. And the framers of this regulation apparently had in view the rights of the licensee who would in the ordinary course take those fish coming from areas between berths as well as from his own berth. Certainly the defendants were not entitled to fish in between these berths. The fish would be rightfully the property of the licensee whose seine would have caught the fish. It happens in this case that the licensee of the adjacent berth, No. 59, would have no claim, but, perhaps, that is not material. Of course "licensee" may be read in the plural. Therefore I do not agree with the defendant's argument as to the proper construction of the regulation.

But there is a phrase in this regulation the proper interpretation of which I think defeats this action, viz. "Any fish . . . shall be the property of the licensee." That must be read with the statutes which I have set forth at length. I think it must be construed to mean fish when "forfeited" or "confiscated." There must always, I think, be some act or mark to signify that "forfeiture" or "confiscation" has taken place. The procedure which would effect that end is given by the statute. Even a provision for dealing with fresh fish so very perishable seems to be hinted at, and I can understand why sec. 91 of the Act deals with "proceeds."

For these reasons I think the action in its present form cannot be maintained.

As to the contention that the plaintiff could maintain an action at common law under the evidence in this case, I think that the decision in the Irish case of *Whalen* v. *Hewson*, Ir. R. 6 C.L. 283, cited in *Young* v. *Harnish*, 37 N.S.R. 213, establishes that contention. The headnote is as follows:—

> The plaintiff who was licensed to fish in the upper waters of a tidal river held entitled to maintain an action against a person (not the owner of a several fishery), who by unlawfully fishing in the lower waters of the river within the prohibited limits of the mouth as defined by the Fishery Commissioners, caused damages to the plaintiff in the exercise of his right to fish.

In the English case of *Young* v. *Hitchins*, 6 Q.B. 606, cited *contra*, there was one fisherman as against another in the sea and it was an action of trespass. The plaintiff had not encircled the fish when the defendant interfered, and had no ownership and had

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no license to fish in a given area. Lord Denman, C.J., in the closing words of his judgment intimated that there could have been a recovery in another form of action. The only question in such a case would be a question of fact, would the fish in the ordinary course have gone into the plaintiff's seine? His chance of them coming there in any case is worth something. Here it is almost a certainty and there may be damages awarded for that. *Chaplin* v. *Hicks*, [1911] 2 K.B. 786. It is for the jury.

I do not see any material difference between the habits of fish to go up a river as in the Irish case and to go in a given course on the shore for food. I refer particularly to the evidence of the fishery officer. I think an amendment should be allowed by inserting after par. 4 of the statement of claim the words: "In the alternative the said fish in the ordinary course would have been caught by the plaintiff's said seine."

The appeal should be allowed without costs. The defendant will have the costs of the amendment and of the former trial.

The plaintiff will have judgment for $50 and costs other than the costs of the trial.

Harris, J.

HARRIS, J.:—Sec. 45 of the Fisheries Act 1914 (Can. Stat., 1914, ch. 8), authorises the Governor-in-Council to make regulations:—

(*a*) for the better management and regulation of the sea coast and inland fisheries.

(*c*) to regulate and prevent fishing.

(*e*) to forbid fishing except under authority of leases or licenses.

And it provides that such regulations shall have the same force and effect as if enacted by that chapter notwithstanding that such regulations extend, vary, or alter any of the provisions of the Act respecting the places or modes of fishing, etc.

Sec. 60 provides that "any fish taken, caught, killed . . . in violation of this Act or any regulation thereunder . . . shall be confiscated to His Majesty."

The Governor-in-Council made regulations one of which provides that in any established seining district no one shall be allowed to fish in the manner known as seine fishing except under a special license from the Minister of the Naval Service. By another regulation Upper Prospect is made an established seining district. Its boundaries are defined and it includes the waters within half a mile of the coast between certain points.

The regulations provide that a license shall entitle the holder

to fish within the limits of the berth for which it is issued in the manner known as seine fishing.

In the Upper Prospect district certain berths are laid off and numbered. Among others the following: No. 69, Delorey's Point: from Delorey's Point to Boat Cove. No. 60—Shanahan's Flat Rock: from Shanahan's Flat Rock to Norris Island. No. 61—Shanahan's Head: from Shanahan's Head to Flat Rock. No. 62—Plunk Shanahan's Island: from Plunk to Shanahan's Head. No. 63—Brook Berth: from Brook Berth, Shanahan's Island, to Plunk.

There was a regulation applying to Halifax County reading as follows:—

(a) Any fish caught in or between berths by any other than the person entitled to fish therein, when the berth is occupied by the person entitled thereto, shall be the property of the licensee.

It will be noticed that berths 60, 61, 62, and 63 are contiguous, but there is a considerable distance between 60 and 59 which is unlicensed. Between Norris Island where 60 ends around the island and into the cove where 59 begins is between half a mile and one mile.

The plaintiff took out a license for berth No. 60 and was occupying it in July last when the defendants, who had no license for a berth in this vicinity set their seine in the unlicensed waters between berths 59 and 60 at a distance of 266 yards from Shanahan's Flat Rock where the plaintiff's seine was located and 116 yards from the point on Norris Island where plaintiff's area ended, and they caught $100 worth of mackerel. The plaintiff demanded possession of these mackerel and not getting it, brought an action to recover the value of the fish. The Judge dismissed the action and the plaintiff has appealed to this Court.

The plaintiff's counsel put his claim on three grounds:—(1) That the fish were caught in his berth. (2) That the fish were caught between his berth and berth No. 59. (3) That plaintiff was a licensed fisherman and the defendant was fishing illegally and was liable to plaintiff for damages for catching the fish which otherwise might have entered plaintiff's seine.

The first two points depend upon the regulation of the Governor-in-Council, and it is objected that it is *ultra vires*.

Before proceeding to consider the question as to whether or not the regulation is *ultra vires* I think I should say that the plain-

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tiff has, in my opinion, failed to shew that the fish were caught in his berth. There is a difficulty in defining the limits of his berth because the regulations give only the shore line; there is nothing to shew whether the berth runs out from the shore at right angles or on some other angle; but whatever the shape of the berth may be it obviously does not include the place where the fish were caught.

The second contention of the plaintiff raises the rather difficult question as to the proper construction to be given to the regulation and particularly as to the meaning therein of the word "between." No construction is free from difficulty, but I am inclined to think that if it became necessary to decide the question I should hold that the fish were caught between berths within the meaning of the regulation and that as the berth 59 was not occupied the plaintiff as the holder of berth 60 could recover the fish or their value. But it is unnecessary to decide this question because I have reached the conclusion that the regulation in question is *ultra vires*.

Sec. 80 of the Fisheries Act, 1914, provides that any fish caught in violation of the Act or of any regulation shall be confiscated to His Majesty. The fish so confiscated or the proceeds thereof would become part of the Consolidated Revenue Fund of Canada and subject to the provisions of ch. 24 of R.S.C. 1906.

There is nothing in sec. 45 of the Fisheries Act authorising the Governor-in-Council to make regulations inconsistent with the Act itself, or inconsistent with other statutes, except in respect to the places or modes of fishing. The Act says that fish illegally caught shall be confiscated to His Majesty; the regulation says that in certain cases they shall not go to His Majesty but shall go to one of His Majesty's subjects. I do not see how the regulation can over-ride the statute and it is in my opinion not justified by anything delegated to the Governor-in-Council by sec. 45.

But it is said that sec. 1037 of the Crim. Code (R.S.C. 1906, ch. 146), authorises the Governor-in-Council to make the regulation in question.

> The Governor-in-Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expense of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.

In the Criminal Code we find the words "forfeit" and "forfeiture" used in different senses. They are used sometimes in connection with goods or things and sometimes in connection with fines, penalties or compensation. In Forms 32, 39, 41 and 59 to the Act the words "forfeit and pay" are used with regard to fines, penalties or compensation. The question is in what sense the words "fine, penalty or forfeiture" are used in sec. 1037. The provision is that the Governor-in-Council may direct that any fine, penalty or forfeiture be paid, etc. It seems to me that the word "paid" shews that the words are used in a restricted sense.

One cannot imagine parliament using such an inappropriate word as "paid" with reference to goods or things. It is an apt word for money or for pecuniary fines or forfeitures but it seems obvious that it does not extend beyond that.

One has only to attempt to apply the language of sec. 1037 to the facts of this case to see how inappropriate it is. Parliament would not enact that the fish caught should be paid to the licensee. The obvious inference is that the thing about which parliament was legislating was money or pecuniary forfeitures in respect to which the word "paid" is an appropriate word.

See *The King* v. *Johnston* (No. 1) 11 Can. Cr. Cas. 6, per Graham, E.J.

If it be suggested that sec. 1037 refers to the proceeds of the goods or things it does not help the plaintiff because the order-in-council in question does not purport to deal with the proceeds of the sale of the fish but the property in the fish themselves. The use of the words "the same shall be applied" in the latter part of the section does not extend the scope of the section because it is "the same" thing which was to be paid which is to be applied and if, by reason of the use of the word "paid" in the earlier part of the section, we must restrict the meaning of the words "fine, penalty or forfeiture" we cannot give them any other meaning in the latter part of the section.

Since preparing this opinion my attention has been called to sec. 91 of the Fisheries Act, which was not referred to on the argument. It does not, in my opinion, help the matter as it applies only to proceeds of confiscated articles and not to the property in the articles themselves.

I am, therefore, of opinion that sec. 1037 of the Criminal Code

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does not authorise the Governor-in-Council to make the regulation in question, and that sec. 91 does not assist, and as the regulation in question is in conflict with sec. 80 of the Fisheries Act, 1914, it is *ultra vires* and void.

But plaintiff contends that, even if the regulation is *ultra vires*, he can still succeed because he was licensed to fish and defendant was unlawfully fishing and the fish caught by him might have gone into the plaintiff's seine. The case of *Whalen* v. *Hewson*, Ir.R. 6 C.L. 283, is relied upon.

There the plaintiff was licensed to fish in the upper waters of a tidal river, and the defendant, who had no license, unlawfully fished in the lower waters of the river and took a quantity of fish. The Court held the defendant liable in damages for his unlawful act in intercepting fish proceeding in their natural course up the river, which would otherwise have come into the upper waters where the plaintiff fished.

In *Young* v. *Hitchins*, 6 Q.B. 606, it was held that there is not sufficient property in fish nearly enclosed in a net to maintain trespass against a person who prevents their capture, but Lord Denman evidently thought that plaintiff could recover in some other form of action, and there does not seem to be anything in this case which cannot be reconciled with the decision in *Whalen* v. *Hewson*.

While I do not overlook the fact that in *Whalen* v. *Hewson*, the fish were caught by defendant in a river and in their ascent of the river would, perhaps, have been more likely to come to plaintiff's nets than would fish in the open sea, still, in view of the habits of mackerel to follow the shore, I think this case is within the principle laid down in *Whalen* v. *Hewson*, and that it should govern here.

It is obvious that the plaintiff's action was brought for damages for the conversion of the fish which plaintiff claimed were his, by virtue of the regulation of the Governor-in-Council. The theory upon which *Whalen* v. *Hewson* was decided was not set up in the statement of claim, and was not dealt with by the trial Judge, and an amendment of the pleadings is necessary to enable the plaintiff to succeed.

Ordinarily in such a case it would be the duty of the Court to amend the pleadings and send the case back for a new trial, but here the amount involved is small, and there is no reason to

think that on a new trial the evidence would be different, and justice requires that the matter be finally disposed of now.

In my opinion the appeal should be allowed without costs, the statement of claim amended, and the plaintiff should have judgment for damages which I would fix at $25.

The costs should be disposed of as in *Harvey* v. *Municipal Permanent Investment Building Society*, 26 Ch.D. at p. 287, where Cotton, L.J., in dealing with a similar case said:—

With respect to the costs we think that, as the decision of the Court was right on the pleadings then before it, the order as to costs should not be disturbed, and that there should be no costs of the appeal.

This seems to be the practice adopted in England, See An. Pr. 1916, 1303.

LONGLEY, J., concurred with HARRIS, J.

CHISHOLM, J.:—I agree with my brother Harris, and for the same reasons, that the regulations relied on by the plaintiff are *ultra vires*.

Appeal allowed.

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THE KING v. GABOR FEHR.

Nova Scotia Supreme Court, Chisholm, J. June 27, 1916.

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1. TREASON (§ I—J)—SUFFICIENCY OF INDICTMENT—NAME OF ENEMY.

An indictment for treason under sec. 74, sub-sec. (*i*), of the Can. Crim. Code must be so framed as to afford notice to the accused in terms which he cannot mistake of the acts with which he is charged and which the Crown intends to establish by evidence. An indictment under that section should be quashed where it fails to state the name of the public enemy the accused is charged with assisting, and does not in sufficient terms state any definite overt act of treason.

MOTION to quash indictment for treason.

CHISHOLM, J.:—The accused is charged with treason under sec. 74, sub-sec. (*i*), of the Criminal Code—"Treason is . . . assisting any public enemy at war with His Majesty in such war by any means whatsoever."

He was indicted at the June Criminal Sittings and his trial was fixed for this day in order to enable the Crown to serve him with the documents mentioned in sec. 897 of the Code.

The indictment is as follows:—

The Jurors of our Lord the King present that Gabor Fehr on or about the twenty-third day of July in the year of our Lord one thousand nine hundred and fifteen, at Sydney in the County of Cape Breton, did unlawfully commit treason by assisting a public enemy at war with His Majesty in such war, to wit, the Austria-Hungary war loan, to the amount of four hundred and seventy-two dollars and fifty cents ($472.50) contrary to the form of the statute in such case made and provided.

Statement.
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Before the defendant pleaded his counsel moved to quash the indictment on the ground that it did not state any overt acts as required by sec. 847 of the Code, and the accused had consequently no notice of the case he was expected to meet.

When a man is charged with treason the law gives him every opportunity to make his defence. The indictment is required to state the particular overt acts complained of: the power of amending indictments is expressly stated not to extend to authorise the Court to add to the overt acts set out in the indictment (sec. 847, sub-sec. 2), and 10 days before his arraignment there must be delivered to him a copy of the indictment, a list of the witnesses to be produced on the trial to prove the indictment, and a copy of the panel of the jurors who are to try him returned by the sheriff (sec. 897). It is further provided that the list shall mention the names, occupations and places of abode of the said witnesses and jurors and that all the documents mentioned shall be given to the accused at the same time and in the presence of two witnesses.

These provisions clearly are intended to enable the accused to know exactly what is charged and what is intended to be proved against him.

The indictment found against the accused is, in my opinion, defective, in that it does not set forth with precision the offence charged and does not in sufficient terms state any overt act of treason. The name of the public enemy is not stated and it is left to the accused to guess which of the 3 or 4 public enemies at the time at war with His Majesty he is charged with assisting. Moreover, the only approach to a statement of an overt act is the mention of the Austria-Hungary war loan and of the sum of $472.50. This can hardly be considered a statement of an overt act of treason. It gives the accused little or no idea of what he has to meet; it may apply, if it applies at all, to a great number of entirely distinct and different acts. I think the indictment should be so framed as to afford notice to the accused in terms which he cannot mistake of the acts with which he is charged and which the Crown intends to establish by evidence. The indictment in this case does not do that, and I am of opinion that it must be quashed. *Indictment quashed.*

BAIN v. FULLER.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, J. July 26, 1916.

1. AUTOMOBILES (§ III B—260)—COLLISION AT STREET CROSSING—RULES OF ROAD—LIABILITY.

Where the primary cause of an automobile collision was the defendant's violation of the rules of the road (Nova Scotia Stats. 1914), by running on the wrong side of the road when approaching an intersection and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff (who was originally on the proper side of the cross street) had swerved, in the emergency, to the wrong side of the cross street in an attempt to avoid the collision.

Statement.

ACTION claiming damages for injuries sustained by plaintiffs in consequence of the negligent and unlawful driving of defendant's automobile.

R. W. E. Landry and *J. J. Cameron*, for the plaintiffs.

W. E. Roscoe, K.C., *L. Chipman*, and *C. L. Sanderson*, for defendant.

Russell, J.

RUSSELL, J.:—The plaintiff's car was coming westwardly along the south side of Parade St., in the town of Yarmouth, and the defendant's car was going northwardly along the east side of Willow St. The latter runs northwardly until it comes to Parade St., where it stops, the row of houses being continuous along the north side of Parade St. From what I have said, it is apparent that the defendant's car was proceeding along the wrong side of Willow St., and I so find on the overwhelming force of the evidence. When the defendant came to Parade St., he turned the corner of Willow and Parade Sts. at a point variously stated to be from 3 to 6 feet distant from a hydrant which stands on the south sidewalk—at the edge of the south sidewalk of Parade St.—and, I should judge from the plans, a little to the eastward of the east side line of Willow St. produced. Erastus Lovitt measured the distance between the hydrant and the defendant's track immediately after the accident, with his cane, and fixes the distance at 3 feet. If this measurement is correct, the defendant, I should judge from one of the plans used at the trial, must have cut the sidewalk on Willow St. or Parade St., or both. However that may be, he was clearly, on entering Parade St., on the wrong side of the street. Whether he would have continued to run along the wrong side of Parade St., as he had been doing on Willow St., it is impossible to say. The moment he turned into Parade St., he saw the plaintiff's car coming towards him and immediately shot his own car diagonally across

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Parade St. towards the north, which was the proper side for him to be travelling on. The witnesses differ on the point whether defendant ran for any perceptible distance along the south side of Parade St., or took his course diagonally across to the northward or rather to the north-east immediately upon entering the street. I incline to the latter view of the facts, and so find, if such finding should become important at any stage of this litigation. The plaintiff's chauffeur, seeing the defendant's car on the wrong side of the street, and directly ahead of him, and apprehending that if he himself should continue in the course that he was pursuing, there would be a collision, immediately shot the plaintiff's car to the north side of Parade St. in a course diagonally across the street. The consequence was that the two cars collided. Defendant was thrown out of his car and suffered serious injury, whether permanent or not it may be necessary to determine at a later stage. A young girl who sat beside the plaintiff's chauffeur was thrown out, suffering a scalp wound and bruises on her side and limbs, besides breaking some ribs. Both the defendant and the young girl referred to, named Myrtle Giles, were for a time unconscious, and there are three actions at law. The owner of each car is suing the other, and Myrtle Giles is suing the defendant. The defendant's action takes the form of a counter-claim.

I find little difficulty in coming to the conclusion that the primary cause of the accident was the defendant's violation of the rule of the road. A question is made whether the clause of the statute of 1914 prescribing the proper course for an automobile, when turning from one street into another at the intersection of two streets, applies to such a case as the present, where the street claimed by the plaintiff to be an intersecting street does not cross the other but stops when it comes to the other. I think the statute must be read as applying to such a case, because the reason for the rule is no more applicable to a street which crosses another than to one which merely runs into the other. But if there were no such explicit provision at all, the rule would, I think, be the same as that so explicitly stated. The defendant was bound to keep to the left of the centre of Willow St. and Parade St. If he had done so he could not at any point of his journey have found himself off the line of Willow St. and on Parade St. on the wrong side of it. Obviously he could

only obey the behest of the law by continuing in a course along the west side of Willow St. until he reached the north side of Parade St. Had he done this, there would have been no accident. It is mathematically demonstrable that, all other conditions and processes being the same as they were—save and except the plaintiff's swift turn to the north in the hope of avoiding collision with the defendant—the plaintiff's car would have proceeded in safety on its course along Parade St. westwardly.

But the defendant claims that the course pursued by the plaintiff's car not only contributed to the result but was the efficient cause of the accident. He is no doubt right in saying that if the plaintiff's car had continued on its course instead of swinging to the northward, the accident would not have happened. But it is easy to be wise after the event. If the plaintiff's chauffeur had known that the defendant, who came out of Willow St. on the wrong side of the road, meant to immediately cross over to the proper side of Parade St., it is certain that he would have held to his original course. But it is equally certain that he had no such knowledge. He saw the defendant's car ahead of him on the wrong side of the road. He had no time for deliberation. He had reason to fear a collision, and the instinct of self-preservation, we may feel well assured, prompted him to take the course which at the moment seemed to him most likely to save his own life and that of his passengers. The account of the accident given by Myrtle Giles is so graphic and natural that I see no reason to question its essential truthfulness. She describes the relative positions of the cars, as she no doubt believes them to have been, though not necessarily as they actually were. She anticipated a collision should the cars continue to proceed in the directions in which they appeared to be moving. She uttered an exclamation and had hardly time to do more before the collision occurred.

The witnesses differ widely as to the point at which the plaintiff's car swung off to the northward. Several highly respectable witnesses say that it was at Landry's gate, which is less than sixty feet from the corner of Willow and Parade Sts. Other witnesses, equally respectable, say that the point of departure was the tree opposite the Sanderson property, 125 ft. from the corner. I do not find it necessary to decide between these two classes of witnesses. The only importance of the evidence of the latter class

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is to prove a longer time for deliberation on the part of the plaintiff than he had if the testimony of the other group of witnesses is to be believed. My reason for saying that it is not necessary to determine which group of witnesses is correct, is that the evidence of the defendant himself is enough to shew that there was no time for deliberation. He says that from the time he first saw the plaintiff's car until the moment of the collision not more than 2 seconds elapsed or perhaps 2 or 3 seconds, and a very intelligent coloured gentleman who also witnessed the accident corroborates that estimate of the time, fixing it, at, I think, 2 beats of the pulse. The plaintiff's chauffeur was obliged to act immediately, and it is not for the defendant, whose wrongful act placed the plaintiff in that predicament, to complain if in the emergency in which the chauffeur found himself he did not take the course which we at our leisure may determine would have been the safest and the best.

It is contended that the plaintiff caused or contributed to the accident by travelling at an undue and illegal rate of speed, and the fact that his auto proceeded so far as it did after the collission occurred is adduced as evidence to prove that the speed must have been excessive. But it is to be borne in mind that when the plaintiff's chauffeur resolved that his best course was to cross to the northward he immediately accelerated his speed, and therefore the circumstance referred to throws no light at all upon the question as to the rate of speed at which he was going towards the point of departure. In order to disentitle the plaintiff to recover on the ground of excessive speed, I should have to come to an affirmative conclusion that his speed was excessive. The evidence does not convince me that it was greater than that allowed by the law. The witnesses differ widely in their opinions. The only person who knows is the chauffeur and he says that his rate at the time immediately before he swerved from his original course was 14 miles. I am asked to infer that he must have come down more swiftly than that because he promised to get his passengers through without their getting wet, and because further he is reported to have admitted that he was going at a good clip.

I do not find these expressions inconsistent with his explicit statement as to his rate of speed. Few things are less reliable than the estimates and opinions of inexpert witnesses as to the

speed of a passing car. I may have my suspicions—I certainly have—not only suspicions but a strong opinion that he was at some parts of his course going faster than 15 miles an hour, but my opinion is not founded on the conflicting evidence in the case. It is based on my observation that the speed limit is almost universally exceeded and nobody seems to take any interest in preventing the excess until after an accident has happened. I am not at all certain that the car was going at an excessive speed immediately before reaching the point of departure. The chauffeur gives a circumstantial statement of his reason for decreasing his speed before reaching this point. Any excessive speed further back in his course would, I think, be too remote for consideration.

But I am unable to see that even if the speed was excessive it had anything to do with the accident. The defendant says that when he turned the corner he saw the plaintiff's car between Zion church and the Sanderson property. This is further from the corner than the plaintiff's point of departure according to the defendant's witnesses already referred to, 125 feet distant from the corner. Very well. If the defendant had been where he ought to have been and gone where he ought to have gone, instead of misleading the plaintiff's chauffeur by turning in on the wrong side of Parade St., the plaintiff's car would have been nowhere near the defendant at any time. Defendant had to run only 30 feet or thereabouts to reach the north side of Parade St. Plaintiff's car could have been running 40 and perhaps 50 miles an hour and yet would not have reached the corner before the defendant was safely out of his road.

It was not the plaintiff's speed that contributed to the accident, but the fact that he swerved to the northward and that fact was wholly due to the defendant's violation of the law.

I assess the plaintiff's damages at $450 and those of Myrtle Giles at $150. Both cases were tried together, and all the witnesses called, with negligible exceptions, gave evidence applicable to both cases. The defendant's counter-claim did not occasion any substantial costs other than those of the pleadings. These circumstances must be taken into account in defendant's favour in adjusting the costs of the actions. *Judgment for plaintiff.*

YUKON.

T. C.

CANADIAN KLONDYKE MINING CO. v. YUKON GOLD CO.

Yukon Territorial Court, Macaulay, J. June 28, 1916.

MINES AND MINERALS (§ I C—15)—*Protection from operations of adjoining claim owner—Obstruction of river—Injunction—Rights of respective lessees.*] Application for injunction to restrain an adjoining claim owner from washing down mining tailings. Granted.

C. W. C. Tabor, for plaintiff.

J. P. Smith, for defendant.

MACAULAY, J.:—This is an application made before the Court on behalf of the plaintiff for an order restraining the defendant, its servants, agents and workmen, from depositing, washing down, or placing, or causing to be deposited, washed down or placed, from Creek Placer Mining Claims Nos. 17 and 18 on Bear Creek, or from Bear Creek, on to the lands of the plaintiff embraced in Hydraulic Lease No. 18, any gravel, rocks, dirt, tailings and other debris and matter from the workings and mining operations of the defendant company carried on upon the aforesaid mining claims.

It appears from the affidavits read on this application that the original bed of Bear Creek (where it flows through and over what were originally Creek Placer Mining Claims Nos. 19 and 20 on Bear Creek, and which are now in the possession of the plaintiff company and claimed by it to now form a portion of the lands embraced in Hydraulic Lease No. 18), has been obliterated and destroyed by the mining operations which have heretofore been carried on upon said claims 19 and 20 on Bear Creek, and a new water course constructed over said claims by the defendant on May 18, 1916, and known as Water Course No. 1, under an arrangement entered into between the defendant and the plaintiff, which water course was blocked about May 26, 1916, by a freshet in said Bear Creek caused by a heavy rainstorm, and on May 27, 1916, the defendant constructed a new water course known as Water Course No. 2, which it states is sufficient to carry off the water and silt from its said operations, unless some unforeseen freshet should again occur, such as occurred on the night of May 25 last.

The plaintiff admits that the said water course is sufficient to carry off the said water as claimed by the defendant but it states in the affidavits filed and read before me, that such water

course was not sufficient to carry away gravel and silt brought down into it from the working of the defendant company, and that gravel, rocks, muck and other debris were being washed down by the defendant in its workings onto the said water course and that such gravel, rocks, muck and other debris were filling the said water course and were being deposited upon what the plaintiff claims is a part of the ground embraced in said Hydraulic Lease No. 18.

On June 22 instant, I attended, in the presence of counsel and in the presence of the president and general manager of the plaintiff company, and the resident manager of the defendant company, and personally viewed the ground in question, and it was quite apparent that gravel and silt which would not float easily in water at a slow rate of speed had been carried down from defendant's workings and deposited in said Water Course No. 2, which is the present water course through which the water from Bear Creek, and the water used by the defendant from its ditch on Bear Creek in carrying on its said operations, flows towards the Klondyke River.

Defendant's counsel contended that defendant had the right to deposit tailings in creek or river bed under sections 6 and 7 of Hydraulic Lease, and that decisions on injunction under the Mining Act were not applicable to the Hydraulic Lease unless its rights were as wide as the rights of a claim owner under the Placer Mining Act. He also contended that claims Nos. 19 and 20 on Bear Creek did not revert to Hydraulic Lease No. 18, and that most of the damage complained of, if any, occurred on ground covered by said claims. I do not feel that I am called upon to decide the title to claims Nos. 19 and 20 Bear Creek on this application. That will be a matter, if raised, to be decided at the trial of this action.

As to the defendant's claim to its right to deposit tailings in the bed of the river running through the ground covered by Hydraulic Lease No. 18, while it might have the right to deposit tailings in the bed of the said river which is excepted from the ground demised by said lease, it would not, in my opinion, have the right to deposit tailings on the demised ground unless under the terms of the said lease such right were reserved to persons holding locations on the banks or shore of either the said creek or the said river.

I am unable to distinguish the right of the lessee under the said

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Hydraulic Lease No. 18 from the right of a claim owner under the Placer Mining Act in respect to its right to protection from deposits of tailings from the ground of an adjoining claim owner, and am of opinion that it enjoys the same right to protection from an adjoining claim owner that one claim owner enjoys as against an adjoining claim owner under the provisions of the Placer Mining Act.

In *McLaren* v. *Jensen*, 4 W.L.R. 162, it was held by a decision of the Court *en banc* on appeal upon an application by a claim owner to restrain an adjoining claim owner from allowing tailings from the defendant's mining operations to be carried by water and deposited on the mineral claim of the plaintiff, that all tailings, which may be described as gravel, stones and even coarse sand, should be restrained, but that material which floats easily in water at a slow rate of speed, such as silt and fine sand which cannot be retained by any reasonable dam which could be constructed, should be allowed to flow in the stream to the claim below. That decision, which was rendered some 10 years ago, has since been followed in this Territory, and is binding on me. See also *Klondyke Government Concessions, Ltd.* v. *McDonald*, 2 W.L.R. 219.

On the application before me defendant's counsel further argued that owing to the action of the plaintiff in altering the course of the Klondyke River, the river bed over which the said river formerly ran was now dry, which prevented the silt which was carried in suspension from the defendant's workings being carried off by the waters of the said river, and in consequence, the silt was deposited in the bed of the river and obstructed the flow of the water from the defendant's workings, causing some of the silt to remain on plaintiff's ground. This, in my opinion, does not affect the plaintiff's right to be protected from material other than silt from being deposited on its ground from the workings of defendant.

The plaintiff will, therefore, be entitled to its restraining order as asked, except as to material which floats easily in water at a slow rate of speed, such as silt and fine sand which cannot be retained by any reasonable dam which could be constructed, which said material should be allowed to flow in the stream to the claim below.

Following the usual rule as to costs, the costs of this application shall be costs in the cause. *Injunction granted.*

ROSCOE v. McCONNELL.

ONT.

S. C.

Ontario Supreme Court, Mulock, C.J.Ex., and Riddell, Sutherland, and Leitch, JJ. October 27, 1913.

1. MORTGAGE (§ I B—8)—ABSOLUTE CONVEYANCE—SUBSEQUENT AGREEMENT AS TO EQUITY OF REDEMPTION—INTENTION.

A conveyance absolute in form may be intended to operate as a mortgage or pledge only, but the mortgagor may, by subsequent independent agreement, extinguish his equity of redemption in favour of his mortgagee or surety, at the same time acquiring an option to repurchase, and if such is the real intention of the parties the equity of redemption ceases to exist, and the former mortgagor has only his option or privilege of repurchasing on the terms set out in the agreement.

Statement.

APPEAL by plaintiff from the judgment of Middleton, J. Appeal dismissed.

J. P. MacGregor, for appellant.

G. H. Watson, K.C., for respondent.

The judgment of the Court was delivered by

Mulock, C.J.

MULOCK, C.J.:—The action is brought by Maglen Roscoe, daughter and administratrix of the estate of Thomas McConnell, deceased, to have it declared that a certain transaction carried out by deed from one James H. Simmons, bearing date December 20, 1906, to the defendant, of certain lands on Yonge St., in the City of Toronto, and by a contemporaneous agreement between the defendant and the plaintiff's father, was in fact a mortgage transaction, and not a *bonâ fide* sale to the defendant with a right of repurchase by the father.

The facts established by the evidence are as follows:—

The lands in question had been vested in fee simple in Simmons, but on a secret trust for Thomas McConnell, the beneficial owner, and at McConnell's request and for his benefit were mortgaged to certain persons, one of them being Samuel C. Smoke, who, on August 15, 1905, became mortgagee thereof for $500, subject to the prior mortgages.

At this time, Thomas McConnell was erecting buildings on the land, intending in the near future to effect a larger loan wherewith to pay for the buildings.

In October, 1905, he applied to Mr. Smoke for a further advance, which was refused unless McConnell gave further security. McConnell then applied to his son, the defendant, for assistance, and the latter, for his father's accommodation, on numerous occasions, gave to him his promissory notes for sums amounting to between $3,000 and $4,000, and these notes Thomas McConnell discounted with Mr. Smoke.

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Thomas McConnell having made default in payment for the buildings, mechanics' liens were registered against the land, and proceedings were taken to realise on these liens, Mr. Smoke being a party defendant in those proceedings. On their culminating in a judgment, he, with the consent of Simmons and Thomas McConnell, paid the amounts owing, and obtained a further mortgage to secure the amount then due to him, being something over $8,000; John E. McConnell still remaining liable to Mr. Smoke in respect to the notes above mentioned. Subsequently, interest on this mortgage falling into arrear, Mr. Smoke, in October, 1906, began power of sale proceedings, when Thomas McConnell applied to the defendant for his assistance towards obtaining their discontinuance.

It was then agreed between Thomas McConnell and the defendant that, if the defendant would secure a discontinuance of the proceedings by becoming liable to Mr. Smoke for the amount of his mortgage-claim, Thomas McConnell would cause the property to be conveyed to him for his own use, on the condition that he should be given the option of repurchasing it within three months.

In pursuance of this agreement, the defendant gave to Mr. Smoke his written undertaking (to which his father was a party) whereby the defendant undertook with Mr. Smoke that "unless your (Smoke's) claim is otherwise paid by November 31, 1906, I will then pay your claim, including principal, interest, and costs; you at the same time assigning to me your securities."

In consideration of this undertaking, Mr. Smoke discontinued the sale proceedings, whereupon Thomas McConnell refused to carry out his promise to have the property conveyed to the defendant. In consequence, the defendant, by letter of December 3, 1906, requested Mr. Smoke to bring the property to a sale; and, accordingly, Mr. Smoke again instituted sale proceedings.

Then again Thomas McConnell agreed with the defendant to have the property conveyed to him—he, Thomas McConnell, "to have three months within which to take the property off the owner's hands at what it had cost the son to buy the property back," according to the evidence of Mr. Smoke.

Thomas McConnell and the defendant then instructed Mr. Smoke to prepare the necessary papers for carrying out the

agreement, and the latter then caused to be prepared the deed in question in this action, bearing date December 20, 1906, from Simmons to the defendant, and the contemporaneous agreement between Thomas McConnell and the defendant, securing to the former the right of repurchase within three months. The deed vested the property in the defendant in fee simple, subject to the existing incumbrances, and the contemporaneous instrument is worded as follows:—

Agreement made this 20th day of December, 1906, between John E. McConnell, of the first part, and Thomas McConnell, of the second part, witnesseth that, in consideration of the sum of $1 now paid by the party of the second part to the party of the first part, the party of the first part hereby gives and grants to the party of the second part, or his nominees, the right, at any time within three months from the date hereof, of purchasing from the party of the first part the property now belonging to the party of the first part and known as (describing the land in question) at a price equal to the now existing mortgages and other incumbrances, charges, and liens upon the said lands, and interest thereon according to the terms of the said mortgages, together with all costs which have been incurred or may hereafter be incurred by the party of the first part in respect of the said property, and all moneys which may be hereafter paid by the party of the first part in respect of the said properties. . . . The party of the second part, in the event of his exercising the said option or right, must accept the title of the party of the first part as it stands and must bear all expense to which the party of the first part may be put in carrying out the said sale. Time is strictly of the essence of this agreement; and, unless the said option or right shall be exercised and the transaction wholly carried out within the said period of three months, the party of the second part and his nominees shall have no right whatever in or to the said property under or by virtue of this agreement or otherwise howsoever. (Signed and sealed by the parties.)

Whether this transaction was a mortgage transaction to secure the defendant in respect of his suretyship for his father, or an actual sale with a right of repurchase, is the real issue here. If the latter, then the condition that, on failure to exercise the option within the stipulated time, Thomas McConnell should lose his right to repurchase, is not a penalty or forfeiture, but a privilege, and its terms must be strictly complied with: *Barrell* v. *Sabine*, 1 Vern. 268; *Perry* v. *Meadowcroft*, 4 Beav. 202; *Gossip* v. *Wright*, 9 Jur. (part 1) 592; *Shaw* v. *Jeffrey*, 13 Moo. P.C. 432.

Mr. MacGregor seemed to attach much weight to *Samuel* v. *Jarrah Timber and Wood Paving Co.*, [1904] A.C. 323, and other cases of that nature, but they can have no application to this case. Those are all cases in which, as part of the original transaction, the borrower conveyed to the lender the estate as security,

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by instrument absolute in form, and where, at the same time and as part of the original transaction, it was agreed between the parties that the grantor might repurchase within a named period, failing which the right should cease. In those cases, in each of which the grant was in fact a security, it was not competent for the parties by any contemporaneous contract to override the equitable doctrine "once a mortgage always a mortgage," and those cases simply affirm that well-established equitable doctrine.

But a mortgagor may, by subsequent independent transaction, extinguish in favour of his mortgagee his equity of redemption, at the same time acquiring the option to repurchase; and, if such be the real agreement, the equity of redemption ceases to exist, and the former mortgagor has only an option or privilege.

In the present case, the mortgage to Mr. Smoke for some $8,000 had been made some months previously, and it was competent for Thomas McConnell on December 20, 1906, to extinguish his equity of redemption in favour of his mortgagee or the defendant, his surety, acquiring as part of that arrangement an option to repurchase. If such was the real agreement between the parties, Thomas McConnell thereafter had no rights incident to the right to redeem, but only such as the option gave him; thus, the question resolves itself into one of fact, what was the real nature of the agreement between the parties?

The written agreement of December 29, 1906, purports to set forth the terms in plain, unmistakable language, and I see no reason for thinking that it does not contain the real agreement.

An examination of the conduct of Thomas McConnell shortly before, and also subsequent to, the transaction on December 20, 1906, is helpful, as indicating his view of the transaction. . . .

[References to the documentary and oral evidence.]

Thomas McConnell died on July 23, 1912. His conduct in acquiescing in the oft-repeated notice of the defendant's interpretation of the true nature of the transaction, must be construed as an admission that the transaction of December 20, 1906 in substance, was an extinguishment of Thomas McConnell's equity of redemption, and secured to him merely an option to repurchase on the terms set forth in the agreement; and I do not think that the plaintiff, a mere volunteer, can be heard to make a claim

inconsistent with the attitude of Thomas McConnell, through whom she claims.

The plaintiff also charges undue influence, but wholly fails to establish the charge, which is unsupported by any evidence.

I, therefore, think this appeal should be dismissed with costs.

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ANNOTATION BY C. B. LABATT.

Annotation.

COMPETENCY AND SUFFICIENCY OF PAROL EVIDENCE FOR THE PURPOSE OF SHOWING THAT A WRITTEN INSTRUMENT WHICH ON ITS FACE IMPORTS A COMPLETE TRANSFER OF A LEGAL OR EQUITABLE ESTATE OR INTEREST IN PROPERTY WAS INTENDED TO OPERATE AS A MORTGAGE OR PLEDGE.

I. *Introductory.*

1. Scope of Article.
2. General Statement.
3. Oral agreement made by agent in excess of authority.
4. Operation of absolute instrument of transfer intended as a mortgage.

II. *Admissibility of parol evidence where some special ground of equity jurisdiction is relied upon.*

5. Generally.
6. Doctrine that parol evidence is admissible only in cases where relief is sought on some special equitable ground.
7. Parol evidence to prove usury.

III. *Unrestricted doctrine as to the competency of parol evidence.*

8. General statement.
9. Doctrine not applicable, generally speaking, except to shew that a given transaction was a mortgage.
   - (*a*) *Evidence to impart a conditional quality to an absolute conveyance.*
   - (*b*) *Evidence offered for the various other purposes.*

IV. *Rationale of the unrestricted doctrine.*

10. Generally.
11. Theory that the basis of the doctrine is constructive or quasi fraud.
12. Grounds upon which the doctrine has been reconciled with the rule which forbids the introduction of parol evidence to vary the terms of a written contract.
    - (*a*) *Parol evidence admitted to establish an independent equity.*
    - (*b*) *Parol evidence admitted to shew the actual object of the transaction.*
    - (*c*) *Parol evidence admitted to prove the real consideration of the absolute transfer.*
    - (*d*) *Parol evidence admitted to shew the fact of a loan.*
    - (*e*) *Parol evidence admitted to explain an ambiguity.*
    - (*f*) *Concluding remarks.*
13. General comments.
14. Points of contact between the restricted and unrestricted doctrines.

Annotation.

V. *Doctrine adopted in England and Scotland.*

15. English decisions rendered with reference to contracts made before the statute of frauds became operative.
16. English decisions rendered after with reference to contracts made after the statute of frauds became operative.
17. English decisions concerning the admissibility of parol evidence in actions at law.
18. Scotland.

VI. *Doctrine adopted in British possessions.*

19. Supreme Court of Canada.
20. Upper Canada and Ontario.
21. Upper Canada and Ontario, criticism of doctrine adopted in.
22. Other Canadian Provinces, exclusive of Quebec.
23. Quebec.
24. Australia.

VII. *Competency of parol evidence considered with relation to the distinction between trusts and mortgages.*

25. Generally.
26. Distinction not always observed by courts in cases involving the admissibility of parol evidence to establish a mortgage.
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XIV. *Competency of parol evidence considered with reference to statutes as to the registration of instruments.*

I. Introductory.

1. Scope of article.—The following article contains a review of all the English, Canadian and Australian cases which bear upon the subject indicated by the title. For the purpose of sustaining doctrinal statements as to useful points concerning which these cases are either entirely silent or do not afford sufficient information, resort has been had to the American decisions.

2. General statement.—The cases as a whole illustrate the operation of four distinct doctrines, viz.:

(1) That parol evidence is admissible whenever the party who alleges that the instrument in question was intended as a mortgage bases his claim or defense upon one of the general grounds of equitable relief, such as fraud, mistake, etc. This doctrine is merely a particular application of a general principle of the law of contracts.

(2) That parol evidence is admissible only in cases where the claim or defense is based upon one of the grounds specified in paragraph (1). A considerable number of the American decisions have proceeded upon this doctrine.

(3) That parol evidence is admissible although the claim or defense is not based upon any of the grounds specified in paragraph (1). In England this doctrine has always prevailed, and it is now accepted by nearly all the American courts.

(4) That parol evidence is not admissible, unless a foundation has first been laid by the introduction of testimony which does not rest in parol, and which tends to shew that the actual agreement contemplated by the parties was different from that which was embodied in the instrument or instruments under review. The only jurisdiction in which this doctrine prevails is Ontario. See §§ 20, 21.

For the sake of brevity the second and third of the doctrines formulated above will sometimes be referred to in this monograph as the "restricted" and "unrestricted" doctrines.

In some instances a distinction has been taken between "parol evidence" and "surrounding circumstances."[1] As "sur-

[1] In Pond v. Eddy (1873) 113 Mass. 149, the court, adverting to certain acts of the parties and writings exchanged between them, observed: "Upon the other evidence reported, the master might well have found, independently of the parol proof, that these mortgages were assigned as collateral."

In Shank v. Groff (1897) 43 W. Va. 337, 27 S. E. 340, it is laid down in the syllabus written by the court, that "though a deed be absolute on its face, the real nature of the transaction may be shewn by parol evidence or surround-

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rounding circumstances" are ordinarily proved by parol evidence, and in the nature of the case can seldom be proved in any other manner, it would seem that the language used with regard to this distinction is really intended to express in an elliptical form the conception of an antithesis, assumed to exist between parol evidence which relates to the oral statements of the parties to the written contract, and parol evidence which relates to surrounding circumstances. But such a differentiation is unreasonable and illogical. It is clear that the expression "parol evidence," being descriptive simply of the character of the evidence itself, has a connotation which renders it applicable, irrespective of the nature of the fact to be proved.

3. Oral agreement made by agent in excess of authority.—Upon general principles it would seem to be sufficiently clear that an oral agreement made by an agent of the transferee, that the instrument of transfer should operate as a mortgage, cannot affect the transferee with any binding obligation if the agent exceeded his authority in making the agreement. For this doctrine there is specific authority.[2] One decision which proceeds upon the opposite theory may safely be pronounced erroneous.[3] But if the principal elects to accept the deed, and avail himself of the benefits of it, he will hold it as a mortgage merely, and not as an absolute conveyance.[4]

4. Operation of absolute instrument of transfer intended as a mortgage.—Whenever it is proved that an instrument of transfer, absolute on its face, was intended to create the relation of mortgagor and mortgagee, "all the rights and obligations incident to that relation attach to the parties. . . . The fact once established, either by the terms of the conveyance or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees; and the conveyance remains but 'a mortgage until the equity of redemption is foreclosed."[5]

ing circumstances." Similar phraseology is found in Vangilder v. Hoffman (1883) 22 W. Va. 1 (p. 18) and Sadler v. Taylor (1901) 49 W. Va. 127, 38 S. E. 583; Allen v. Fogg (1885) 66 Iowa, 230, 23 N.W.644.

See also the Canadian cases reviewed in §§ 21, 22 post.

[2]Danner Land & Lumber Co. v. Stonewall Ins. Co. (1884) 77 Ala. 184; Nye v. Swan (1892) 49 Minn. 431, 52 N.W. 39.

[3]Cobb v. Day (1891) 106 Mo. 278, 17 S.W. 323.

[4]Nye v. Swan (1892) 49 Minn. 431, 52 N.W. 39. The court applied the rule that where an agent has entered into an authorized contract in behalf of his principal, the latter cannot ratify a part of it, and repudiate the remainder, but must either adopt the whole or none, and, a fortiori, if he adopts it, he must adopt it as made, and not as something entirely different.

[5]Carr v. Carr (1873) 52 N.Y. 251. See also Hughes v. Ewards (1824) 9 Wheat. (U. S.) 489, 6 L. ed. 142; Poindexter v. McCannon (1830) 16 N.C. (1 Dev. Eq.) 373, 18 Am. Dec. 591; Schneider v. Reed (1905) 123 Wis. 488, 101 N.W. 682; Marshall v. Steel (1872) Russell (N.S. Eq.) 116; Rutherford v. Mitchell (1904) 15 Manitoba L.R. 390.

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II. Admissibility of parol evidence where some special ground of equity jurisdiction is relied upon.

5. Generally.—Some of the cases in which the competency of parol evidence for the purpose of shewing that an instrument of transfer, absolute in form, was intended as a mortgage, is affirmed, simply illustrate the general rule that, in an equitable suit in which one of the parties to a written contract asks to be relieved from its obligation on the ground of fraud, the real nature of the transaction may be established by parol evidence.[1]

Mere inadequacy of price will not of itself entitle the transferor to relief on the ground of fraud.[2] But "if there is such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to fraud. If the transaction be such as marks overreaching on one side and imbecility on the other, it puts the parties in such a situation as to shew that it could not have taken place without superior powers on the one side over the other."[3]

With regard to inadequacy of price as an element tending to shew that the transaction contemplated was a mortgage, see § 39, post.

[1]"Even parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to shew that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money." 2 Story, Eq. Jur. § 1018, note 2.

"There can be no doubt that where a deed fails to embody the contract of parties, by reason of fraud, accident, or mistake, parol evidence must be admitted. . . . In this respect, the rule in regard to mortgage transactions does not differ from the rule applicable to other contracts." Le Targe v. De Tuyll (1850) 1 Grant, Ch. (U.C.) 227. The grounds upon which relief was refused were thus stated: "The plaintiff's imperfect acquaintance with the English language, and his unskilfulness in matters of business, have indeed been established to our satisfaction; other circumstances there are, too, sufficient to excite suspicion. But no evidence has been adduced as to the dealings of these parties in relation to this contract, either prior to or at the time of its completion. Neither of the witnesses to the deed has been examined."

In Williams v. Owen (1840) 5 Myl. & C. (Eng.) 303, Lord Cottenham was of the opinion that "although the bill alleges a case of fraud and misrepresentation on the part of the defendant, there is no proof of it; and, on the contrary, whatever may have been the intention of the parties, there is, I think, no doubt of their having signed these instruments with full knowledge of their contents. The defendant is described as a shopkeeper, and Richard Williams as a solicitor and he must be supposed, in the absence of all evidence to the contrary, to have been fully aware of the nature of the transaction and cognizant of his rights; but there is nothing in the case to shew that, at the time of the agreement, or at any time afterwards, during the three years of his subsequent existence, anything passed between the parties which tends to explain the relative position. The case, therefore, must be decided upon the contents of the instruments themselves, with the aid of the few facts to which I have already adverted." See § 49, post.

[2]Lynch v. Lynch (1913) 22 Cal. App. 653, 135 Pac. 1101.

[3]Heathcote v. Paignon (1787) 2 Bro. Ch. 175. This statement, made by Lord Thurlow with reference to contracts generally, was relied upon in Watkins v. Stockett (1823) 6 Harr. & J. (Md.) 435.

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Relief on the ground of fraud will be refused whenever it appears that the party who seeks to convert the given instrument into a mortgage was a participant in the fraud.[4]

Cases in which instruments absolute in form have been executed by parties who intended merely to obligate themselves by instruments operating as securities clearly fall within the scope of the general rule which treats accident and mistake as grounds for reforming written contracts. Such cases, like those which involve fraud, form exceptions to the general rule which excludes parol evidence, and stand upon the same plane as the rule itself.[5]

6. Doctrine that parol evidence is admissible only in cases where relief is sought on some special equitable ground.—A large number of American decisions have proceeded upon the doctrine, that the cases in which relief is sought upon the grounds specified in the preceding sections constitute the only class in which a conveyance absolute by its terms can be converted by parol evidence into a mortgage. But this doctrine has been almost entirely abandoned. So far as can be ascertained from the reports, the foothold which it obtained in the first place was due simply to the fact that the judges who decided some of the earlier cases were imperfectly acquainted with the English precedents. The result of this insufficient knowledge was that they failed to appreciate the real nature and scope of the theory upon which parol evidence was held by English judges to be admissible, viz., constructive or quasi fraud. The restricted doctrine therefore represents merely an aberration from the straight path of authority which had been marked out by the decisions of the English Court of Chancery. It follows that the final acceptance of the unrestricted doctrine in jurisdictions in which the restricted one has at one time prevailed imports not an evolution of the former from the latter, but a reversion to the true theory.[6]

[4]In Baldwin v. Cawthorne (1812) 19 Ves. Jr. (Eng.) 166, a negative answer was given to the question which the evidence raised, viz., "whether, all the parties having agreed with a fraudulent purpose that this instrument shall on the face of it be an absolute deed, meaning, therefore, that it never shall be producible as a mere mortgage, a court of equity will, at the instance of those who, with a fraudulent view made it an absolute instrument, correct it, and make it a mere mortgage security."

[5]Story Eq. Jur. § 156.

In Joynes v. Statham (1746) 3 Atk. (Eng.) 388, Lord Hardwicke remarked, arguendo: "Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omits to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty to insist in this court upon reading evidence to shew the omission? . . . In a case which has happened, of the mortgage being drawn in two deeds, one an absolute conveyance, the other a defeasance, and the mortgagee omits to execute the defeasance, the mortgagor shall be admitted to shew the mistake."

[6]Among the judges who apparently misapprehended the real purport of the earlier English decisions was Chancellor Kent, who formulated in Stevens

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7. Parol evidence to prove usury.—By courts which hold that parol evidence is not admissible in an action at law for the purpose of shewing the intention of the parties to create a mortgage, it has been laid down that the rule excluding such evidence applies, even though facts indicative of usury are alleged.[7]

The general rule that parol evidence is admissible for the purpose of shewing that a written contract of any description is tainted with usury is not infrequently one of the determining factors in cases of the type discussed in this monograph. Parol evidence which shews that the parties intended to create a mortgage obviously shews at the same time, either that the relationship of debtor and creditor existed between them before the execution of the given instrument and subsisted afterwards, or that such a relationship was contracted at the time when the instrument was created. See § 37, post. If the second of these alternatives is established, the transaction exhibits itself as one which comprises an agreement for the lending of money, and, if its other incidents

v. Cooper (1875) 1 Johns. Ch. (N.Y.) 425, 7 Am. Dec. 499, the doctrine that the only cases in which parol evidence was admissible were those in which "fraud, mistake, or surprise in making or executing the mortgage" was alleged. His error is apparent from the construction which has been placed upon those decisions by the English courts themselves; but his opinion has doubtless been responsible for the adoption of the restricted doctrine in those American states in which it had prevailed.

In Strong v. Stewart (1819) 4 Johns. Ch. (N.Y.) 167, he laid it down that "parol evidence is admissible . . . to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale." The right of redemption was affirmed on the ground of "fraud" on the part of the defendant in attempting to convert a mortgage into an absolute sale." The language here used is on its face possibly susceptible of being construed in such a sense as would render it consistent with the unrestricted doctrine. But the actual standpoint of the learned judge is indicated by the earlier case.

It has been sometimes supposed that the statement in Story's Equity Jurisprudence, vol. 2, § 1018, that "even parol evidence is admissible in some cases, as in cases of fraud, accident and mistake, to shew that a conveyance absolute on its face was intended between the parties to be a mere mortgage or security for money," is to be taken as shewing that the author limited the admission of the parol evidence to cases in which fraud, accident, or mistake in the execution of the given instrument was alleged. See Chaires v. Brady (1862) 10 Fla. 133. But this language does not necessarily imply that the rule as laid down was considered to be exclusive as well as inclusive. A decisive objection to such a construction is that it cannot be adopted without placing the learned author in the predicament of affirming as a text-writer a doctrine which would be wholly irreconcilable with his categorical statement in Taylor v. Luther (1836) 2 Sumn. 228, Fed. Cas. No. 13,796, that parol evidence is admissible in cases where the defeasance is "omitted by design," and not merely in cases where the omission is due to fraud or mistake.

A well-known author states that the earliest cases, both in England and America, admitted such evidence solely upon the grounds of fraud, accident, or mistake. Jones, Mortg. § 321; Jones, Chat. Mortg. § 23. From the authorities cited in §§ 15, 16, post, it is plain that this remark is entirely erroneous so far as it applies to the English cases. It is only partially correct with regard to the American cases.

[7]Flint v. Sheldon (1816) 13 Mass. 443, 7 Am. Dec. 162; Bates v. Crowell (1898) 122 Ala. 611, 25 So. 217.

are indicative of usury, the further conclusion that it is invalid on that ground necessarily follows.[8]

III. Unrestricted doctrine as to the competency of parol evidence.

8. General statement.—The doctrine which, except in so far as it may have been abolished or modified by statute, now prevails in nearly all jurisdictions, other than those in which the civil law is administered, may be thus formulated: Although none of the special elements adverted to in the preceding subtitle may be alleged as a ground for relief, parol evidence is admissible in an equitable suit for the purpose of proving that the parties to a written instrument which on its face is expressive of an absolute transfer of property intended it to have the effect of a mortgage or pledge.

"It seems to be well settled as a principle of equity jurisprudence in the courts of equity of England, in the United States courts, and in some of our state courts, that oral evidence is admissible in a suit in equity to prove that a conveyance of real estate absolute in its terms was intended as a security for a debt, or an indemnity against a liability, and that upon such evidence a decree of redemption will be made."[1]

"A conveyance, though absolute in form, may be shewn by oral proof to have been made in trust, or by way of security."[2]

"It is now too late to controvert the proposition that a deed [which is] absolute upon its face may, in equity, be shewn by parol or other extrinsic evidence to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties."[3]

[3]For cases in which the parol evidence was directed both to the question whether a mortgage was contemplated, and to the question whether the transaction was usurious, see Douglas v. Culverwell (1862) 4 De G. F. & J. (Eng.) 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327; Mobile Bldg. & L. Asso. v. Robertson (1880) 65 Ala. 382; Irwin v. Coleman (1911) 173 Ala. 175, 55 So. 492; Monroe v. Foster (1873) 49 Ga. 514; Heacock v. Swartwout (1862) 28 Ill. 291.

[1]Newton v. Fay (1865) 10 Allen (Mass.) 505.

In Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671, the decision was rendered with reference to special findings, one of which was that the deed in question was "executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution other than may be inferred, if any, from the facts testified to." The court observed that "the decisions in the Federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance 'be omitted by design upon the mutual confidence between the parties.'" The phraseology thus referred to is taken from the opinion of Mr. Justice Story in Taylor v. Luther (1836) 2 Sumn. 228, Fed. Cas. No. 13,796.

[2]Jennings v. Demmon (1907) 194 Mass. 108, 80 N.E. 471.

[3]Horn v. Keteltas (1871) 46 N.Y. 605.

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"It is well established that a deed absolute on its face may be shewn by parol or other extrinsic evidence to have been intended as a mortgage."[4]

9. Doctrine not applicable, generally speaking, except to shew that a given transaction was a mortgage.—(a) *Evidence to import a conditional quality to an absolute conveyance.*—In some cases the courts have gone very far toward recognizing the existence of a broad and comprehensive doctrine under which parol evidence would be treated as competent in every instance where the question to be determined is whether a conveyance which purports to be unconditional was really made on certain conditions.[5] In a

[4]Carr v. Carr (1873) 52 N.Y. 251.

[5]In Walker v. Walker (1740) 2 Atk. 98, John Walker, the eldest brother of the family, being near his end, applied to Thomas Walker, the plaintiff, and to his sister, who had solicited him to do something for them, and told them, if you will surrender your copyhold estate, as you have no children of your marriage, for the benefit of your brother Ralph Walker, the defendant, I will secure an annuity of £5 per annum for your life, and an annuity of £2, 10s. for your sister. The plaintiff did agree to the terms and promised to surrender his copyhold estate; upon which John Walker surrendered his copyhold estate to the defendant, charged with these annuities. The defendant refused to pay them unless the plaintiff would surrender his own copyhold estate pursuant to his promise to John Walker. Commenting upon the agreement that parol evidence was not admissible to shew the actual nature of the transaction, Lord Hardwicke said: "I am very clear of opinion that such evidence ought to be admitted here, and would be a great injustice to the defendant if it was not. It is not rightly stated when it is said the evidence to be read here is in support of an agreement, but may more properly be said to be a defense arising from the fraud and imposition of the plaintiff, and has nothing in the world to do with the statute of frauds and perjuries. Here is a surrender in pursuance of an agreement, with an annuity charged upon the defendant, the surrenderee, for the plaintiff's benefit, and he refusing to perform his part, is not this such a case as the court will relieve? Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeasance, will not this court relieve against such fraud. . . . The agreement as set forth in the defendant's answer is proved by three witnesses in the fullest manner, and their being relations is no objection to their competency. Four pounds per annum is the value of the copyhold estate which the plaintiff, according to his agreement with John Walker, was to surrender the inheritance of, subject to his own and his wife's life. The question is whether the plaintiff is entitled to have the aid of a court of equity, to recover the annuity which he has failed in at law? I am of opinion that the plaintiff is not entitled to have the aid of a court of equity, and that it would be contrary to the rules of justice; for it appears to me plain that John Walker intended to grant these annuities or rent charges conditionally only. . . . I am not at all clear whether, if the defendant had brought his cross bill to have this agreement established, the court would not have done it, upon considering this in the light of those cases where, one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement. (See Lacon v. Mertins, 3 Atk. 4, note.) The allowing any other construction upon the statute of frauds and perjuries would be to make it a guard and protection of fraud, instead of a security against it, as was the design and intention of it."

In Young v. Peachy (1741) 2 Atk. 254, where a father induced his married daughter to suffer a recovery, Lord Hardwicke said: "It manifestly appears the conveyance from Fox and his wife was obtained in order to answer one particular purpose, but that the father has attempted to make use of it for

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strictly logical point of view, it certainly seems somewhat difficult to escape from the conclusion that, if a transferee who denies that a conveyance absolute in form was understood to be conditional, in that it was intended to operate as a mortgage is chargeable with a constructive or quasi fraud (see § 11, post), fraud of that character should also be imputed to a transferee who denies that such a conveyance was understood to be conditional in some other respect. But the applicability of a principle of the scope thus indicated to transactions so closely analogous to mortgages as agreements for the payment of annuities has been uniformly denied in cases where the parol evidence was offered for the purpose of proving that they were redeemable at the option of the grantors.[6] So far as the present writer has been able to ascertain, no

a very different one; and there have been a great many cases, ever since the statute of frauds, where a person has obtained an absolute conveyance from another in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against, the doing it is dolus malus, and that appears to be the present case. . . . In the present case the recovery, as has been said, was suffered for one purpose, and is attempted to be made use of for another, and though it has been objected the allowing the evidence of this sort is against the statute of frauds and perjuries, yet if that objection should be allowed, the statute would tend to promote frauds rather than prevent them."

In Davies v. Otty (1865) 35 Beav. 208, 5 New Reports, 391, 34 L.J. Ch. N.S. 252, 12 L.T.N.S. 789, 13 Week. Rep. 484, the plaintiff, apprehensive of being indicted for bigamy (which it turned out he was not liable to be), conveyed real property to the defendant on a parol agreement to transfer when the difficulty had passed. On a bill for a retransfer, the defendant denied the agreement and insisted on the statute of frauds, the trust not being in writing. Held, that this was a case of fraud and that the statute did not apply. A witness made an affidavit and died four days afterward, and before she could be cross-examined. Her evidence was admitted at the hearing.

The cases cited in sub sub-sec. (b), post, may also be referred to in this connection.

[6]In Irnham v. Child (1781) 1 Bro. Ch. 92, Lord Thurlow thus stated his reasons for holding parol evidence to be inadmissible: "Whether this question arises upon the statute or at common law, I do not see much difficulty. The rule is perfectly clear that where there is a deed in writing, it will admit of no contract that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence. It is contended to be the general authority of a court of equity to relieve in cases of fraud, trust, accident, or mistake, and that this applies to agreements as well as to other subjects. This must always clash with the argument drawn from the statute. It is admitted that the deed will bind if no fraud is committed, but objected that when a fraud interferes, there the evidence may be introduced. . . . If the agreement had been varied by fraud the evidence would be admissible. The argument then must be to impute fraud to the party. The rule of evidence is not subverted, if there is clear proof of fraud. . . . If admitted to be a mistake, the court would not overturn the rule of equity by varying the deed; but it would be an equity dehors the deed. . . . Here a large annuity is sold for rather a small price,—not for the natural sum; the agreement they say was that it should be redeemable, but this does not meet my present idea. To sell an annuity and make it redeemable is not usury, because it is not alone. It is a question whether the intent to suppress this, as leading to usury, will admit the party to come into a court of equity. There is no case of a kind of mistake like this, where

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court has ever attempted to deal with the difficulty suggested by the apparent inconsistency which results from excluding such evidence in this instance.[7] But the difficulty of differentiating upon any satisfactory basis these decisions regarding annuities

the doubt was whether the clause would be evidence of usury. It was agreed by both parties not to introduce the clause, but it was to stand on parol evidence. Then it results as a question whether I can admit the evidence. I was long inclined to admit the reading of it. It is necessary to see the statement of the bill; if it states that it was agreed that it should not be inserted, they cannot read it; but if it is stated that it was intended to be inserted, but it was suppressed by fraud, I cannot refuse to hear evidence read to establish the rule of equity. They are at liberty to read evidence to prove such a fraud as will make a ground of equity."

The same doctrine was applied by Lord Kenyon, when master of the rolls, in Portmore v. Morris (1787) 2 Bro. Ch. 219.

The incompetency of parol evidence was also affirmed by Lord Kenyon in Rosamond v. Milsington, an unreported case cited on p. 40 of note to Pym. v. Blackburn (1796) 3 Ves. Jr. 34; and by Buller, J. (sitting for the chancellor) in Hare v. Sherwood (1790) 3 Bro. Ch. 168, 1 Ves. Jr. 241. The ratio decidendi in the latter case was that the only excepted cases in the view of the court of chancery were cases of fraud, and those where the defendant admitted there was some agreement,—a statement manifestly incorrect, so far as regards cases in which an absolute conveyance is asserted to be a mortgage. Indeed, the authority of both of these decisions is greatly diminished by the circumstance that the judges who rendered them were not equity lawyers.

For a case in which parol evidence was rejected in an action at law, see Haynes v. Hare (1791) 1 H. Bl. (Eng.) 660, where a bond and warrant were given to secure an annuity, and judgment entered. The decision proceeded upon the grounds (1) that "parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the specific agreement which they have executed" and (2) that the court had not "a greater latitude by having an authority over the judgment entered up, than in the decision of the question between the parties themselves."

[7]In Townshend v. Stangroom (1801) 6 Ves. Jr. 328, Lord Eldon thus commented upon the first two cases cited in the preceding note: "Upon the question as to admitting parol evidence, it is perhaps impossible to reconcile all the cases, Irnham v. Child (1781) 1 Bro. Ch. 92, went upon an undisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious; and they desired the court, not to do what they intended, for the insertion of that provision was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit, it was not to be in the deed; and why was the court to insert it, where two risks had occurred to the parties,—the danger of usury, and the danger of trusting to the honor of the party. The same doctrine was laid down in Portmore v. Morris (1787) 2 Bro. Ch. (Eng.) 219." The emphasis here laid upon the special circumstance that the form of the written contract was determined by the desire of the parties to avoid a usurious transaction suggests a doubt as to whether Lord Eldon would have admitted the soundness of a general doctrine which should go to the extent of affirming the inadmissibility of parol evidence to establish the redeemable character of an annuity. But in what seems to be most recent of judicial utterances relating to the question, a doctrine of that scope seems to be approved. "Grants of annuities are perfectly lawful in themselves, and there have been many cases in which the right to purchase or redeem them has been decreed; but the court of equity has never, so far as I know, turned a grant of an annuity untainted by fraud, into a simple loan of money repayable with simple interest." Preston v. Neele (1879) L.R. 12 Ch. Div. (Eng.) 760, per Bacon, V.C.

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from those which exemplify the doctrine enounced in the preceding subdivisions is strikingly illustrated by the fact that they have not infrequently been relied upon as precedents by courts which were arguing in favour of, or proceeding upon, the theory that parol evidence to convert a conveyance into a mortgage should be admitted only in cases where fraud or some other special ground of equitable jurisdiction was alleged.[8]

(*b*) *Evidence offered for the various other purposes.*—The extent to which the courts have deemed it proper to go in applying the principle that the statute of frauds "cannot be invoked as a shield to protect a party in the perpetration of a fraud" is indicated by the following statement: "This is the basis upon which the doctrine of the specific performance of verbal contracts for the purchase of real estate by courts of equity in cases of part performance rests. Upon this principle, where a party whose lands were about to be sold by judicial sale has agreed with another to loan him money, and bid off and hold the land as a security for the money, and the agreement has been consummated, the vendor has been held to hold the title so acquired as a mortgagee in equity. . . . But no case can be found where a contract has been taken out of the statute in favour of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. . . . A party, in no legal sense, commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right both at law and in equity to refuse performance. But where the party seeking performance has partly performed, or has parted with valuable property upon the faith of the contract, the case is different. In such cases, equity will not permit a party to retain property obtained on the faith of a verbal contract, to consummate a fraud by retaining the property and refusing to perform the contract."[9]

In another case it was laid down broadly that "the only exception to the universal rule which will not allow a written instrument to be contradicted, modified, or varied by parol evidence is that a deed or bill of sale purporting to convey or transfer an absolute title may by parol evidence be given the force and effect of a mortgage."[10]

In accordance with the limitations recognized in the statements set out above, the courts have, in cases where the analogy of the admission of evidence to change absolute instruments of transfer

[8]See, for example, Cook v. Eaton (1853) 16 Barb. (N.Y.) 449; Watkins v. Stockett (1823) 6 Harr. & J. (Eng.) 435.

[9]Levy v. Brush (1871) 45 N.Y. 589.

[10]Reisterer v. Carpenter (1890) 124 Ind. 30, 24 N.E. 371.

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into mortgages was relied on as a ground for allowing the contracts under review to be varied in this manner, laid it down that such evidence "is not admissible to shew that an absolute conveyance was intended to operate as a conditional sale, or a sale with the right of repurchase;"[11] or to reduce the amount of a debt below that specified in a judgment confessed on bond and warrant of attorney;[12] or to shew that a deed purporting to convey the fee simple merely conveyed the interest which the grantors held as agents and trustees of the grantees;[13] or to shew that parties to a bond who are obligated thereby as principals were only bound as sureties;[14] or to establish an agreement alleged to have been made at the time when a mortgage of several lots of land was executed, that, in case the mortgagor sold either of the lots, the mortgagee would release the lot so purchased from the mortgage, on being paid a certain sum per acre by the purchaser;[15] or to shew that subsequently to the execution of an instrument purporting to secure a particular debt, the parties agreed that it should be extended so as to cover other debts also;[16] or to prove a rescission of a written contract by which a mortgagor's equity of redemption had previously been transferred;[17] or, in a jurisdiction in which it is expressly enacted that a chattel mortgage must be in writing, to shew after such a mortgage had been satisfied, that it was to continue as a security to the vendee;[18] or to shew that a written stipulation made between the parties to a case after it had been referred to a master did not express the agreement actually entered into.[19]

It has frequently been laid down that a written contract which on its face purports to be a mortgage cannot be converted by parol evidence into an absolute conveyance[20] or a conditional sale.[21] But this rule does not preclude the reception of such

[11]Peagler v. Stabler (1890) 91 Ala. 308, 9 So. 157. See also Flint v. Sheldon (1816) 13 Mass. 443, 7 Am. Dec. 162.

[12]Nelson v. Sharp (1843) 4 Hill (N.Y.) 584.

[13]Bernardy v. Colonial & U. S. Mortg. Co. (1905) 20 S.D. 193, 105 N.W. 737. For the decision on a former appeal, see 17 S.D. 637, 106 Am. St. Rep. 791, 98 N.W. 166.

[14]Bank of Mt. Pleasant v. Sprigg (1832) 1 McLean, 183, Fed. Cas. No. 891.

[15]Stevens v. Cooper (1815) 1 Johns. Ch. (N.Y.) 425, 7 Am. Dec. 499.

[16]Hester v. Gairdner (1907) 128 Ga. 531, 58 S.E. 165.

[17]New England Mortg. Security Co. v. Tarver (1894) 9 C.C.A. 190, 23 U.S. App. 114, 60 Fed. 660.

[18]Interstate Lumber Co. v. Duke (1913) 183 Ala. 484, 62 So. 845.

[19]Mussey v. Bates (1888) 60 Vt. 271, 14 Atl. 457.

[20]Snyder v. Griswold (1865) 37 Ill. 216; Johnson v. Prosperity Loan & Bldg. Asso. (1901) 94 Ill. App. 260; Proctor v. Cole (1879) 66 Ind. 576; Clark v. Condit (1867) 18 N.J. Eq. 368; Van Keuren v. McLaughlin (1868) 19 N.J. Eq. 187, reversed in 19 N.J. Eq. 575 (but merely on the ground of defect of parties; Goon Gan v. Richardson (1897) 16 Wash. 373, 47 Pac. 762.

[21]Kunkle v. Wolfersberger (1837) 6 Watts (Pa.) 126, referring to Colwell

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evidence for the purpose of ascertaining the amount of the debt secured, if it is not specified;[22] or of proving the truth of the facts stated in the contract.[23]

IV. Rationale of the unrestricted doctrine.

10. **Generally.**—It is a fundamental principle of equity jurisprudence that "the particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument transferring an estate is originally intended between the parties as a security for money, or for any other encumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage."[1] This principle, it will be observed, goes no further than to affirm the competency of documentary evidence extraneous to the instrument which purports to transfer the property in question. It does not authorize the introduction of oral evidence regarding the real nature of the transaction.

The doctrine now under discussion requires for its support the more comprehensive principle which is embodied in the statement that a "court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shewn to be one of security, and not of sale, it will give effect to the actual contract of the parties."[2] In this point of view the intention of the parties is regarded as an element which is susceptible of being proved by any description of legal evidence either written or oral.

In its application to deeds of real property the broader of these two principles comes into collision with "two rules of positive law; one, forbidding oral testimony to be heard in contradiction of the written definition of the transaction made by the parties; and the other, forbidding any other than written evidence of title to land."[3] In other words, the position is taken that, "when an absolute conveyance is taken by a surety or creditor, as a security for the debt, parol evidence may be given to prove the true nature

v. Woods (1834) 3 Watts (Pa.) 188, 27 Am. Dec. 345. See also Kerr v. Gilmore (1837) 6 Watts (Pa.) 405; Brown v. Nickle (1847) 6 Pa. 390; Woods v. Wallace (1853) 22 Pa. 171; Haines v. Thomson (1872) 70 Pa. 434.

[22] In Burnett v. Wright (1892) 135 N.Y. 543, 32 N.E. 253.

[23] Bacon v. Brown (1848) 19 Conn. 29.

[1] 2 Story, Eq. Jur. 13th ed. § 1018. This statement follows very closely the language of Mr. Hargrave's note to 2 Co. Litt. L. 3, chap. 5, § 332.

[2] Peugh v. Davis (1877) 96 U. S. 332, 24 L. Ed. 775.
"If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." Story, J., in Flagg v. Mann (1837) 2 Sumn. 533, Fed. Cas. No. 4,847, quoted in Hawes v. Williams (1899) 92 Me. 483, 43 Atl. 101.

[3] De France v. De France (1859) 34 Pa. 385.

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of the agreement, without violating either the statute of frauds, or that rule of evidence which forbids that a written paper shall be varied by parol."[4] It is apparent, however, that only the former of these rules is, so far as regards the great majority of transactions, contravened in cases where the subject-matter of the instrument of transfer is personal property.

11. Theory that the basis of the doctrine is constructive or quasi fraud.—The unrestricted doctrine enunciated in the preceding subtitle is usually regarded as being referable to the notion that a person who accepts an absolute conveyance in the understanding that it is to operate merely as a security for the payment of a debt owed to him by the grantor is chargeable with a constructive or quasi fraud if he subsequently denies the existence of such an understanding.[5]

"They who take a conveyance of an estate as a mortgage, without any defeasance, are guilty of a fraud."[6]

"The principle of the court is, that the statute of frauds was not made to cover fraud. If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage transaction, it is in the eye of this court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages—to which I referred in the course of the argument—seems to me to be directly applicable. Here is an absolute conveyance, when it was agreed there should be a mortgage; and the conveyance is insisted upon in fraud of the agreement."[7]

"To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter

[4]Pattison v. Horn (1856) 1 Grant's Cas. (Pa.) 301.

[5]In Story's Eq. Jurisprudence, vol. 1, 13th ed. § 330, it is observed in the discussion of constructive fraud, that, with regard to the operation of the statute of frauds, "a general principle has been adopted that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases where from fraud, imposition, or mistake a contract of this sort has not been reduced to writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party guilty of a breach of confidence who attempts to shelter himself behind the provisions of the statute."

[6]Cotterell v. Purchase (1735) Cas. T. Talb. 63. As to the significance of this remark, see further, § 15, note 1, post.

[7]Turner, L.J., in Lincoln v. Wright (1859) 4 De G. & J. 16. The argument in behalf of the appellant, that there was no consideration moving from the plaintiff, was met by the learned Judge with the remark that it was "a case not of mere trust, but of equitable fraud."

In Baker v. Wind (1748) 1 Ves. Sr. (Eng.) 160, Lord Hardwicke declared that the failure to assert the defeasance in the deed was an imposition. Parol evidence is admitted "on the ground that the court has power to rectify the instrument, and that it would be a fraud to insist on the absolute form of the instrument if it were only intended as a security for money." Kay, L.J., in Madell v. Thomas [1891] 1 Q.B. (Eng.) 230.

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of any written papers, however precise and complete they may appear to be."[8]

In a Massachusetts case the court remarked that the doctrine under which parol evidence is admitted for the purpose of shewing that a conveyance absolute in form was intended as a mortgage was said to be "analogous, if not identical, with that which has so frequently been acted upon as to have become a general if not universal rule in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument."[9]

The contention that an instrument of transfer, absolute in form, cannot be shewn by parol evidence to have been intended as a security for a debt due to a third person, has been rejected on the ground that "it is as much a fraud to take and insist upon the benefit of an absolute conveyance which was intended to secure a debt due to another as to take and insist upon it when it was intended to secure a debt due to the grantee."[10]

There is some authority for the theory that the fraud which is inferred from the circumstance of a grantee's refusal to allow the property to be redeemed in pursuance of a verbal understanding relates back to the inception of the contract.[11] But the preferable view seems to be that such relation is not predicable except in a merely constructive sense.[12]

[8]Russell v. Southard (1851) 12 How. (U.S.) 139, 147, 13 L. ed. 927, 930. Compare also the statement in the earlier case, Morris v. Nixon (1843) 1 How. (U.S.) 118, 126, 11 L. ed. 69, 72.

"Nothing is better settled than that the true construction of this statute [i.e., of frauds] does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been very emphatically said, that would be to make a statute purposely made to prevent frauds, the veriest instrument of frauds. The whole class of cases in which courts of equity act in enforcing contracts for the sale of lands in cases of part performance turns upon this general doctrine." Story, J., in Taylor v. Luther (1835) 2 Sumn. 232. See also Carr v. Carr (1873) 52 N.Y. 251; Wallace v. Smith (1893) 155 Pa. 78, 35 Am. St. Rep. 868, 25 Atl. 807; Rowand v. Finney (1880) 96 Pa. 192; Logue's Appeal, (1883) 104 Pa. 136.

[9]Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671.

[10]Clark v. Seagraves (1904) 186 Mass. 430, 71 N.E. 813.

[11]See, for example, Bigler v. Jack (1901) 114 Iowa, 667, 87 N.W. 700; Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co. (1906) 37 Colo. 105, 86 Pac. 94, 11 Ann. Cas. 323.

[12]In Campbell v. Dearborn (1872) 109 Mass. 140, 12 Am. Rep. 671, the court said: "We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which afford ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by shewing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case."

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12. Grounds upon which the doctrine has been reconciled with the rule which forbids the introduction of parol evidence to vary the terms of a written contract.—In order to meet the difficulty created by the apparent inconsistency between the doctrine now under discussion and the general rule that the terms of a written contract cannot be contradicted or varied by parol evidence, the courts have resorted to various theories.[13]

(*a*) *Parol evidence admitted to establish an independent equity.*—The conception most commonly relied upon is, that the parol testimony which is deemed to be competent under the doctrine is admitted, not for the purpose of varying or contradicting the contract which is embodied in the instrument of transfer, but for the purpose of establishing an independent and superior equity which will control the operation of that contract, to the extent of investing the grantee and persons who claim through him with the right to redeem the property in question.[14]

What seems to be a serious objection to this theory is that the establishment of an independent equity upon which the right of redemption may be predicated must necessarily operate in effect so as to produce that very alteration of the contract which is

[13]It should be pointed out in this connection that "the general rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument is confined to the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. Grove v. Rentch (1866) 26 Md. 367, quoting Greenl. Ev. § 279.

[14]Evidence dehors the deed is used "not for the purpose of putting a construction upon the deed, but of superadding an equity controlling the estate and interest given by the deed." Lord Cottenham in Scottish Union Ins. Co. v. Queensberry (1842) 1 Bell's Sc. App. (Scot.) 183. Keithley v. Wood (1894) 151 Ill. 566, 42 Am. St. Rep. 265, 38 N.E. 149; Booth v. Robinson (1880) 55 Md. 450; Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671; Pond v. Eddy (1873) 113 Mass. 149; Sweet v. Parker (1871) 22 N.J. Eq. 453; Huoncker v. Merkey (1883) 102 Pa. 462.

The following remarks of Lord Eldon in Townshend v. Stangroom (1801) 6 Ves. Jr. (Eng.) 332, 22 Eng. Rul. Cas. 843, may be here referred to, as shewing the essentially different standpoints of courts of equity and courts of law with respect to the use of parol evidence. - Commenting upon the decision rendered by Buller, J., while sitting for the chancellor in Hare v. Shearwood (1790) 3 Bro. Ch. (Eng.) 168, 1 Ves. Jr. 241, the learned judge observed: "Speaking with all the veneration and respect due to so great a judicial character, the point in which it seems to have failed is, that he thought too confidently that he understood all the doctrine of a court of equity. It cannot be said that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the court will not execute, must be struck out, if it is true that, because parol evidence should not be admitted at law, therefore it shall not be admitted in equity, upon the question whether admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court in which, it is admitted, parol evidence cannot be introduced."

assumed to be obviated. From the logical inference to which this fact points it is impossible to escape by treating the juristic operation of the equity as being merely one of "control." The recognition of the right based upon the equity virtually introduces an unexpressed condition into the contract, and, having regard to this consequence, it is merely juggling with words to assert that "variation" and "contradiction" do not result from the evidence which raises the equity.

(b) *Parol evidence admitted to shew the actual object of the transaction.*—It has also been laid down that the general rule is not infringed by the introduction of parol evidence, because its function is merely to establish the "object" of the transaction,[15] or its "purpose,"[16] or its "real nature."[17] The exact significance of these expressions is not altogether clear. But it seems difficult to escape the conclusion that the explanation which they suggest is merely tantamount to a declaration that parol evidence is competent as bearing upon the intention of the parties. In this point of view, it is clear that the explanation cannot be regarded as furnishing a satisfactory rationale of the exception to the general rule which is created by allowing the reception of parol evidence for the purpose of affecting the operation of one particular class of written contracts.

It has also been laid down that parol evidence is admitted for the purpose of shewing "the intended effect" of the writing or writings in which the contract is embodied; "that is, for the purpose of shewing whether the transaction was intended to extinguish or to continue the transferee's mortgage debts."[18] The theory underlying this statement is somewhat obscure; but it seems to be similar to that which is reflected in the expressions quoted above, and to be open to the same criticism.

(c) *Parol evidence admitted to prove the real consideration of the absolute transfer.*—The theory has also been put forward that the doctrine as to the competency of parol evidence is merely a special application of the rule which permits the actual consideration of a written contract to be proved by parol evidence.[19] But

[15] Peugh v. Davis (1877) 96 U.S. 332, 336, 24 L. ed. 775, 776. Similar phraseology was used in Brick v. Brick (1878) 98 U.S. 514, 25 L. ed. 256 (transfer of share of stock held to be a pledge only.)

[16] Thomas v. Scutt (1891) 127 N.Y. 140, 27 N.E. 961.

[17] Butler v. Butler (1879) 46 Wis. 430, 1 N.W. 70.

In Streator v. Jones (1824) 10 N.C. (3 Hawks) 423, the court quoted the statement in Powell on Mortgages, 151, that "the proof offered is not considered a variation of the agreement, but explanatory only of what it was meant to have been."

[18] Whitney v. Townsend (1869) 2 Lans. (N.Y.) 249.

[19] The doctrine was explained on this footing in Bowker v. Johnson (1868) 17 Mich. 42; McMillan v. Bissell (1886) 63 Mich. 66, 29 N.W. 737; Hyler v. Nolan (1881) 45 Mich. 357, 7 N.W. 910; Bashinski v. Swint (1909) 133 Ga. 38, 65 S.E. 152.

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the conception that the terms upon which the property transferred by an absolute instrument is to be held by the transferee are a part of the consideration within the meaning of that rule would seem to be one of very dubious soundness. It is apprehended that the consideration of a contract by which property is transferred is merely the money or other valuable thing which the transferor receives from the transferee, or the transferor's exoneration from some liability which the transferee assumes, either provisionally or absolutely. If the word "consideration" should be construed as embracing also the conditions of an agreement, the general principle which forbids the introduction of parol evidence for the purpose of varying written contracts would be virtually abrogated. The correct view, it is submitted, is that the consideration of a transfer of property is a matter entirely distinct from the question whether the transfer was made merely as a security. The two issues may in fact be presented as distinct and separate elements in the same case.

(*d*) *Parol evidence admitted to shew the fact of a loan.*—In one case it was stated that "the extrinsic evidence is received, not to qualify or destroy the terms of the deed, but to establish the fact of a loan; and this fact being established makes the deed, which would otherwise have been absolute, a defeasible conveyance."[20] But this explanation does not furnish any reason for the existence of the unrestricted doctrine. It is merely expressive of a legal consequence which results from shewing that the transferor and transferee stood in the relationship of debtor and creditor after the transaction,—a circumstance, it should be remarked, which is not regarded by all courts as conclusive proof that the written contract was intended as a mortgage. See § 37, post.

(*e*) *Parol evidence admitted to explain an ambiguity.*—In one case a "logical basis for treating, by the aid of parol evidence, an instrument according to the purpose mutually intended, regardless of the letter of the paper," was found in the conception that "where ambiguity in a contract exists, which is developed by applying the paper to the subject dealt with, proof of the circumstances under which it was made to enable the court to construe it as the parties intended, or proof by parol of that part of an entire contract which in partial execution was in the other features reduced to writing, should not be denominated variances or contradictions of the agreement."[21] But it seems clear that the doctrine which permits the introduction of parol evidence to explain an ambiguity which is developed from the facts has no

[20] Blakemore v. Byrnside (1847) 7 Ark. 505.

[21] Smith v. Pfluger (1905) 126 Wis. 253, 2 L.R.A. (N.S.) 783, 110 Am. St. Rep. 911, 105 N.W. 476.

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relevancy where the question with regard to which such evidence is offered is simply whether the written instrument under discussion does or does not express the whole of the agreement made between the parties.

(*f*) *Concluding remarks.*—It will be observed that each of the theories discussed in the preceding sub-sections is open to criticism upon some particular ground. If the objections suggested by the writer are well founded, two conclusions are apparently unavoidable, viz. (1), that the unrestricted doctrine is really irreconcilable with the rule which declares that a written contract cannot be varied or contradicted by parol evidence, and (2) that the only possible basis for that doctrine is the conception of a constructive or quasi fraud which is explained in the preceding section.

13. General comments.—The doctrine now under consideration has sometimes been criticized as being not only unsound in a juristic point of view, but also undesirable upon the ground of expediency and public policy.[22] It is presumably upon these grounds that the reception of parol evidence has been prohibited by statute in New Hampshire and Pennsylvania. A passing reference to this aspect of the matter will suffice for the purpose of the present monograph. But a few remarks as to the validity of the position that the doctrine is juristically unsound will not be out of place.

The propriety of admitting parol evidence when it is offered for the purpose of proving actual fraud, is universally conceded.[23] To the category of fraudulent acts the repudiation of an agreement that an absolute conveyance should operate merely as a mortgage was assigned at a very early date by the English Court of Chancery. See §§ 15, 16, post. It is also manifest that this doctrine logically involves the corollary that any act which the courts deem it expedient to treat as being fraudulent, even though it be in a merely constructive sense, should also be regarded as provable by such evidence. The situation presented is therefore one which merely imports the inclusion of another description of acts in the category of constructive frauds, and, as a necessary incident of that inclusion, the recognition of the admissibility of parol evidence to establish those acts.

It cannot be denied that a certain anomaly is involved in the notion that the mere repudiation of one of the terms of a contract

[22]See, for example, Brantley v. West (1855) 27 Ala. 542; Fairchild v. Rasdall (1859) 9 Wis. 392; Sweet v. Mitchell (1862) 15 Wis. 642, and Richardson v. Johnsen (1876) 41 Wis. 103, 22 Am. Rep. 712; Reeves v. Abercrombie (1895) 108 Ala. 538, 19 So. 41.

[23]"I know of no case where parol evidence is not admissible to establish fraud, even in the most solemn transactions and conveyances." Story, J., in Bottomley v. United States (1840) 1 Story, 152, Fed. Cas. No. 1,688.

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may be treated, even in a constructive sense, as a fraudulent act.[24] But a satisfactory reason for placing in a special category cases in which an instrument of transfer, absolute in form, is alleged to have been intended as a mortgage, is not far to seek. It is apprehended that the true rationale of the exceptional inference which in such cases is predicated from the repudiation of a part of the contract is, that this inference represents one of the expedients which the English Court of Chancery has, from a very remote period, employed for the purpose of preventing the oppression of debtors by their creditors. The aphorism of the Hebrew moralist, that "the rich ruleth over the poor, and the borrower is servant to the lender,"[25] is no less applicable to modern, than to ancient, civilizations.[26] The character of the unrestricted doctrine as one which operates for the protection of a class of persons which is peculiarly liable to be subjected to oppression has frequently been adverted to by the courts.[27] In this point of view it is apparent that the admissibility of parol evidence is, in the final analysis, predicated upon the same grounds as those which have led courts of equity to grant relief against the strict conditions of common-law mortgages, and also to protect mortgagors by establishing the familiar rule that any stipulation which operates as a clog upon the right of redemption is invalid.

[24]The following remarks in Matthews v. Holmes (1853) 5 Grant, Ch. (U.C.) 35, may be quoted: "It is very true, he [the grantee] might be told it is a great fraud in him to claim the benefit of an absolute deed when he knows that nothing more than a pledge was intended; but he might naturally answer that that was assuming the fraud against him without legal proof, in order to make the proof of it appear legal; and he might well remonstrate that the first fraud was in the grantor attempting to destroy an honest deed by the viva voce evidence of false witnesses,—the very fraud which a statute has been wisely passed to prevent." But, for the purposes of the present discussion, this balancing of the two descriptions of fraud does not afford much assistance to the inquirer.

[25]Proverbs, xxii. 7.

[26]In Vernon v. Bethell (1761) 2 Eden (Eng.) 113, Lord Northington, referring to the rule which forbids the clogging of the equity of redemption, observed that "there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." For a case in which this statement was quoted with relation to the doctrine as to the admission of parol evidence, see Streator v. Jones (1824) 10 N.C. (3 Hawks) 423.

[27]"The not inserting the clause [i.e., of defeasance] in the deed was an imposition upon the mortgagor, but the reason was, that he was in distress, and therefore turned it into the shape of a purchase, but still he meant it as a security." Lord Hardwicke in Baker v. Wind (1748) 1 Ves. Sr. (Eng.) 16.

"Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the court, and rest in the simple good faith of the creditor." Pierce v. Robinson (1859) 13 Cal. 116. See also Emerson v. Atwater (1859) 7 Mich. 24; McEwan v. Ortman (1876) 34 Mich. 326; Hassam v. Barrett (1875) 115 Mass. 256; Stinchfield v. Milliken (1880) 71 Me. 567; Booth v. Robinson (1880) 55 Md. 419.

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14. Points of contact between the restricted and unrestricted doctrines.—In any case where the essential fact alleged by the party who seeks to convert an absolute instrument of transfer into a mortgage is that he executed the instrument under the supposition, induced by the acts or words of the transferee, that it was to operate merely as a security, it would seem that a situation is presented in which, generally speaking, the claim for relief might be based upon the conception either of actual or constructive fraud.[28] This circumstance is probably accountable for some expressions of judicial opinion which, if accepted as correct enunciations of the law, would apparently render it useless to predicate any distinction between the restricted and unrestricted doctrines.[29] Such remarks, however, as those adverted to in the footnote, are, it may be assumed, merely indicative of the extremely tenuous nature of the distinction, and strongly suggestive of the conclusion that a restricted doctrine which can be regarded as sustaining the admission of parol evidence in respect of conditions identical with

[28]"It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds." Dixon v. Parker (1750) 2 Ves. Sr. 219, 255. Commenting on this passage in Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671, the court said: "This indeed is only one form of application of the general rule of equity that one who has induced another to act upon the supposition that a writing had been or would be given shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault."

In Hillock v. Frizzle (1863) 10 N.B. 655, decided in a jurisdiction in which the unrestricted doctrine prevails, it was shewn, in addition to the fact of the antecedent understanding with regard to the nature of the transaction, that, on the morning after the deed was delivered, the grantee, upon being asked whether he had not promised that the grantor could redeem the land, admitted that he had, but said that he could break his promise. The trial judge observed that "believing the evidence on the part of the defendants to be true, as to the plaintiff's promise and his immediate repudiation of it, it appears to me that he is chargeable with gross fraud and duplicity in obtaining the deed as a mortgage, and then claiming it as an absolute conveyance." The supreme court affirmed the decision, remarking that the course pursued by the grantee at the hearing shewed that the words used by the grantee after receiving the deed were not merely expressions of irritation, but that it was his settled intention to insist on the advantage which the absolute form of the conveyance had given him.

[29]See, for example, Russell v. Southard (1851) 12 How. (U.S.) 139, 13 L. ed. 927, where the court, after stating its inability to perceive that the Kentucky doctrine which affirms that "oral' evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration," differed from the doctrine accepted by the Federal Supreme Court, proceeded thus: "The inquiry still remains, What amounts to an allegation of fraud, or of some vice in the consideration? and it is the doctrine of this court that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage."

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those to which the unrestricted doctrine is applicable is scarcely worth maintaining. In a logical point of view, of course, the distinction between the two doctrines is real enough, and there is specific authority for the view, that the mere refusal of a transferee to perform a parol agreement to reconvey the given property does not constitute fraud within the meaning of the restricted doctrine.[30]

V. Doctrine adopted in England and Scotland.

15. English decisions rendered with reference to contracts made before the statute of frauds became operative.—Some of the early cases indicate that before the enactment of the statute of frauds in 1678, the court of chancery had already recognized the admissibility of parol evidence for the purpose of shewing that a conveyance absolute on its face was intended by the parties to operate as a mortgage, and that the application of the doctrine thus adopted was not restricted to cases in which one of the general grounds of equitable relief adverted to in subtitle II. ante was alleged.[1] The precise theory upon which such evidence was regarded as being competent is not shewn by the reports; but from the first of the cases cited under the following section, it is manifest that the rationale of the doctrine applied must have been the same as that which has been always specified in the more recent decisions, viz., constructive or quasi fraud. Having regard to the fact that the statute of frauds was not a factor in these cases, it is obvious that the only rule of positive law which was contravened by the admission of parol evidence was that which declares that the terms of a written contract cannot be varied or contradicted by such evidence. But this aspect of the matter is not adverted to in any of the reports.

[30]Harper v. Harper (1868) 5 Bush (Ky.) 176.

[1]In Copleston v. Boxwill (1660) 1 Ch. Cas. 1, there was evidence to the effect that the grantee had declared several times after the conveyance that he knew not how long he should enjoy the said lands in question, and that he would take his money with interest. Foster, Ch. J. (sitting in the absence of the chancellor), did not make any specific ruling with regard to the competency of this evidence, the case being referred to be determined by the parties themselves. In Gorey's Case (1695) 3 Salk. 241, the case is referred to as one in which the court "doubted." But this seems to be a mere inference of the later reports.

In Thornborough v. Baker (1675) 3 Swanst. 631. 1 Ch. Cas. 283, 2 Freem. Ch. 143, 18 Eng. Rul. Cas. 231, Lord Nottingham observed, arguendo: "If the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage."

The following cases were decided after the statute came into force, but had reference to instruments executed prior to that time.

In Talbot v. Braddill (1683) 1 Vern. 183, the plaintiff, being seised in possession of land of £15 per annum, and in reversion of certain other lands of about £25 per annum (one of these estates being subject to encumbrances), in consideration of £320, demised, in 1657, those lands to the defendant for ninety-nine years, at 5s. per annum rent, upon condition that if the plaintiff or his heirs should pay the defendant £380 the 25th of March, 1688, then the conuzees should stand seised to the use of the plaintiff and his heirs, and the plaintiff covenanted for the defendant's enjoyment accordingly. A few years

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16. English decisions rendered after with reference to contracts made after the statute of frauds became operative.—By the 4th section of the statute of frauds, which was enacted in 1678, it was declared that no person could be charged upon any

afterwards the value of the land so demised was augmented to £45 per annum, through the decease of two of the life tenants. Twenty-five years after the conveyance, the plaintiff brought his bill to be admitted to redeem the premises, and to have an account of profits from the date of the deed, alleging that though the deed was in that form, yet it was nevertheless agreed between him and the defendant that it should be a mortgage, and redeemable at any time upon payment of £320 and interest. Although there was no proof of any other agreement than the deed, and there was a bond to perform the covenants of the deed, and although it appeared that the estate consisted much in old buildings and a mill, and that the defendant had laid out about £100 in repairs, yet in regard the plaintiff's mother died within three years after the deed, whereby the revenue exceeded the interest of the money, North, the lord keeper (afterwards Lord Guildford), thought this an unreasonable bargain, and decreed an account of the profits ab origine and a redemption on payment of what the profits fell short of the £320 and interest, and appointed the same to be paid at a day certain, and not to expect till 1688, according to the condition of the deed. On rehearing before Lord Chancellor Jeffrey, 1 Vern. 394, this decree was affirmed with some variations, immaterial for present purposes.

In Barrell v. Sabine (1684) 1 Vern. 268, 3 Salk. 241, in support of the plaintiff's contention that the deed in question was a mortgage, it was urged, first, the overvalue. Secondly. That Sabine was at the charge of the conveyance. Thirdly. That the purchaser had declared that if Sabine would repay his money within a year and a half, and give him a specified sum for his pains, Sabine should have his estate again. On the other side it was answered that the overvalue was not so great as was pretended, and that this had all the forms and steps of an absolute purchase, there being first express articles for an absolute purchase, and then a conveyance made in pursuance of those articles, and possession delivered immediately upon execution of the conveyances. Lord Guildford said he was fully satisfied that it was not originally a mortgage, but an absolute purchase, but believed Sabine might complain he had sold his estate too cheap, and that thereupon Mr. Serjeant Barrell might declare, if he would repay him his money within one year, and give him £100 for his pains, that he should repurchase his estate. The bill was dismissed.

In Manlove v. Bruton (1688) 2 Vern. 84, where there was an absolute conveyance, but the purchaser had by a contemporaneous deed agreed to reconvey if the vendor paid a specified sum at the end of one year, the master of the rolls allowed the vendor's assignee to redeem after twenty years. But in this instance relief was apparently granted on the theory that the two instruments together constituted a mortgage. The report does not refer to any parol evidence.

In Jason v. Eyres (1680) 2 Ch. Cas. 35, where land which had previously been leased for 500 years to secure a debt chargeable upon it was conveyed by a deed containing a provision as to the surrender of the lease upon payment of the debt, the transaction was held to be a mortgage. Parol declarations offered on both sides were not received. The report does not shew whether they were rejected on the ground of an assumed general principle that parol evidence was wholly inadmissible for the purpose of controlling the terms of a written contract, or on the ground that the transaction was regarded as being a mortgage in point of law. Having regard to the decisions cited, supra, and also to the fact that on its face the conveyance was intended as a security for a debt, the latter supposition is apparently the correct one. In this point of view the rejection of the parol evidence was not, as had been suggested, inconsistent with modern practice (1 Cooke, Mortg. p. 23). Such evidence was deemed to be inadmissible simply because the undisputed facts created an irrebuttable presumption as to the character of the transaction.

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"contract or sale of land, or any interest in or concerning the same," unless the agreement, or some memorandum or note thereof, was in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized. As the conversion of an absolute conveyance into a mortgage by means of parol evidence involves in effect the establishment of an unwritten defeasance agreement, it is clear that, under the provision, if it had been strictly and literally construed, courts of equity would have been debarred from granting this description of relief. But soon after the statute came into force Lord Nottingham (who, it should be noted, had himself framed it), explicitly rejected this view, on the ground that a grantee who repudiated his promise to allow redemption was guilty of fraud, and that the statute was not intended to inhibit the proof of fraud by means of unwritten evidence.[2]

[2]"Where a man treated to lend money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the conveyance he refused to execute the defeasance, yet my Lord Nottingham decreed it against him on the fraud after the statute." This is the effect of an anonymous case (of uncertain date, but earlier than 1682, the year of Lord Nottingham's death), as stated by Lord Chancellor Parker in Maxwell v. Mountacute (1719) Prec. in Ch. 526, where the actual question involved was the right of a woman to enforce, after the marriage, a parol promise made by her husband before the marriage, that he would settle all her property upon her. A plea of the statute of frauds was allowed at the first hearing; the chancellor observing "where there is no fraud, only relying on the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere." The bill was then amended, setting forth other facts, and also setting forth a letter of the defendant. This letter was regarded by the chancellor as taking the case out of the statute. The case itself, therefore, affords no authority for admitting parol evidence to shew that an absolute deed is intended as a mortgage, but the reverse. See the remarks of the court in Conner v. Chase (1843) 15 Vt. 764.

The decision of Lord Nottingham was also alluded to by Lord Hardwicke in the following terms: "A man intended to make a mortgage of his estate by two different deeds, the one an absolute one, the other a defeasance upon payment of the mortgage money, which was the old way of making mortgages (Cotterell v. Purchase (1735) Cas. t. Talb. 64), he executed the absolute conveyance, but when he had so done, the other party refused to execute the defeasance, but the court, without any difficulty, decreed him to do it." Young v. Peachy (1741) 2 Atk. (Eng.) 258.

In Walker v. Walker (1740) 2 Atk. (Eng.) 98, the same judge, arguendo, put the question: "Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeasance, will not this court relieve against such fraud?"

For other statements of the effect of Lord Nottingham's decision, see Maxwell's Case (1719) 1 Eq. Cas. Abr. 20, pl. (5), 2 Eq. Cas. Abr. 592, pl. (6).

In Cotterell v. Purchase (1735) Cas. t. Talb. 61, the plaintiff and her sister being seised of an estate as joint tenants, the plaintiff by lease and release, in consideration of £104, conveyed the moiety to the defendant and his heirs; but it was admitted that the conveyance, though absolute in law, was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Sometime after, in the year 1708, those deeds were canceled, and in consideration of a farther sum, which made up the whole to £184, she conveyed the estate in manner as before, but with this farther covenant,—that she would not agree to any division or partition of

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Towards the end of the eighteenth century the soundness of the doctrine thus laid down was questioned by an equity judge

the estate, or make, or cause to be made, any division or partition thereof, without the consent of the defendant. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710, when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed it quietly till 1726, at which time the plaintiff filed her bill to be let into redemption. The master of the rolls was of opinion that the deeds of 1708 amounted to an absolute conveyance, and dismissed the bill. This decision was affirmed by Lord Talbot, who reasoned thus: "The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner excepting an odd sort of covenant, which is the darkest part of the case; for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance, so that it is of no great weight, and must be laid out of the question. Then, as to the circumstances, on one side has been shewed an account stated of money received; and it is there said so much received on account of purchase money, and in another general account the sum of £184 is called 'purchase money.' Then, as to the agreement in 1710, that if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest, and the costs he had been at; this shews it was not redeemable at first. (Barrell v. Sabine (1684) 1 Vern. 268, 3 Salk. 241.) There have been strong proofs on both sides as to the value. One has shewn the rent to be but £27 per annum, and then deducting one third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be £40 per annum. But I rather give credit to the first, because it is certain the dower was but £9 per annum. So that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified, for they who take a conveyance of an estate as a mortgage, without any defeasance, are guilty of a fraud (Bacon's Tracts, 37); and no length of time will bar a fraud." The statement as to the taking of a conveyance as a mortgage is obviously merely an abbreviated reiteration of the doctrine referred to in the cases cited above. But it seems that this doctrine cannot, as the report indicates, and as has been affirmed by the court in Streator v. Jones (1824) 10 N.C. (3 Hawks) 423, be sustained by anything in Bacon's Tracts. On p. 37 of that work (2d ed. 1741), it is observed: "This rule faileth in covinous acts, which though they be conveyed through many decrees and reaches, yet the law taketh head to the corrupt beginning, and counteth all as one entire act." The rule referred to is, "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The conclusion suggested is that the citation of the Tracts is misplaced,—that it really applies to the clause, "no length of time will bar a fraud," and not to the one which precedes it. For this information as to the Tracts and the suggestion as to the real bearing of the citation, the writer (to whom this work is not accessible), is indebted to Mr. Edward B. Adams, the Librarian of the Harvard Law School.

In Baker v. Wind (1748) 1 Ves. Sr. 160, the father of the plaintiff mortgaged an estate to the defendant, and by articles they agreed that the mortgagee, upon being reimbursed what he advanced, and £50 over, for such improvements as he might possibly make, he should reconvey; but this clause was not inserted in the deed of conveyance, the mortgagor, upon account of his creditors, being willing it should appear as a purchase; and by subsequent facts and agreements it appeared in proof that the defendant admitted it

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of no very high authority.[3] In one case he even treated it as being applicable only in cases where a foundation for the admission of the parol evidence could be laid down by written evidence.[4]

to be a redeemable estate, and it had been referred to arbitrators, who, though they did not choose to make an award, yet were of opinion that he should take the money, and give up the estate. The mortgagor's son, within a year after he came of age, but twelve years after the transaction, brought this bill to redeem. Defendant relying upon Cottrell v. Purchase, supra, Talb. 61, it was insisted that he should neither be redeemed, nor come to an account after so long a time. But Lord Hardwicke said: "This is the strongest case that ever came before me for the decreeing a redemption, where that redemption was controverted, and also to make the mortgagee, who opposed it, not only lose, but pay costs; there being such a series of transactions in which it was constantly admitted to be redeemable, as it clearly was. The not inserting the clause in the deed was an imposition upon the mortgagor; but the reason was that he was in distress, and therefore turned it into the shape of a purchase; but still he meant it as a security. The value of the estate does not appear; but if he, as a friend to the mortgagor, thought fit to take it as security, he did it with his eyes open, and the redemption cannot be prevented; and wherever the court finds such a clause as this, it adheres to it strictly, to prevent the equity of redemption from being entangled to the prejudice of the mortgagor. And the getting a further sum of £50, inserted upon a mere pretense, for whether he improved or not (which was in his election) he was to have the £50, is an evidence of hardship put on him; then surely twelve years is not sufficient to bar a redemption. But the present plaintiff was a minor all that time, which in cases upon the statute of limitations is always deducted; nor did it rest as a thing undemanded."

In Dixon v. Parker (1750) 2 Ves. Sr. (Eng.) 219, the bill charged that there was a draft of a defeasance made, intended to be executed; but that by contrivance and management of Garland it was not executed at the same time with the deeds, but put off to another time, and that Garland, having got the absolute conveyance, would not let the defeasance be executed. Lord Hardwicke said: "On Parker there is no imputation; it seems to be the act of his steward. But the bill is not adapted to this case, but to another; charging expressly that there was a preparation, not an execution, of a defeasance, which was taken into the custody of Garland, who hindered the execution; and on that head is the relief prayed, which would make it the case of a mortgage with defeasance, as the old way of transacting was. It is determined on the statute of frauds that if a mortgage is intended by an absolute conveyance in one deed, and a defeasance making it redeemable in another, the first is executed and the party goes away with the defeasance; that is not within the statute of frauds."

[3]In Whiting v. White (1792) G. Cooper 1, 2 Cox, Ch. Cas. 290, Pepper Arden, M.R., observed: "I will not lay it down in this case that no parol evidence shall ever be admitted, because this case does not call for it, though I should be glad to find it so ruled, and the case of Perry v. Marston (1788) 2 Bro. Ch. 397, itself is strong evidence of the wisdom of the statute of frauds." But this expression of opinion was disapproved by Plumer, V.C., in Beeks v. Postlethwaite (1815) G. Cooper 161.

[4]In Cripps v. Jee (1793) 4 Bro. Ch. 472, he argued thus: "It is clear from the written evidence that the agreement really made between the parties was not that stated by the deed; will not that be sufficient to let in the parol evidence? In Irnham v. Child, 1 Bro. Ch. (Eng.) 92, 2 Dick. 554, Lord Thurlow laid down the rule very clearly, that the omission must be proved to be either by fraud or mistake in order to introduce the parol evidence. Here is that equity dehors the deed which he required. Here is evidence from the parties themselves, that the transaction was not what the deed purports it to be; this introduces Hunt's evidence, and he accounts for its being made an absolute conveyance, and makes it clear that the Rogerses were intended to be trustees, and that it was a pious fraud, as it was thought better they should not appear such; and the plaintiffs may clearly come for a

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But otherwise the precedents relating to the doctrine are quite harmonious.[5]

17. English decisions concerning the admissibility of parol evidence in actions at law.—Early in the nineteenth century it was held that, in an action of trover brought for a ship by the assignees in bankruptcy of the owners against the assignee in bankruptcy of persons to whom a bill of sale of the ship had been executed, it was not competent for the plaintiffs to avail themselves of a parol agreement, to the effect that the real consideration of the instrument was that the ship was to be a security for future advances to be made by the grantees to the owners, but was to remain in the possession of the owners until they made default in providing for the payment of the advance. So far as the owners of the ship were concerned such an agreement was "in contradiction of their own deed," and their assignees were in this respect in no better situation.[6] As evidence of the parol agreement thus excluded would clearly have been admissible in an equitable suit, this decision may be regarded as being in effect illustrative of a difference between the rules of law and equity. But this aspect of the matter was not alluded to.

On the other hand, in several later cases, parol evidence was declared or assumed to be admissible for the purpose of shewing that the transactions in question were mortgages or pledges.[7]

redemption. The whole has arisen from the bankruptcy of Rogers." The written evidence introduced consisted of certain entries in the account books of one of the grantees, and a note and bond by which the widow of that grantee and the other grantee acknowledged themselves to be trustees of the grantor's estates.

[5]In addition to the cases cited in note, 1, ante, see the following: Yates v. Hambly (1742) 2 Atk. 360 (defendant held to be entitled to an absolute estate, though it was "an exceeding dark transaction"); England v. Codrington (1758) 1 Eden 169; Perry v. Marston (1788) 2 Bro. Ch. (Eng.) 397, 2 Cox, Ch. Cas. 295; Barron v. Martin (1815) G. Cooper 192, 2 Cox, Ch. Cas. 290; Williams v. Owen (1840) 5 Myl. & C. (Eng.) 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114; reversing 10 Sim. 386; Tull v. Owen (1840) 4 Young & Exch. 192, 9 L.J. Exch. n Eq. N.S. 33; Barnhart v. Greenshields (1853) 9 Moore P. C.C.N.S. 18, affirming 3 Grant, Ch. (U.C.) 1; Holmes v. Mathews (1855) 9 Moore P.C.C.N.S. 413, affirming 5 Grant, Ch. (U.C.) 1; Alderson v. White (1858) 2 De. G. & J. 105, 4 Jur. N.C. 125, 6 Week. Rep. 242; Manchester, S. & L.R. Co. v. North-Central Wagon Co. (1888) L.R. 13 App. Cas. 554, 58 L.J. Ch. N.S. 219, 59 L.T.N.S. 730, 37 Week. Rep. 305, 5 Eng. Rul. Cas. 42, per Lord Macnaghten, (arguendo); Fee v. Cobine (1847) 11 Ir. Eq. Rep. 406; Lincoln v. Wright (1859) 4 De G. & J. 16, 5 Jur. N.S. 1142, 7 Week. Rep. 350; Douglas v. Culverwell (1862) 4 De G. F. & J. 20, 6 L.T. N.S. 272, 10 Week. Rep. 327, affirming 31 L.J. Ch. N.S. 65, 543, 8 Jur. N.S. 29, 3 Giff. 251.

[6]Robinson v. M'Donnell (1818) 2 B. & Ald. 134, 5 M. & S. 228.

[7]In Allenby v. Dalton (1827) 5 L.J.K.B. 312 (assumpsit), where the contract involved provided for the surrender of a copyhold, and included a defeasance agreement, circumstantial evidence (not stated except the payment of interest by the surrender) was admitted in an action of assumpsit, for the purpose of shewing the transaction was really a mortgage.

In Myers v. Willis (1855) 17 C.B. 77, an action for damages resulting from the failure to transport a cargo, the court citing an equity case, admit-

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In none of these cases was any reference made to the earlier decision mentioned above.

18. Scotland.—In Bell's Com. § 2257, the law is stated thus: "Written evidence alone is competent in bargains and conveyances of land, and in proof of trust. Parol evidence is not sufficient, and so is excluded, as proof to establish (inter alia) . . . the qualification or alteration of a written agreement. But this doctrine is subject to an exception when the written contract is challenged for fraud or error." The "fraud" here mentioned apparently connotes only actual fraud. Professor Bell makes no reference to the English doctrine under which the admissibility of parol evidence for the purpose of converting an absolute conveyance into a mortgage is predicated upon the conception of a constructive fraud. See § 11, ante.

ted evidence which shewed that the bill of sale in question was accompanied by a latter stating it to be executed as security, and had been accepted on those terms, and also that the consideration of the instrument was inadequate.

In Gardner v. Cazenove (1856) 1 Hurlst. & N. 423, 26 L.J. Exch. N.S. 17, 5 Week. Rep. 195 (decided with reference to the provisions in the merchant shipping acts, anterior to that of 1854), where the point involved was the right of the vendee of a ship to the freight carried by it, the vendor testified that a member of the firm to which she belonged, when verbally requested by the vendee to renew a bill given for the purchase price, refused to do so unless the applicant would pledge himself to procure the transfer as a security if the second bill was not paid, and that, if the bill had been paid, the vendor had no right to the vessel. Replying to the contention of counsel that such evidence had been improperly admitted in a court of law, Watson, B., said: "Both at law and in equity, although an assignment (of a ship) is absolute in the face of it, the court may look and see whether it is by way of pledge or sale."

In Ward v. Beck (1863) 13 C.B.N.S. (668) 32 L.J.C.P.N.S. 113, 9 Jur. N.S. 912, it was held that § 66 of the merchant shipping act, 1854 (17 & 18 Vict. chap. 104), did not preclude the owner of a ship who had executed an absolute transfer of his interest therein, from shewing that the real intention of it was to give the transferee only a security by way of mortgage for an advance of money. This case and the preceding ones were followed in The Innisfallen (1866) L.R. 1 Adm. & Eccl. 72.

In Braddock v. Derisley (1858) 1 Fost. & F. 60, an action of ejectment, both the plaintiff and the defendant claimed to have purchased the premises, and the defendant had in fact had them knocked down to him at an auction; but the plaintiff had paid the deposit and the purchase money, and had the estate conveyed to him. The case for the defendant was that the plaintiff was to advance the money to him for the purchase, and that the estate should be conveyed to the plaintiff only by way of mortgage. Wightman, J., thus directed the jury: "The question for you is whether the plaintiff was the real purchaser of the premises, and the defendant had been in possession as his tenant, or whether there was an understanding between them that the defendant was to be the purchaser, and the premises were to be assigned the plaintiff only as security for the purchase money." So far as the report shews, it was not contended by counsel that parol evidence was admissible only in an equitable suit. Commenting upon the language of Wightman, J., the reporter remarks in a note: "This might not have been a legal answer, as the estate had passed (see Feret v. Hill, 23 L.J.C.P.N.S. (Eng.) 185, 15 C.B. 207, 2 C.L.R. 1366, 18 Jur. 1014, 2 Week. Rep. 493) but on a bill to have the estate conveyed to the defendant, the court of equity would desire to have the question of fact determined, and probably by a jury; so that practically, it was the substantial question, if any, to be tried."

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That doctrine, however, was applied by the House of Lords in a case in which a Scotch decision was affirmed.[s] The theory upon which that decision proceeded is not stated in the report; but the conclusion that it was the same as that adopted by Lord Cottenham in his judgment may reasonably be drawn from the fact that neither he nor the counsel who represented the appellant suggested that the law of Scotland differed from that of England with respect to the admissibility of parol evidence.

VI. Doctrine adopted in British possessions.

19. Supreme Court of Canada.—The competency of parol evidence for the purpose of converting an absolute conveyance has been affirmed in unqualified language by the Supreme Court of Canada.[1]

20. Upper Canada and Ontario.—In what appears to be the earliest of the reported cases which bear upon the subject, the decision that the deed in question was intended by the parties to operate as a mortgage proceeded simply upon the ground that the intention in that regard was deducible from certain elements of direct and circumstantial evidence.[2] The court made no reference to the limitations upon the admission of parol evidence which were afterwards established. The rationale of another case decided during the same year is indicated by the following statement of the court: "There has been such a dealing upon the faith of the contract sought to be established as obliges us, upon the clearest principles of justice, to admit evidence of that contract, and enforce its complete observance."[3] The doctrine relied upon in

[s]Scottish U. Ins. Co. v. Queensberry (1842) 1 Bell Sc. App. Cas. 183.

[1]In Rose v. Hickey (unreported), the effect of which is stated in Cassels's Dig. p. 535, it was held that parol evidence was admissible to shew that the absolute conveyance was intended to take effect as a mortgage. It was also declared that the judgment of the court below, so far as it proceeded on the ground that the testimony of the plaintiff, C. H. Rose, required confirmation, was correct, and ought to be affirmed. The decision appealed from was rendered in Ontario (1878) 3 Ont. App. Rep. 309. (See next section, note 8, post.) But no opinion was expressed as to the peculiar doctrine applied in that Province.

For another which indicates an acceptance of the unrestricted doctrine, see McMicken v. Ontario Bank (1891) 20 Can. S. C. 548.

In Robinson v. Chisholm (1894) 27 N.S. 74, a Nova Scotia decision in which the admissibility of parol evidence was asserted without any qualification was affirmed; but no allusion was made by the supreme court to this aspect of the case.

[2]Stewart v. Horton (1850) 2 Grant, Ch. 45. The circumstances relied upon were, that the consideration was inadequate, that the assignment was one made by an imprisoned debtor to his creditor, and that certain witnesses had testified that the agreement was one for security merely.

[3]Le Targe v. De Tuyll (1850) 1 Grant, Ch. 227. Blake, Ch., said: "It is true that in cases like that now under our consideration, possession is not changed upon the contract, but possession is continued in direct opposition to the written contract; and one feels strongly that to suffer a mortgagor who continues in possession under a parol contract for redemption, to be

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this instance may be regarded as representing one particular phase of the more comprehensive one which was expounded in several cases decided during the next few years. The effect of those cases is that, for the purpose of proving that an instrument of transfer, absolute in form, was intended to operate as a mortgage, parol evidence is not admissible unless a foundation for its admission has first been laid by the introduction of testimony, the quality of which is defined by such statements as the following: that the party who alleges that the transaction was a mortgage must "shew by something which does not depend upon parol evidence that there is reason to believe the instrument does not truly speak the agreement made;"[4] that "there must be evidence of some fact—something done that cannot be accounted for otherwise than by inferring a new and different agreement than the

treated as a trespasser and charged with rents and profits, would be to sanction a fraud as flagrant as could occur in any case that can be suggested. But whatever the result may be, where continued possession is the only circumstance upon which the admission of parol testimony is rested, we think that no doubt can exist where the parties have so dealt as to render such continued possession clearly referable to the parol agreement—as for instance, by the demand and payment of interest, or the demand and payment of the debt, or any portion of it, which has been the case here." See also the remarks of Spragge, V.C., on the second hearing of the case, 3 Grant, Ch. 369.

[4]Howland v. Stewart (1850) 2 Grant, Ch. 61. In the judgment delivered for the court, Burns, J., said: "Assuming for the present that the evidence does clearly prove that the defendants did agree to execute such a bond as stated, the question is whether parol evidence is sufficient to establish what the plaintiff contends for; or rather, the true way to look at it is, treating the plaintiff's case as true, according to the legal effect of his statements when taken altogether, can an agreement, resting entirely in parol, to execute a bond for reconveyance at a future period, be received to control the positive effect of the conveyance? Or, in other words, can the nonexecution of such bond at the future period, whenever that may be, be treated as such a fraud that parol evidence of the agreement may be received to control the effect of the conveyance? We understand the plaintiff to rest his case upon the proposition that in all cases where the question is mortgage or no mortgage, parol evidence is admissible, and that such evidence is receivable to shew that an agreement or defeasance was afterwards to be executed; that is, what was necessary to constitute the transaction a mortgage was agreed to be reduced to writing, and consequently equity would consider an agreement to reduce the agreement to writing as a matter outside the statute of frauds. There is no pretense that the deed was obtained upon any other footing than that of a verbal promise to execute a bond at a future period, and the fraud consists in the defendants not performing that promise. No fraud was committed at the time of the execution of the conveyance, nor does the plaintiff pretend there was anything unfair at that time. He executed the deed, well-knowing what the contents were and their effect, and did so on the defendants' promise to execute a bond at a future time. The fraud of the defendants was therefore committed when they refused to execute the bond, and the plaintiff's case is in fact an attempt to carry that back to the time of the giving of the conveyance, and to engraft upon the conveyance, for the purpose of controlling its legal effect, the subsequent fraud of the defendants in refusing to comply with their agreement; the evidence of that agreement resting entirely in the recollection of witnesses, without any manifestation by writing in any way, or any acts of the defendants inconsistent with what the deed purports to be upon the face of it. We find no case where a court of equity has decreed the performance of such an agreement as the plaintiff states and denied by the defendant, and can nowhere discover any authority or

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deed imports;"[5] that parol evidence is only admissible "after it has been made manifest by written evidence legally admissible, or by the conduct or admission of the party, that the transaction could not have been such as the deed represents it to have been;"[6] that, "if a foundation had been laid for the reception of parol evidence by proof of any fraud charged against the defendant, in declining to execute a defeasance which he had agreed to execute, or in obtaining the deed in its present terms by any deception or contrivance; or if facts had been proved from which the court could see clearly that the conduct of the parties since the assignment had been inconsistent with such a transaction, as the deed alone would import, then parol evidence might have been admissible to explain the real intention of the transaction;"[7] "that there may be facts shewn, either by written or verbal evidence,

principle which can be adduced to support such a case. . . . There is no doubt that in cases of accident, mistake, or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat the terms of written instruments; but the plaintiff, in our opinion, misapplies in this case the effect of the cases decided on these heads. If we were to hold that simply to prove an agreement to give a defeasance at a future time, and that the not giving it was such a fraud that equity would decree specific performance of it, we are quite sure it would be so held for the first time. We can discover no principle which applies to mortgage cases different from other cases, as to the reception of parol proofs, but in every case where parol evidence has been received, there has been something independent of the parol evidence to shew the transaction different from what the deed expresses before the proof is let in, and then the evidence is receivable for the purpose of explaining the transaction. The whole current of authority shews this to be so, and it at once explains the grounds upon which equity acts, and proves that no conflict whatever exists between the two jurisdictions in the reception of such proofs.

[5]Greenshields v. Barnhart (1851) 3 Grant, Ch. 1.

[6]Matthews v. Holmes (1853) 5 Grant, Ch. 32, reversing 3 Grant, Ch. (U.C.) 379. There Robinson, Ch. J., said: "We cannot properly accede, I think, to the broad way in which it has been stated in argument, that parol evidence may always be received to vary or contradict a deed upon the question of mortgage or no mortgage, because the very question involves an inquiry into an imputed fraud. The argument seems to be this: Because it would be fraudulent in any man to set up a conveyance as absolute, which it was intended he should hold only as a security (though it was made absolute in its terms), therefore you are at liberty to shew by any kind of evidence, and without regard to what is contained in the seventh clause of the statute of frauds, that the grantee in the deed did verbally agree that his absolute conveyance should be acted upon and used by him only as a security. The reason of this thing, I think, lies the other way. . . . What I do not accede to is, that a party holding an absolute conveyance of an estate is liable to have his interest cut down to a mortgage by parol evidence alone of his verbal admission, at the time of making the deed or afterwards, or by any mere verbal statements of witnesses as to the nature of the transaction."

[7]Munro v. Watson (1860) 8 Grant, Ch. 60, reversing 6 Grant, Ch. 385. In the reversed decision, however, Blake, Ch., referred to two circumstances as shewn by the evidence, viz., (1) that the value of the improvements on the land was three or four times as great as the amount paid by the defendant; and (2) that the plaintiff continued to receive the rent of the property for two years after the assignment. It would seem that, under the doctrine with reference to which the case was decided, such facts as these might reasonably be regarded as "laying a foundation" for the introduction of parol evidence.

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which, when established to the satisfaction of the court, may lead to the conviction that a deed on the face of it absolute could not have been intended so to operate between the parties, and that this will lay a proper foundation for receiving parol testimony to explain what was the real nature of the transaction, is clear on numerous authorities."[8]

In a portion of the cases which have been decided since the doctrine embodied in these statements was first formulated it has been explicitly referred to.[9] In others the courts, without mentioning it, have proceeded upon the broad ground that parol evidence is admissible.[10] Having regard to the number of instances

[8]Robinson, Ch. J., in Bernard v. Walker (1862) 2 U.C. Err. & App. 121. In Greenshields v. Barnhart (1851) 3 Grant's Ch. 1 (50), Macaulay, J., said: "I take it therefore to be clear, that it is not competent to the respondent Robert Barnhart, in this case, to prove by mere parol evidence, upon the footing of the assignment to Patterson, being only in part performance of a pre-existing oral contract on the subject, or upon any other ground short of fraud, actual or presumed, that such assignment was not to be absolute, but was only to operate as a security and to be redeemable, however oral or parol evidence may be made available as auxiliary or explanatory when an equity is first raised aliunde and irrespectively. Consequently, it depends upon the consideration whether facts and circumstances dehors the assignment, and not mere oral statements, exist, and are shewn sufficient to raise the equity alleged, according to what I take to be the true principle, as admirably expressed by Lord Chief Baron Eyre, in Davis v. Symonds (1787) 1 Cox, Ch. Cas. (Eng.) 402, 1 Revised Rep. 63; and see also Hartopp v. Hartopp (1810) 17 Ves. Jr. (Eng.) 184."

[9]Papineau v. Gurd (1851) 2 Grant, Ch. 512; Campbell v. Durkin (1870) 17 Grant, Ch. (U.C.) 80.

In Rose v. Hickey (1878) 3 Ont. App. 309, two members of the court held that relief could not be granted on the evidence before them, viz., the direct testimony of the son of the deceased grantor, as to certain declarations of the grantee, and letters written by the grantee after the transaction. Blake, V. C., dissented on the ground that the letters were sufficient to let in the parol evidence regarding the grantee's declarations, and that the trial judge being in a more favorable position for estimating its probative value, his opinion should be accepted as correct. The decision was affirmed by the Dominion supreme court. See § 19, note 1, ante.

[10]McIlroy v. Hawke (1856) 5 Grant, Ch. 516; Sampson v. McArthur (1860) 8 Grant, Ch. 72; Bullen v. Renwick (1860) 9 Grant, Ch. 202, reversing 8 Grant, Ch. 342; Bernard v. Walker (1862) 2 U.C. Err. & App. 121; McDonald v. McDonell (1864) 2 U.C. Err. & App. 393; Fallon v. Keenan (1866) 12 Grant, Ch. 388; Healey v. Daniels (1868) 14 Grant, Ch. 633; Rapson v. Hersee (1869) 16 Grant, Ch. 685; Stuart v. Bank of Montreal (1913) 10 D.L.R. 841, 24 Ont. W.R. 714.

In Bostwick v. Phillips (1858) 6 Grant, Ch. 427, a lessee of the Crown, being in arrears for rent, assigned his interest to another, taking a bond to reconvey a half thereof, on payment of half the amount advanced, within a year. A mortgage was inferred from evidence given by the person who drew the deed, and by another witness, regarding the nature of the transaction contemplated by the parties. Spragge, V.C., proceeded upon the broad doctrine that "oral testimony is admissible on the question of mortgage or no mortgage," and made no reference to the qualification of that doctrine established by the cases cited in the preceding notes. Esten, V.C., treated the parol evidence as being corroborative of the conclusion deducible from the papers themselves. But there is no warrant in the English cases (the more recent ones, at all events) for the doctrine that a contract which includes a stipulation as to reconveyance is prima facie a mortgage. See § 115, note 1, post.

In Roscoe v. McConnell (1913) 29 D.L.R. 121, a transaction in which

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in which it has been explicitly affirmed, no particular importance can be attached to the fact that it was not distinctly relied upon in these cases. But in one instance it seems to have been not merely ignored, but contravened.[11]

The following elements have been adverted to as being sufficient to "lay a foundation" for the admission of parol evidence:—The fact that, after the execution of the given instrument of transfer, the transferor continued in possession of the property, and treated it as his own;[12] circumstances disclosed by the

the instruments consisted of a deed and a writing by which the grantors were given the right of repurchase, and time was declared to be of the essence of the contract, was held not to be a mortgage, for the reason that, while the grantor's attorney and the grantee were carrying on a correspondence regarding the affair, both before and after the expiration of the period allowed for repurchase, the grantor made no objection to the grantee's construction of the contract as being an absolute sale. The earlier cases in which the competence of oral evidence was discussed were not referred to.

[11]In McAlpine v. How (1862) 9 Grant, Ch. 372, an assignment of a bond for the conveyance of land was made from a debtor to his creditor, by a writing absolute in form, but the creditor at the same time executed a memorandum shewing such assignment to be by way of security only. Subsequently the debtor executed another absolute assignment without receiving back any such memorandum from the creditor. The decision proceeded simply upon the ground that the evidence offered to shew that the assignor was to be interested in the proceeds of the land over and above his indebtedness to the assignee was insufficient to overcome the effect of the instrument itself. Commenting upon the testimony of a witness as to a statement made to him by the assignee, which "could not be reconciled with any other state of things than McAlpine being entitled to the surplus of the arbitration moneys, after paying the debt of the defendants," Esten, V.C., said: "The evidence afforded by this statement, which was made, McMillan says, not once, but many times, and probably in conversation with others or another of the defendants, and always to the same effect, and as a fact is incontestable, appears to me so strong that it has almost convinced my mind of the truth of the plaintiff's contention. Upon reflection, however, I think it insufficient to overbear the effect of the form of the transaction. I cannot imagine why, if the transaction were the creation of a new security, and not a purchase, it should not have assumed that form. Upon a former occasion a memorandum was delivered to McAlpine, indicative of his right of redemption. The parties, therefore, were alive to the importance of such a provision. Not only is any such provision omitted in the latter transaction, but the statement with regard to the payment of the consideration is utterly incompatible with the fact of this instrument being a mere security, and the variation of phraseology as regards the cost of the proceedings agrees with the view." As there was no "foundation laid" in this case by extrinsic testimony independent of the parol evidence considered, it is clear that, under the doctrine as to that prerequisite, the case might have been decided without any discussion of the probative weight of the statement referred to.

[12]Le Targe v. De Tuyll (1850) 1 Grant, Ch. 227; Papineau v. Gurd (1851) 2 Grant, Ch. 520; Barnhart v. Greenshields (1851) 3 Grant, Ch. 1; Mundell v. Tinkis (1884) 6 Ont. Rep. 625.

In Papineau v. Gurd (1851) 2 Grant, Ch. 512, it appeared that, when a sheriff's sale of plaintiff's lands was about to take place, he agreed with the defendant that the latter should buy the property at the sale, pay for it out of his (the defendant's) own funds, and give the plaintiff two years to repay him. The property was then sold for about one fifth or one eighth of its value to the defendant, who paid for it. The plaintiff was allowed to remain in possession for two years under the agreement, and to make valuable improvements on the property, and he also made payments which the grantee's

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contents of letters and other documents written by the parties;[12] the fact that, when third persons holding a mortgage on the property in question instituted a foreclosure suit, the grantee had taken an active part in assisting the grantor, as owner of the equity of redemption, to reduce the amount claimed to be due on the mortgage, and also to have the time extended for payment of the mortgage debt;[14] and the failure of the parties to come to any definite understanding as to the value which, for the purposes of the transaction, should be ascribed to the property conveyed.[15]

The parol evidence which, in the absence of the above specified or similar elements, is regarded as incompetent, is that which consists of oral statements made by the parties with respect to the quality of the transaction.[16]

answer shewed to have been made as interest. Blake, Ch., said: "The plaintiff has acted upon the parol agreement in such a way that it would be a fraud upon him unless it were performed. He has been placed in a situation which makes it against conscience that the defendant should be allowed to insist on the want of writing as a bar to his relief; and therefore the parol evidence is, of necessity, as it were, admitted. And, being received, establishes, in our opinion, the plaintiff's case."

[13]Rose v. Hickey (1878) 3 Ont. App. 309. Patterson, J.A., was of opinion that the letters in question were not "clear and unambiguous," and, being as consistent with the theory of a mortgage as of a sale, "fell short of establishing that the conveyance was not intended to be what on its face it purported to be." One of the letters contained the following words: "Pay me my advances, as agreed, and you can have your property." The learned judge observed that the word "advances" is "usually employed to denote money paid which is to be repaid, but it does not necessarily mean more than 'outlay,' or 'money out of pocket.'" Burton, J.A., did not express any definite opinion upon the particular aspect of the evidence; but Blake, V.C., considered that this letter and certain memoranda of amounts paid for the grantor "furnished, within the authorities, ample ground for the admission of verbal testimony."

[14]Bernard v. Walker (1867) 2 U.C. Err. & App. 121.

[15]In Bernard v. Walker, supra, the plaintiff relied on the following circumstances, of which there was evidence: First, that according to the defendant's deposition in this case, and from the other evidence, no certain sum was paid or agreed to be paid as the price of the land, nor anything said or considered between the parties in regard to its value, nor any reckoning of the amount which the grantees in the deed had already paid to the city on the plaintiff's account, or of the amount which they would be called upon to pay thereafter, nor any amount brought forward, or spoken of as being due by Thompson to the plaintiff on their mutual transactions; though it had been understood that any debt due by Thompson should be allowed to be set against the moneys advanced or to be advanced by the grantees in the deed to the city, on account of the plaintiff. Robinson, Ch. J., said: "If the transaction was really such as Bernard represents,—simply a sale of the land in consideration of whatever claim Thompson and Bernard might have upon the plaintiff for indemnity,—it would certainly seem strange that the parties should have entered into no calculations to ascertain how far the land would or would not be a just satisfaction of the indemnity which the sureties would have had a right to claim.

[16]In Greenshields v. Barnhart (1851) 3 Grant, Ch. 1, Robinson, Ch. J., said: "Besides what was said respecting the possession, I find nothing in the evidence of any of the witnesses on which I can suppose it to have been imagined by the plaintiff that he could expect us to hold the case to be taken out of the statute of frauds, unless it be what is said by John Barnhart. We can-

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21. Upper Canada and Ontario, criticism of doctrine adopted in.—The doctrine stated in the preceding subsection is open to three objections, any one of which would seem to be fatal.

In the first place, it is not warranted by the English decisions as a whole. Only one of those decisions can be said to afford it any support. Towards the close of the eighteenth century, Pepper Arden, M.R., expressed the opinion that certain parol evidence which he received would have been treated as inadmissible if certain written evidence had not been previously introduced.[17] But the views of a judge of such mediocre ability are manifestly of no importance, when it is apparent that they were inconsistent with the rest of the authorities.[18] The utmost that can be affirmed with regard to the English cases apart from this one is, that the decisions as rendered are in harmony with the Provincial doctrine to this extent, that, in the various combinations of elements upon which the conclusions arrived at in each instance were based, there is generally found one or more circumstances of the same nature as those which, under that doctrine, are regarded as supplying a sufficient foundation for the admission

not act upon what he said he was told in May, 1834, or at any time, about the object of giving the deed, and that it was to be a security. If the statute of frauds had never been passed, the deed would not be allowed to be affected by such evidence. A plaintiff suing on a bond for £1,000 might be as well met by evidence that he had been heard to say he was never entitled to claim more than £500 under it; and why should not a mortgage for £2,000 be cut down to a mortgage for £1,000 by parol evidence, as well as an absolute estate reduced to one that is redeemable? . . . Mere parol evidence, such as the plaintiff's father swearing that both parties told him that the assignment was meant to be only a security, can never of itself be allowed to unsettle the title under the deed."

In Bernard v. Walker (1862) 2 U.C. Err. & App. 121, Robinson, Ch. J., said: "We must hold, I think, that the plaintiff in this case should not be allowed to redeem, if he had nothing to rely upon but the verbal evidence of witnesses that the defendant Bernard had, either at the time of the deed of the 28th of October, 1851, being executed, or afterwards, admitted that that deed was only taken as a security, and was not intended to operate as an absolute conveyance. Still less could any evidence avail of conversations had with him before the deed was made."

See also Matthews v. Holmes (1853) 5 Grant, Ch. 1; Munro v. Watson (1860) 8 Grant, Ch. 60; Rose v. Hickey (1878) 3 Ont. App. 309.

[17]Cripps v. Jee (1793) 4 Bro. Ch. (Eng.) 472. See § 16, note 3, ante. This case was cited in Le Targe v. De Tuyll (1850) 1 Grant, Ch. 227, as "warranting this proposition: that where it is clear from the written evidence that the agreement really made between the parties was not that stated by the deed, parol evidence will be admitted." The words quoted were wrongly ascribed to Lord Kenyon.

[18]The only case cited by the Master of the Rolls was Irnham v. Child (1781) 1 Bro. Ch. 92, 2 Dick. 554 (see § 9, note 2, ante), in which Lord Thurlow had laid it down that, in the absence of allegations of fraud or mistake, the redeemable quality of an annuity could not be shewn by parol evidence. But it is well settled that mortgages and annuities stand in this respect upon a different footing. See note 2, ante. This distinction, it should be observed, was evidently not understood by the court which in Greenshields v. Barnhart (1851) 3 Grant, Ch. (U.C.) 1, treated the annuity cases as being precedents in point.

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of parol evidence.[19] Indeed an attempt has been made to justify the doctrine on this very ground.[20] But as no English judge except the one just mentioned has ever formally and explicitly recognized it, the hypothesis that the English and Provincial cases can be reconciled upon this footing is manifestly untenable. The significance of this consideration is greatly augmented by the circumstance that, although some of the Provincial cases have been affirmed by the Privy Council upon the facts as presented, the affirming judgments do not contain any words that can be construed as denoting an approval of the Provincial doctrine.[21] It seems impossible to avoid the conclusion that the adoption of that doctrine resulted from an imperfect acquaintance with the English precedents which are reviewed in §§ 15, 16, ante.[22] It may reasonably be supposed that, if the attention of the courts whose judgments established the doctrine had been directed to all those

[19]In order to shew that, even in this point of view, the Provincial doctrine cannot be reconciled with all the English decisions, it is only necessary to refer to one which has been cited by the Provincial courts,—Lincoln v. Wright (1859) 4 De G. & J. 16, 28 L.J. Ch. N.S. 705, 7 Week. Rep. 350. There the evidence upon which Turner, L.J., relied, as being confirmatory of that bearing directly upon the purport of the alleged parol agreement that the transaction was to be one of lending and borrowing, consisted of certain testimony which tended to shew that the father of the grantee, a minor, had inquired about the safety of the investment, and that, after his death, the minor's guardian had offered to pay the grantor a certain amount if he would relinquish the property. Such evidence seems to have been entirely "parol," in the sense in which that word is understood by the Provincial courts. See note 15, supra. Under these circumstances it is somewhat singular that those courts, so far from having observed that the case really overthrows their doctrine, have even cited it as a precedent. See Campbell v. Durkin (1870) 17 Grant, Ch. 80; Rose v. Hickey (1878) 3 Ont. App. 309.

[20]In Matthew v. Holmes (1853) 5 Grant, Ch. 1, Robinson, C.J., argued thus: "It is true there are cases in which very eminent judges in equity have so expressed themselves as to afford support to the doctrine in its full extent: that, for the purpose of deciding upon the question of mortgage or no mortgage, parol evidence is always admissible,—that is, under all circumstances, and not merely in aid of other proofs; but almost invariably, I think, in such cases something appears in the report of the case which shews you that, either from the admissions in the answer or from something in the conduct of the parties in dealing with the property, or in recognizing a debt as still due, a foundation has been laid for holding that the deed cannot be suffered to be advanced as an absolute title, and then parol evidence has been called in to explain what the true nature of the transaction was. I do not mean to say that all that has been held and done from the beginning in this way is easy to be reconciled with reason and acts of Parliament, but that there are such limits to the reception of parol evidence in these cases as I have endeavoured to describe. And if in any case a court has gone the length of acting upon the naked principle that whether mortgage or no mortgage is always a question which opens the door unreservedly to the reception of parol evidence, it has been held to be an error, which subsequent decisions have corrected."

[21]See Barnhart v. Greenshields (1853) 9 Moore, P.C.C. 18, affirming 3 Grant, Ch. (U.C.) 1; Holmes v. Matthews (1855) 9 Moore, P.C.C. 413, affirming 5 Grant, Ch. (U.C.)1.

[22]The list of authorities cited in what may be regarded as the leading case, Howland v. Stewart (1850) 2 Grant, Ch. (U.C.) 61, is very incomplete, and the cases which have followed it did not enlarge the list to any great extent.

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decisions, the position taken by them would have been different. Owing to their inadequate knowledge of the older authorities they failed to grasp the two fundamental conceptions upon which the whole law of the subject hinges, viz., (1) that the ground upon which parol evidence is deemed by the English court of chancery to be admissible for the purpose of shewing that an instrument of transfer, absolute in form, was intended as a mortgage, is simply constructive or quasi fraud; and (2) that cases in which it is sought to affix the quality of a mortgage to an instrument of that character constitute the only class in which that description of fraud is recognized as a ground for admitting parol evidence to control the words of a written contract.[23]

[23] If the true ground of the admissibility of parol evidence had been adequately understood by the court which decided Howland v. Stewart, supra, it would not have taken so much pains to demonstrate that actual fraud could not be inferred from the mere fact that the grantee had violated a specific promise to give a bond for reconveyance. Under the English doctrine that circumstance would simply have been regarded as evidence of the intention entertained by the parties at the time the deed was executed. In the same judgment it was observed that in Maxwell v. Mountaeute (1719) Prec. in Ch. 526, one of the propositions put is, that where it was agreed that the mortgage should be in the old form, the one then in use, and that the mortgagor should execute an absolute conveyance and there should be a defeasance from the mortgagee, it would be decreed a mortgage. The following comment was made upon this statement: "What undoubtedly was meant was not merely an agreement for a defeasance, to be executed at some future period, but one which was either prepared or in course of preparation, and the party refused to execute it; for the case itself shews that a distinction was taken where the parties came to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they wholly rely upon their parol agreement, in which case it is stated, that unless this be executed in fact, neither party can compel the other to a specific performance; and the case where there is an agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, as where instructions are given and preparations made for drawing a marriage settlement, etc., in which cases the court gives relief." The court omitted to mention, and apparently was not aware, that the "proposition" thus referred to was merely a statement of the effect of an earlier decision, rendered by Lord Nottingham soon after the enactment of the statute of frauds. Several other versions of his statement are set out in § 16, note 1, ante, and it is submitted that neither in the one referred to by the court (which, it may be remarked in passing, is not accurately quoted) nor in any of the others is there any sufficient warrant for the view that he had in mind merely the consequences of a refusal to execute a defeasance contract under circumstances indicative of the conclusion that the grantee was guilty of actual fraud in respect of procuring the execution of the absolute deed.

The passage quoted in note 5, supra, from the judgment delivered in Matthews v. Holmes (1853) 5 Grant, Ch. (U.C.) 1, affords another curious illustration of the length to which the Provincial courts have gone in attempting to explain away the English authorities.

In Le Targe v. De Tuyll (1850) 1 Grant, Ch. 227, Blake, Ch., observed: "We think that the law of England, by which we are governed, knows no distinction between mortgage and other contracts, in this respect, and that the question whether parol evidence should or should not be received is to be solved on principles generally applicable." The learned judge also admitted that the doctrine which was being adopted by the court was inconsistent with the broad statements made by such eminent text writers as Butler's Co. Litt. vol. 2, p. 205, note 96; Powell, Mortg. 15, 125a, with Coventry's note; Coote,

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A second objection to the doctrine is that, in the form in which it has been enunciated and applied, it involves a manifest inconsistency. If the position had been taken that only written evidence was competent for the purpose of laying a foundation for the introduction of parol evidence, a definite and perfectly logical theory would have resulted. But it is clear that the circumstances which are regarded as appropriate to "lay a foundation" (see preceding section) are of such a character that they must ordinarily be shewn, if at all, by parol evidence. Indeed, it has been explicitly laid down that they may be established "either by written or verbal evidence."[24] In this point of view it is clear that the doctrine operates so as to create a purely arbitrary distinction between verbal evidence which relates to circumstances appropriate to "lay a foundation," and verbal evidence which relates to those statements of the parties which cannot be proved until the foundation is laid.

Finally, having regard to the language used and the decisions rendered by the Provincial courts, it seems to be impossible to avoid the conclusion that, for the purpose of the doctrine, the expression "parol evidence" is assumed to connote "parol evidence concerning oral declarations." Such a connotation is certainly not warranted by ordinary usage.[25] There can be no question but that the expression "parol evidence," as commonly understood and employed, is synonymous with "oral evidence," and that it is equally applicable, irrespective of the nature of the subject-matter of the evidence.

22. Other Canadian Provinces, exclusive of Quebec.—In all the other Canadian Provinces in which the common law is administered the admissibility of parol evidence has been affirmed without any qualification.[26]

Mortg. p. 25. The statement in Coote on Mortgages, was also deliberately disregarded in Howland v. Stewart (1850) 2 Grant, Ch. (U.C.) 61. It is remarkable that these authorities should have been so lightly brushed aside in the earlier cases by which the Provincial doctrine was established, and still more remarkable that, so far as appears from the reports, it has never since occurred to any judge or counsel to make a further investigation for the purpose of ascertaining whether authors of such high reputation might not, after all, have correctly understood the real effect of the English decisions.

[24] See Bernard v. Walker (1862) 2 U.C. Err. & App. 139.

[25] A few American cases in which a similar meaning has been ascribed to the words "parol evidence" are cited in § 2 note 3, ante.

[26] Arnold v. National Trust Co. (1912)—Alta.—, 7 D.L.R. 754; Whitlow v. Stimson (1909) 14 B.C. 321; Rutherford v. Mitchell (1904) 15 Manitoba L. Rep. 390; Winthrop v. Roberts (1907) 17 Manitoba L. Rep. 221; Hillock v. Frizzle (1863) 10 N.B. 655; Beaton v. Wilbur (1906) 3 N.B. Eq. Rep. 309; Robinson v. Chisholm (1894) 27 N.S. 74; Fraser v. Murray (1901) 34 N.S. 186 (action of replevin); Blunt v. Marsh (1888) 1 Terr. L. Rep. 126; Boardman v. Handley (1899) 4 Terr. L. Rep. 266.

In Lamont v. Olson (1911) 18 West L. Rep. (Can.) 200, the question whether parol evidence was admissible to shew that a bill of sale was intended as a

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23. Quebec.—By § 2040 of the Civil Code, enacted that it is "conventional hypothec cannot be granted otherwise than by acts in authentic form." So far as the present writer has been able to ascertain, this provision is not subject to any qualification except that which is created by § 991 of the Code, under which "error, fraud, violence, or fear and lesion are causes of nullity in contracts."

24. Australia.—A doctrine of the same unqualified character as that which prevails in England and in most of the Canadian courts has been applied in Victoria [27] and New Zealand.[28]

VII. Competency of parol evidence considered with relation to the distinction between trusts and mortgages.

25. Generally.—That a conveyance in trust is fundamentally dissimilar from a conveyance by way of mortgage is apparent from two considerations. The essence of the former is a "confidence" reposed in the grantee with respect to the property in question,[1] while the latter—at all events under that equitable theory with which alone we are concerned in the present discussion—operates merely so as to subject the property to a lien. Again, the former "is an absolute and indefeasible conveyance of the subject-matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible."[2] In either of these two points of view it is clear that the ultimate issue to which the evidence is directed in a case in which a trust is alleged is entirely different from that which is presented in a case in which the theory of an intention to create a mortgage is relied upon. The distinction between the two classes of transactions has frequently constituted the determinative factor in cases in which it has been held or assumed that enactments which provide that express trusts in respect of real property shall be authenticated by writing do not preclude the introduction of parol evidence for the purpose of shewing that an instrument which purports to convey property of that description absolutely was intended to operate as a mortgage;[3] and in cases which have proceeded upon the

mortgage was raised in a court of first instance, but left undecided, because a determination of the point was regarded as being unnecessary under the circumstances.

[27] Halfey v. Egan (1873) 4 Austr. J.R. 147; Young v. Mook Ah Meng (1891) 17 Vict. L.R. 143.

[28] Driver v. Carson (1888) 7 New Zealand L.R. 134 (interviews prior to the execution of the deed).

[1] See the definitions of "trusts" in Lewin on Trusts, 12th ed. p. 11, and Perry on Trusts, § 13.

[2] Hoffman v. Mackall (1855) 5 Ohio St. 133, 64 Am. Dec. 637.

[3] For cases in which this doctrine was explicitly affirmed with reference to deeds, see Taylor v. Luther (1836) 2 Sumn. 232, Fed. Cas. No. 13,796, per Story, J.; Amory v. Lawrence (1872) 3 Cliff. 523, Fed. Cas. No. 336, per Clifford, J.; Glass v. Hieronymus Bros. (1899) 125 Ala. 140, 82 Am. St. Rep.

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ground that the rule under which such evidence is treated as being admissible for the purpose of converting an absolute conveyance into a mortgage "affords no ground for saying that a parol trust can be upheld" in respect of property that falls within the scope of such provisions.[4]

26. Distinction not always observed by courts in cases involving the admissibility of parol evidence to establish a mortgage. —Notwithstanding the well-marked distinction between trusts and mortgages and the very important consequences which it involves, it has frequently been ignored to this extent, that, in cases involving claims or defenses based upon the theory that the instruments of transfer in question were intended to operate as mortgages, the transactions have been designated as trusts. Some illustrations of such phraseology are given in the footnote.[5]

These transitions from one point of view to another, and the consequent intermingling of two distinct juristic conceptions, is doubtless a result of the circumstance that the extrinsic evidence is frequently of such a nature that the transaction is susceptible of being construed, according to the point of view, either as a

225, 28 So. 71; Hovey v. Holcomb (1850) 11 Ill. 660; Brown v. Follette (1900) 155 Ind. 316, 58 N.E. 197; Kelso v. Kelso (1896) 16 Ind. App. 615, 44 N.E. 1013, 45 N.E. 1065; Greenwood Bldg. & L. Asso. v. Stanton (1902) 28 Ind. App. 548, 63 N.E. 574; Jones v. Gillett (1908) 142 Iowa, 506, 118 N.W. 514, 121 N.W. 5; Dusenberry v. Bidwell (1912) 86 Kan. 666, 121 Pac. 1098; Emerson v. Atwater (1859) 7 Mich. 12; Harper's Appeal (1870) 74 Pa. 320.

[4]Sturtevant v. Sturtevant (1815) 20 N.Y. 39, 75 Am. Dec. 371. The distinction adverted to in this case was also recognized in Barrett v. Carter (1870) 3 Lans. (N.Y.) 68; and Barton v. Lynch (1893) 69 Hun, 1, 23 N.Y. Supp. 217. See also Nevius v. Nevius (1907) 117 App. Div. 236, 101 N.Y. Supp. 1091, where it was held that parol evidence could not be introduced by a plaintiff who had specifically alleged that the bill of sale in question was executed as one of trust. See, however, § 27 (b), post.

[5]In Munro v. Watson (1860) 8 Grant, Ch. (U.C.) 60, the court said that the main question was whether the deed "was intended to be subject to a trust that the defendant would reconvey upon his receiving payment of his alleged debt and interest."

In Rose v. Hickey (1878) 3 Ont. App. Rep. 309, Patterson, J.A., adverted to "the written evidence on which the appellants rely for the purpose of shewing that the deed was only a trust; and enabling them to give parol evidence of the trust."

In Morris v. Nixon (1843) 1 How. (U.S.) 118, 11 L. ed. 69, the conveyance was declared to be subject to "a secret trust, for the security of moneys loaned and advanced by Nixon to the grantor." In another part of the opinion the circumstances were said to "raise a violent presumption of a secret trust," and to indicate that the deed was "meant to secure advances."

In Babcock v. Wyman (1856) 19 How. (U.S.) 289, 15 L. ed. 644, the court said: "We think that there can be no reasonable doubt that the deed in controversy was intended to be a mortgage. And this brings us to the second point of inquiry: Can the trust be established by parol testimony." In another place the court said: "Although the trust is denied in the answer, there are circumstances in the case which go strongly to establish it."

In Carr v. Carr (1873) 52 N.Y. 251, an agreement under which the purchase price of land owned by A was to be advanced by B to C, and B was to take the legal title as security, was referred to as having created a "trust in the nature of a mortgage for the security of the lender."

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mortgage or as a trust. This remark is more especially applicable to the cases in which the unexpressed terms which it is sought to affix to the contract comprise, in addition to the mere right of redemption, certain alleged arrangements with respect to the control and disposition of the subject-matter by the transferee. Under such circumstances, it is possible to consider the transaction either as a mortgage or a trust, according as the attention is fixed upon the element of a furnishing of security for money advanced by the transferee, or upon the element of his assumption of a certain responsibility with respect to the use as well as the reconveyance of the property. But the fact that the evidence may be regarded under either one of two alternative aspects scarcely seems to be a sufficient justification for speaking of a mortgagee as a trustee.

27. Admissibility of parol evidence on the ground of fraud.—(*a*) *Generally.*—The general principle under which parol evidence is always competent for the purpose of sustaining a claim or defense which is based on alleged fraud has been sometimes relied on even in jurisdictions in which the statute of frauds does not contain any provision as to express trusts, and there was consequently no necessity to invoke it.[6] But the results of its application are of course most striking in cases decided with reference to the limitations of such a provision.

(*b*) *English decisions.*—The English doctrine has been thus

[6]In Martin v. Martin (1855) 16 B. Mon. (Ky.) 8, a court commissioner sold a tract of land belonging to Josiah Martin to satisfy a judgment. Draffin bought the land for Josiah Martin to prevent, as he informed him after the sale, a sacrifice of his property. Draffin afterwards transferred the benefit of his purchase to E. Martin, with the agreement that he was to take Draffin's place in the purchase, pay the money bid by him for the land, and, when his brother paid him, he was to have the land back. After this transfer by Draffin, E. Martin procured an order for a conveyance of the land to himself. In a suit brought by Josiah Martin to cancel the deed and have the possession of the land surrendered by him, it was held "that, although the agreement was in parol, it was a trust that the purchaser could not refuse to perform." The court said: "The property was acquired by the defendant when the plaintiff had no right or power, in law, to redeem or repurchase, but Draffin bought the property for the plaintiff, and was, in fact, holding it in trust for him, and the right to redeem being conceded, he could as effectually have obtained it as if, by law, he could have enforced its surrender. He was as effectually lulled into repose, and his exertions to make a personal redemption from Draffin were as certainly prevented, by the arrangement with the defendant, as was the debtor by the arrangement with Coffey prevented from a redemption in person, in the case quoted from B. Monroe. . . . To apply the statute of frauds as a barrier to relief would be to make the statute an instrument for the perpetration, instead of the prevention, of frauds."

In Frazier v. Frazier (1908) 32 Ky. L. Rep. 1339, 108 S.W. 889, land belonging to an ex-slave had been purchased at a judical sale by a person who had orally agreed to permit him to redeem it. Upon that person's beginning to press for payment of the amount so expended, the property was conveyed, at the request of the ex-slave, to the son of his former master. The ex-slave's evidence that his master's son was to hold the property on the same trust as the third person was accepted as true by the court, being corroborated by the direct testimony of that person and others, and also by the fact that the sum advanced was much smaller than the value of the property.

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stated by the Court of Appeal: "It is . . . established by a series of cases, the propriety of which cannot now be questioned, that the statute of frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."[7]

[7]Lindley, L.J., in Rochefoucauld v. Boustead [1897] 1 Ch. 196 (judgment delivered for the whole court). The learned judge thus reviewed the earlier authorities: "In Bartlett v. Pickersgill (1760) 1 Eden, 515, 1 Cox, Ch. Cas. 15, 1 Revised Rep. 1, the trust was proved, and the defendant, who denied it, was tried for perjury and convicted, and yet it was held that the statute prevented the court from affording relief to the plaintiff. But this case cannot be regarded as law at the present day. The case was referred to in James v. Smith [1891] 1 Ch. 384, 63 L.T.N.S. 524, 39 Week. Rep. 396, and was treated as still law by Kekewich, J.; but his attention does not appear to have been called to Booth v. Turle (1873) L.R. 16 Eq. 182, 21 Week. Rep. 721, nor to Davies v. Otty (1865) 35 Beav. 208, 5 New Reports, 391, 34 L.J. Ch. N.S. 252, 12 L.T.N.S. 789, 13 Week. Rep. 484, both of which are quite opposed to Bartlett v. Pickersgill, supra. So is Haigh v. Kaye (1872) L.R. 7 Ch. 469, 41 L.J. Ch. N.S. 567, 26 L.T.N.S. 675, 20 Week. Rep. 597. The late Giffard, L.J., one of the best lawyers of modern times, speaking of Bartlett v. Pickersgill, supra, said: "It seems to be inconsistent with all the authorities of this court which proceed on the footing that it will not allow the statute of frauds to be made an instrument of fraud:" see Heard v. Pilley, L.R. 4 Ch. 553, 38 L.J. Ch. N.S. 718, 21 L.T.N.S. 68, 17 Week. Rep. 750. The case not only seems to be, but is, inconsistent with all modern decisions on the subject. See, in addition to those already mentioned, Lincoln v. Wright (1859) 4 De G. & J. 16, 28 L.J. Ch. N.S. 705, 7 Week. Rep. 350, where a conveyance absolute in form was held to be a mortgage only. See also Re Marlborough [1894] 2 Ch. 133, 63 L.J. Ch. N.S. 471, 8 Reports, 242, 70 L.T.N.S. 314, 42 Week. Rep. 456, in which Stirling, J., examined the authorities, and held that an assignment absolute in form was subject to a trust for the plaintiff." The court was by no means satisfied that certain letters signed by the defendant did not contain enough to satisfy the statute of frauds; but the opinion was expressed that "whether this is so or not, the other [parol] evidence is admissible in order to prevent the statute from being used in order to commit a fraud; and such other evidence proves the plaintiff's case completely."

It will be advisable to state briefly the purport of the decisions mentioned in the above extract. Davies v. Otty (parol evidence held by Lord Romilly, M.R., to be admissible to prove a parol agreement that the grantee should reconvey the land conveyed, if the grantor should be convicted of bigamy on a trial about to take place); Booth v. Turle (parol evidence held admissible by Malins, V.C., to prove an agreement that an assignee of leased premises was to hold a part of them in trust for the assignor); Haigh v. Kaye, (parol evidence held to be admissible to affix a trust to a deed expressed to be absolute in consideration of a sum of money, but in point of fact made without any consideration; trust declared, defendant having admitted that he took the estate upon an agreement to return it); In Re Marlborough (parol evidence held to be admissible to prove that a house had been assigned by a wife to her husband solely to enable him to mortgage it in his own name, and that the understanding was that he should reassign it).

In Campbell v. Durkin (1870) 17 Grant, Ch. (U.C.) 80, parol evidence was held to be admissible to prove that a deed made by one joint owner of

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The similarity between the language here used, and that of the judicial statements in which the rationale of the doctrine regarding the admissibility of parol evidence to establish a mortgage has been stated (see § 18, ante), is sufficiently obvious. It seems clear that, under a doctrine so broad as that enounced in the passage above quoted, parol evidence would be treated as competent to sustain an averment of a trust in every, or almost every, instance in which it would be competent for the purpose of converting an absolute conveyance into a mortgage. Indeed, there is reason to suppose that the doctrine under which a trust is deemed to be predicable in the circumstances stated is, to some extent at least, an offshoot of the doctrine which forms the subject of the present monograph. So far as the writer has been able to ascertain, the former doctrine was not judicially recognized in England before the latter half of the nineteenth century;[8] and in several of the instances in which it has been applied, some of the precedents cited were cases in which the object of the suit was to have the given transaction declared a mortgage.[9]

(*c*) *American cases.*—In some cases a doctrine which seems to go to the same length as that applied in England has been more or less explicitly adopted. The theory upon which other cases may be said to proceed is that a trust cannot be predicated on the ground of fraud where the parol evidence merely shews that the person who took the legal title to the property in question violated a parol promise to transfer it to another person.

A comparison of the precedents (too numerous to review

property, at the instance of the other joint owner, to a third person, was executed under an agreement that the grantee should hold the property to secure a sum of money which it was intended that he should advance to pay interest on a mortgage which was on the property, and that, subject thereto, the grantee should hold the property in trust for the wife of such other joint owner, who remained in possession of the property.

[8]What seems to be the earliest allusion to the theory of constructive fraud in this connection is found in Childers v. Childers (1857) 1 De G. & J. 482, 26 L.J. Ch. N.S. 743, 3 Jur. N.S. 1277, 5 Week. Rep. 793, where Turner, L.J., without deciding the point, strongly inclined to the opinion that, even if a certain letter which was deemed sufficient to exclude the operation of the statute of frauds had not been an element in the case, the plaintiff would have been entitled to a reconveyance of land which had been conveyed to his son, merely for the purpose of enabling him to obtain a legal qualification for a certain public office, the son having died intestate and without any knowledge of the conveyance.

[9]The judgment of Turner, L.J., in Lincoln v. Wright (1859) 4 De G. & J. 16, 28 L.J. Ch. N.S. 705, 7 Week. Rep. 350, was cited as a controlling authority in Haigh v. Kaye (1872) L.R. 7 Ch. 469, 41 L.J. Ch. N.S. 567, 26 L.T.N.S. 675, 20 Week. Rep. 597; Booth v. Turle (1873) L.R. 16 Eq. 182, 21 Week. Rep. 721; Re Marlborough [1894] 2 Ch. 133, 63 L.J. Ch. N.S. 471, 8 Reports, 242, 70 L.T.N.S. 314, 42 Week. Rep. 456; Rochefoucauld v. Boustead [1897] 1 Ch. 196, 66 L.J. Ch. N.S. 74, 75 L.T.N.S. 502, 45 Week. Rep. 272. The reference to this judgment is the more singular, as in the course of it the case was expressly declared not to be "one of mere trust but of equitable fraud" (i.e., in denying that the given deed had been executed as a security). The same judgment was also relied on in Campbell v. Durkin (U.C.) supra.

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here), which sustain each of these views, shews that the preponderance of authority in the United States is at present somewhat in favour of the more restricted one. It should be remarked, however, that the weight of the cases in which that doctrine has been applied is, for the purposes of a general discussion, greatly diminished by the circumstance that in none of them apparently was the attention of the courts directed to the English decisions. It is reasonable to assume that those decisions, when they are duly considered, will exercise an appreciable influence upon the future evolution of the law in the United States. In a purely logical point of view it would certainly seem to be extremely difficult to suggest any satisfactory ground upon which a Court can accept the doctrine that the transferee of property conveyed by an absolute instrument of transfer is chargeable with constructive fraud if he repudiates a parol understanding that the instrument should take effect as a mortgage, and at the same time take the position that he is not chargeable with such fraud if he repudiates a parol understanding that he should hold the property as a trustee. The latter doctrine virtually overrides the provisions of the statutes of frauds and the rule which prohibits the introduction of parol evidence which varies the terms of a written contract. But the former doctrine operates in precisely the same manner. In this point of view, there is no more reason why those statutes and that rule should be regarded as obstacles to the adoption of the latter doctrine, any more than they have been regarded as obstacles to the adoption of the former doctrine.

VIII. Burden of proof with respect to the character of the transaction.

28. General rule stated.—The burden of proof manifestly lies upon the party whose claim or defense is founded upon the theory that the real character of the transaction is different from that which is imported by the language of the instrument or instruments in question.[1] So far as regards cases in which the written

[1]In Barton v. Bank of New South Wales (1890) L.R. 15 App. Cas. (Eng.) 379, the court said: "Undoubtedly, the terms of the conveyance may be qualified by collateral evidence; but in order to set aside the arrangement which the parties have assented to by executing and receiving the deed, very cogent evidence is required in a case like the present. Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution."

"The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument." Howland v. Blake (1878) 97 U.S. 628, 24 L. ed. 1029; Shattuck v. Bascom (1889) 55 Hun, 14 28 N.Y.S.R. 333, 9 N.Y. Supp. 934.

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contract does not embrace any stipulation as to the reconveyance of the property, this general rule invariably operates so as to cast the burden upon the party who alleges that the transaction was a mortgage. See following subtitle. But its operation in cases in which such a stipulation forms a part of the written contract will depend upon whether the addition of such a stipulation is regarded as rendering the transaction presumptively a conditional sale, or presumptively a mortgage. With respect to this point there is a conflict of opinion. See § 30, post.

28a. Concurrent intention on the part both of transferor and transferee to create a mortgage must be proved.—The broad ground upon which parol evidence is admitted to qualify the operation of a written instrument of transfer is that its language does not fully express the actual intention of the parties. That intention, therefore, is the ultimate fact to be established in all the cases with which this monograph is concerned.[2] Accordingly, the party who alleges that the transaction under review was a mortgage must establish these facts:

(1) An intention existing at the time when the given instrument was executed.[3] On the one hand, testimony regarding antecedent intentions is irrelevant.[4] On the other hand, "subsequent acts and declarations are admitted in evidence only as having bearing on what the original intention was."[5] If at the time when the parties executed the instrument they intended that it should operate as an absolute conveyance, a subsequent stipulation under which the transferor was to be allowed to repurchase cannot be ingrafted upon the contract by parol.[6]

(2) An intention entertained both by the transferor and the transferee. Evidence which merely goes to prove the uncommunicated intention of one of parties is not sufficient to affix the quality of a mortgage to an instrument absolute in its terms.[7] In other words, "if there is no concurring intention, no parol condition attaches, and in such case the conveyance must prevail."[8]

29. Burden of proof where contract does not include any written stipulation as to reconveyance.—The application of the

[2]Thompson v. Davenport (1792) 1 Wash. (Va.) 125, Cornell v. Hall (1871) 22 Mich. 377; McMillan v. Bissell (1886) 63 Mich. 66, 29 N.W. 737; Sadler v. Taylor (1901) 49 W. Va. 104, 38 S.E. 583.

[3]Frink v. Adams (1883) 36 N.J. Eq. 485, affirmed in 38 N.J. Eq. 287; Stahl v. Dehn (1888) 72 Mich. 645, 40 N.W. 922; Sadler v. Taylor (1901) 49 W. Va. 104, 38 S. E. 583.

[4]Davis v. Brewster (1883) 59 Tex. 93.

[5]Miller v. Smith (1910) 20 N.D. 96, 126 N.W. 499.

[6]Everett v. Estes (1914)—Ala. —, 66 So. 615.

[7]Sewell v. Price (1858) 32 Ala. 97; Mobile Bldg. & L. Asso. v. Robertson (1880) 65 Ala. 382; Thomas v. Livingston (1908) 155 Ala. 546, 46 So. 851.

[8]Douglass v. Moody (1885) 80 Ala. 61.

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general rule stated in § 28, ante, involves no difficulty in cases where the written contract includes no stipulation as to the reconveyance of the given property. Under such circumstances there is not, and cannot be, any dispute as to the character of the presumption to be overcome. All the authorities are agreed that the burden of proving that it was intended to operate as a mortgage lies on the party who alleges that intention.[9] In other words, he "has the burden of adducing evidence satisfactorily explaining how the given instrument came to be drawn as an absolute, instead of a conditional, transfer."[10] If no extrinsic evidence is given which tends to shew that the transaction contemplated was a mortgage, the only permissible conclusion is that the written contract was intended to be what it purports on its face to be.

The accepted doctrine is that the evidence relied upon for the purpose of affixing the character of a mortgage to an absolute instrument of transfer must satisfy the high standard of probative force which is indicated by such expressions as "cogent"[11]; "clear and unequivocal"[12]; "plain and convincing"[13]; or "clear, unequivocal and convincing."[14]

It has been held by many American courts that the intention of the parties must be established beyond a reasonable doubt. Such would seem to be the position taken in a British Columbia case.[15]

30. Burden of proof where contract includes a written stipulation as to reconveyance.—Three different doctrines have been laid down concerning the presumption to be entertained in respect of the quality of a contract of this tenor which does not contain any words indicating either that it was intended to operate as

[9]"The onus is altogether upon the appellant. It is incumbent upon him not only to shew a case against written instruments, but to rebut the presumption which the conduct of the parties affords, that the title as it now stands is consistent with the real intention of the parties." Holmes v. Mathews (1855) 9 Moore, P.C.C. (Eng.) 433.

[10]Donnelly v. McArdle (1903) 86 App. Div. 33, 83 N.Y. Supp. 193.

[11]Barton v. Bank of New South Wales (1890) L.R. 15 App. Cas. 379.

[12]Whiting v. White (1792) G. Cooper, 6, 2 Cox Ch. Cas. 290.

[13]Howland v. Blake (1878) 97 U.S. 624.

[14]Coyle v. Davis (1885) 116 U.S. 108; Cadman v. Peter (1885) 118 U.S. 73.

[15]In Whitlow v. Stimson (1909) 14 B.C. 321, where an action to have an absolute conveyance declared a mortgage was brought after the death of the grantee, it was observed by Clement, J., that the court "should not give effect to the plaintiff's claim, unless the evidence is so clear and cogent as to convince the court beyond all reasonable doubt that, when the grantee died, he held the property as mortgagee, and not as the owner in fee beneficially entitled. The uncorroborated evidence of a plaintiff in such a case would hardly, apart . . . from our own statute, bring conviction to the mind of a judge." It is not apparent from the report whether the learned judge was of the opinion that a lower standard of conclusiveness would have been sufficient, if the grantee had been still alive.

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a mortgage or that the relationship of debtor and creditor existed between the parties after the transaction.[16]

(1) That it constitutes a mortgage as a matter of law. Under this doctrine it is obvious that parol evidence regarding the intention of the parties becomes wholly incompetent. If offered for the purpose of proving that the transaction was a mortgage, it is supererogatory. If offered for the purpose of proving that the transaction was a conditional sale, it is inadmissible, as tending to vary the terms of a written contract.

(2) That it constitutes prima facie a mortgage. Under this doctrine parol evidence which is offered for the purpose of shewing that a mortgage was intended is merely corroborative in its effect.

(3) That it constitutes prima facie a conditional sale. Under this doctrine the effect of such parol evidence as is admitted for the purpose of shewing that the transaction was a mortgage is precisely the same as in cases where the written contract consists merely of an absolute instrument of transfer; that is to say, it is admitted as tending to prove that the provisions of the contract do not express the real agreement made by the parties.

The limitations of space render it impossible to show the extent to which each of these doctrines prevails in the United States. As will be seen from the cases reviewed in the footnote the third doctrine is the one which has been adopted by the English and Canadian courts.[17]

[16]For cases in which words of the latter tenor were held to shew an intention to create a mortgage, see Bullen v. Renwick (1862) 9 Grant's Ch. 202; Hawke v. Milliken (1866) 12 Grant's Ch. 236.

[17]In Newcombe v. Bonham (1681) 1 Vern. 7, 2 Vent. 364, 2 Freem. Ch. 67, the contract under review consisted of an absolute deed and a separate deed by which the land in question was made redeemable upon the payment of a specified sum and interest during the lifetime of the grantor. The transaction was, so far as appears, assumed to be a mortgage, the only question really discussed being whether the stipulation precluding redemption after the grantor's death was enforceable,—that question being answered in the negative. Unless the court proceeded upon the ground that the provision as to the payment of interest imported the existence of a debt, this assumption was inconsistent with the later English decisions. In Rogan v. Walker (1853) 1 Wis. 527, the court said that this case was a suit to redeem, contrary to the written contract of the parties, and that "parol proof was admitted to shew the nature of the original transaction." It is submitted that this is not a case which illustrates the admissibility of parol evidence.

In Manlove v. Bruton (1688) 2 Vern. 84, 1 Eq. Cas. Abr. 113, pl. 15, the court apparently proceeded upon the theory that a mortgage was presumptively created by an absolute conveyance with a contemporaneous deed providing for a reconveyance, although there was no affirmative evidence of an indebtedness created or continuing. If this was really the position taken it is discredited by the later English authorities. In Glover v. Payn (1838) 19 Wend. (N. Y.) 518, the court had no doubt that the facts of this case were imperfectly stated, and pointed out that, as nothing but the decree was given, it was impossible to say on what ground the decision was placed.

In Verner v. Winstanley (1805) 2 Sch. & Lef. 393, Lord Redesdale expressed the opinion that a covenant giving the vendor of a rent charge the privilege of repurchase would not have the effect of turning the transaction into a loan and mortgage as was alleged by the bill.

In Neal v. Morris (1818) Beatty, Ir. Ch. Rep. 597, the same judge remarked:

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IX. Evidential elements of various descriptions, competency and weight of.

31. Generally.—A very large number of cases dealing with the significance ascribed to the various evidential elements which are regarded as proving or disproving the intention of the parties to create a mortgage have been decided by the courts. In the present article it will be impossible to do more than refer to some of the more important of those elements, and shew the position which has been taken with regard to them in England and Canada.

32. Judicial admissions of parties.—The intention of the transferor to create a mortgage may be inferred, where the plead-

"It is alleged that there is no instance, except in the case determined in the House of Lords [Ensworth v. Griffiths (1706) 5 Bro. P.C. 184] (which, to be sure, is a pretty strong authority), of the instrument bearing date the same day with the conveyance, in which it has not been considered as a mortgage and that the intention of the parties so to consider it is manifested by that circumstance. Certainly it is a strong circumstance, but by no means conclusive, and it is perfectly competent for the defendant to explain under what circumstances and for what purpose the memorandum was entered into." This language does not shew distinctly what the theory of the learned judge was with respect to the presumptive quality of the transaction; but, having regard to the opinion expressed by him in the case last cited, his words are apparently to be taken as importing that the execution of a contract as to reconveyance is a circumstance which merely tends to shew that a mortgage was intended. Such a doctrine, it is clear, would leave the establishment of the mortgage character of the transaction conditional upon affirmative proof of the subsistence of a debt, and would be essentially the same as that which is enunciated in the following cases.

In Williams v. Owen (1840) 5 Myl. & C. 303, reversing 10 Sim. 386, Lord Cottenham laid down the following doctrine: "That this court will treat a transaction as a mortgage although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is, no doubt, true; but it is equally clear that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem."

In Alderson v. White (1858) 2 De. G. & J. 105, Lord Cranworth stated his views as follows: "The rule of law on this subject is one dictated by common sense; that prima facie an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance, and become a mortgage, merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments? Here the first instrument was, on the face of it, an absolute conveyance; the second gave a right to repurchase on payment, not of what should be due, but of the full amount of the purchase money of £4,739. Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to shew that it was intended to be a mere mortgage?" This statement of the law was adopted in Baagwan Sabai v. Bhagwan Din (1890) L.R. 17 Ind. App. 98, cited in Coote on Mortgages, 7th ed. p. 24.

For other decisions which were presumably based upon this doctrine, although it was not explicitly referred to, see Waters v. Mynn (1849) 14 Jur. 341 (mortgage character of transaction inferred from extrinsic evidence); Shaw v. Jeffrey (1860) 13 Moore, P.C.C. 432 (assignment of a shipbuilding business and plant, with an agreement as to reassignment, was held, upon the facts, to be a conditional sale); Tapply v. Sheather (1862) 8 Jur. S.N. 1163, 7 L.T.N.S. 298, 11 Week. Rep. 12 (deed and agreement to reconvey

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ings of the party whose claim or defense is based upon the theory that the transaction was not a mortgage contains words which amount, expressly or by implication, to an admission that it was a mortgage.[1] Such an admission will override the effect even of

denied to be a mortgage on the ground that there was nothing in the agreement itself to indicate that the party paying the consideration was to have any security for his money); Fee v. Cobine (1847) 11 Ir. Eq. Rep. 406; O'Reilly v. O'Donoghue (1875) Ir. Rep. 10 Eq. 73 (assignment of sublease and separate agreement as to reassignment, held not to constitute a mortgage because there was nothing in the documents with regard to the payment of interest on an antecedent debt owed by the assignor to the assignee).

In Allenby v. Dalton (1827) 5 L.J.K.B. 312, a deed surrendering copyholds, conditioned to be void if the money advanced was repaid, was held, on proof of certain circumstances, to be intended as a mortgage.

For Canadian cases which proceeded upon the English doctrine, see Bostwick v. Phillips (1858) 6 Grant, Ch. (U.C.) 427; Bullen v. Renwick (1862) 9 Grant Ch. (U.C.) 685; Roscoe v. McConnell 29 D.L.R. 121; Rapson v. Hersee (1869) 10 Grant, Ch. 25 Ont. Week. Rep. 149; Beaton v. Wilbur (1906) 3 N.B. Eq. Rep. 309 (where, however, the actual point under discussion was the effect of an alleged parol agreement to reconvey).

[1]In England v. Codrington (1758) 1 Eden 169, the plaintiffs applied to Simpson, an attorney, with the view of procuring money to satisfy the demands of persons who held mortgages on their land, and were pressing for payment. Simpson introduced them to the defendant, his client, who agreed to assist them, and rendered the assistance by paying off the mortgages and taking assignments thereof from the mortgagees. As to the circumstances attending the transaction, the defendant in his answer stated that on Simpson's applying to him to advance money on the security of the premises as a loan, the defendant refused, but directed Simpson to treat with the plaintiffs for the purchase, if they were inclined absolutely to sell, which Simpson accordingly did; that Simpson advised defendant not to lend the plaintiffs any money, or to become mortgagee; but that defendant has some remembrance that during the treaty Simpson informed him that the plaintiffs expressed some unwillingness to make an absolute sale of their estates, as they might, by means of a marriage of the plaintiff John with a woman of fortune, be enabled to redeem the same; that the defendant believes that Simpson, before the signing the contract, did declare to the plaintiffs that, if the plaintiff John should, within one year after making the said agreement, be enabled to redeem or purchase the said premises by means of such a marriage, that the defendant would reconvey and assign the estates unto them; that though the said declaration (if any such was made by Simpson) was without the privity or directions of the defendant, yet Simpson, having, as the defendant believes, informed the defendant that he had made such declarations to the plaintiffs, the defendant thinks it probable (though he cannot with certainty say) that he did or might give or express his assent thereto; that if the plaintiff had married a person within one year after the date of the agreement, and had within such time tendered the sum paid to him, the defendant would have accepted the same, and conveyed the estates to them, as he should have conceived himself bound in honour to have done; although he is advised that he could not have been compelled thereto, as what passed between Simpson and the defendant was not reduced to writing; nor did, as the defendant apprehends, amount, or could be construed to amount, to more than an intimation of the defendant's intention to accept such money upon the terms aforesaid. The conclusions of Lord Chancellor Northington, were thus stated: "I am of opinion, upon the proofs in this cause, and particularly from the answer of Sir William Codrington, that the agreement, bearing date the 18th of July, 1751, was not for the sale of the premises therein mentioned, but was only an agreement to convey the estates to Sir William and his heirs, redeemable at a certain time, and particular event, upon payment of the money with interest, which ought to have been inserted in the agreement; and appears to me to have been fraudulently omitted by the drawer of it. I am therefore of opinion that the conveyances are not to be considered in

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facts which usually weigh very strongly, or even conclusively against the theory that a mortgage was intended; as, for example, that the grantee refused to take a mortgage, and that it was expressly agreed between the parties that there should be no reconveyance of the land except upon the condition of punctual payment at the times indicated.[2]

The statements made either in an answer or a replication have sometimes been construed as shewing that the transaction was a mortgage, although they did not amount to a specific admission as to its character.[3]

The admissions of the parties in pleadings filed in earlier actions are also admissible.[4]

An allegation that an absolute instrument of transfer was intended as a mortgage is sufficiently proved, where the transferee has given testimony which constitutes an admission that he understood the contract to be of that description.[5]

There is specific authority for the doctrine that the circumstance of a party having previously given inconsistent testimony or made a written statement under oath in previous proceedings of a judicial or quasi judicial character will not preclude him from relying on a different theory as to the nature of the transaction. In this point of view the oral testimony or the written statement is merely one of the elements to be considered with relation to the evidence by which the new theory is sustained.[6]

this court as absolute conveyances, but as securities for the money advanced by Sir William Codrington."

In Papineau v. Gurd (1851) 2 Grant, Ch. (U.C.) 512, statements to the following effect in the defendant's answer were held to "go very far" to establish the plaintiff's case:—that the defendant purchased the property for about a fifth or sixth part of its value, not adversely to the plaintiff, but at his instance, and in accordance with an agreement by which he was to be allowed to redeem; that the plaintiff retained possession for a period of two years, in pursuance of that agreement, and contrary to the letter of the sheriff's deed; and that payments were made which, even upon the answer, were to be regarded as payments of interest.

[2]Wilson v. Drumrite (1855) 21 Mo. 325. The court said: "We have nothing to do here with the question of admissibility of parol evidence to convert an absolute conveyance into a mortgage. The obligation to reconvey, if the money was paid on the day, being admitted in the answer, no question of that character arises here." But the distinction thus taken between parol evidence and the admission in an answer is clearly erroneous. Such admissions are one of the descriptions of parol evidence; at all events, if the expression "parol" is used in its more comprehensive sense, as the equivalent of "extrinsic." See § 1, ante.

[3]Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671.

[4]For cases in which the transaction was held not to be a mortgage, see Dowen v. Edwards (1662) 1 Rep. in Ch. (Eng.) 222 (admission made in bill filed in previous suit by mortgagee against mortgagor to have the lands or money made the deed appear a mortgage); Null v. Fries (1885) 110 Pa. 521.

[5]Jackson v. Lawrence (1885) 117 N.S. 680; Raphael v. Muller (1898) 171 Mass. 111, 58 N.E. 515.

[6]In Holmes v. Mathews (1855) 9 Moore, P.C.C. (Eng.) 413, one of the

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But the courts which have taken this position have not yet considered it with reference to what seems to be a question of controlling importance, viz., whether the testimony of a party which, in the nature of the case, cannot be true unless he committed perjury, or made a grave error, in the previous proceeding, may, under any circumstances, be regarded as an element proper to be considered in relation to an issue which cannot be established by evidence which fails to satisfy that high standard of certainty which is required in cases of the type under discussion. It may be argued with some apparent plausibility that this question demands a negative answer.

33. Character of negotiations preceding the execution of the instrument of transfer.—(*a*) *Generally.*—It is well settled that whatever was said by one or both of the parties to the transaction while its terms were under consideration is admissible for the purpose of shewing its actual nature.[7] The objection that such evidence should be excluded on the ground that its reception contravenes the general rule that, after a contract has been re-

evidential elements commented upon by the court was that, in an affidavit of debts and assets filed by the transferor in bankruptcy proceedings, he had omitted to allude to any equity of redemption in respect of the property.

[7]See cases cited passim in this section.

In Barton v. Bank of New South Wales (1890) L.R. 15 App. Cas. (Eng.) 379, the court made the following remarks: "The evidence which is relied upon for the purpose of cutting down the deed and reducing the bank's conveyance to the level of a redeemable right consists of some letters which passed between the bank and the late Mr. Barton, between the 30th of March, 1874, and the 27th of September, 1876. The first of these letters was from the bank to the deceased, and simply intimates to him that, as his indebtedness in the books was still continuing, it was time that he executed a proper mortgage in their favor, the alternative presented being that he should arrange to release his properties by payment of the debt. On the 9th of April that communication is answered by the deceased in terms which shew that he thoroughly understood and appreciated the difference between a mortgage of his land and conveyance of it in fee. He mentions both alternatives in the letter, and in the conclusion of it he indicates his preference for an arrangement under which the bank should take a conveyance of the land as in full payment of the debt. The next letter relied on was written by Mr. Barton, and was delivered to the bank on the same day as the conveyance was executed and delivered, and upon the terms of that letter there has naturally been a great deal of comment, because there are some expressions in it that might be characterized, if not as enigmatical, at all events as somewhat ambiguous. But the general purport and substance of the letter is beyond doubt. It sets forth that the bank are to take a conveyance in part payment of the debt, and it also states that, when they have taken a conveyance in part payment of the debt, the writer of the letter, Mr. Barton, will become personally liable, if his means improve and his estate is able to afford it, for the whole or part of the difference between his total debt and the value of the land in question. It is sufficient to say that, in the opinion of their lordships, those expressions, 'in part payment of the debt,' 'whole or part of the difference,' are altogether inconsistent with the idea that the writer of the letter supposed for a moment that he was executing a conveyance which was to be a security for the whole debt."

For another case in which letters written prior to the execution of the deed in question were considered, see Scottish Union Ins. Co. v. Queensberry (1842) 1 Bell, Sc. App. Cas. (Scot.) 183.

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duced to writing, its terms cannot be qualified by what the parties said during the negotiations which led up to it, has been explicitly declared to be untenable.[8] This conclusion was obviously inevitable, having regard to the consideration that the very essence of the doctrine discussed in this monograph is the use of parol evidence to control the terms of written agreements.

(*b*) *Application for loan.*—The circumstance that the negotiations which preceded the execution of the instrument of transfer began with a proposition that the transferee should lend money to the transferor or undertake some onerous obligations for his benefit, upon the security of the property which was ultimately conveyed, is conceded to be an element which tends to shew that the transaction as consummated was a mortgage.[9]

(*c*) *Application for loan provisionally entertained.*—In a case where the application for a loan is shewn to have been entertained by the transferee, the evidence relating to the subsequent stages of the negotiations may tend to establish one or other of the following facts:—

(1) That, for an appreciable period, the negotiations were prosecuted by the parties upon the supposition that the contract, when executed, was to be one of lending and borrowing. There is some difference of opinion with respect to the precise evidential significance of the situation which thus supervenes. The ground upon which most of the decisions proceed seems to be that the fact of the negotiations having been for a while conducted with a view to the making of a loan merely tends to prove that the transaction, as finally consummated, was a mortgage.[10] But it has also been declared that the controlling principle is "that a deed absolute on the face of it, for property, offered to secure a loan in a case in which the parties originally met upon the footing of borrowing or lending, will be considered a deed in the nature of a mortgage to secure a loan, though another consideration shall be in the recital of the deed than the loan, unless it shall be proved that the parties afterwards bargained for the property inde-

[8]Beroud v. Lyons (1892) 85 Iowa, 482, 52 N.W. 486.

[9]Bullen v. Renwick (1862) 9 Grant's Ch. 202; Guarantee Gold Bond Loan & Sav. Co. v. Edwards (1908) 90 C.C.A. 585, 164 Fed. 809; Williams v. Reggan (1895) 111 Ala. 621, 20 So. 614; Williams v. Chadwick (1901) 74 Conn. 252, 50 Atl. 720; McArthur v. Robinson (1895) 104 Mich. 540, 62 N.W. 713.

[10]Cases which may apparently be regarded as exemplifying this point of view are Douglas v. Culverwell (1862) 4 De G. F. & J. (Eng.) 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327; Williamson v. Culpepper (1849) 16 Ala. 211, 50 Am. Dec. 175; Wells v. Geyer (1903) 12 N.D. 316, 96 N.W. 289; Banks v. Frith (1914) 97 S.C. 362, 81 S.E. 677.

The fact that the execution of the deed in question was preceded by negotiations for a loan has been said to be a "circumstance of great weight." Vangilder v. Hoffman (1883) 22 W. Va. 1; Kerr v. Hill (1886) 27 W. Va. 576; Fridley v. Somerville (1906) 60 W. Va. 272, 54 S.E. 502.

pendently of the loan; or if it shall appear that the chief inducement of the grantor in making the deed was to procure the loan; or that the grantee, after the execution of the conveyance, treated the money which he had advanced as a substantial part of the consideration, and not as a loan."[11] In this statement the circumstance of the negotiations having been prosecuted on the footing defined by the provisional acceptance of a proposition for a loan is apparently treated as being sufficient of itself to raise a prima facie presumption that the transaction, as finally consummated, was a mortgage. If this is really the doctrine intended to be laid down, its soundness would, in spite of the very high authority by which it was propounded, seem to be open to question. Having regard to the possibility that the character and object of the negotiations may have undergone a change at some time before the instrument of transfer was executed, and to the probability of the occurrence of such a change being, so far as can be seen, equal to the probability of a continuance of the negotiations upon their original footing, there is, it is submitted, no adequate basis for predicating a presumption.

In any point of view it is manifest that the fact under discussion is not conclusive with regard to the character of the transaction as finally consummated.[12]

(2) That up to the time when the instrument of transfer was drafted the negotiations were prosecuted by the parties upon the supposition that the contract, when executed, was to be one of borrowing and lending. Under these circumstances the presumption and the inference which are predicated under the opposing theories considered in the preceding paragraph are proportionally strengthened. But as there is always locus pœnitentiæ until the instrument of transfer has been actually executed, it is clear that, according to the point of view, the presumption may be rebutted or the inference overcome by affirmative evidence as to the actual intention of the parties when the transaction was consummated.[13]

(3) That the instrument of transfer was prepared and executed in pursuance of a definite arrangement embodying the result of negotiations prosecuted upon the supposition that the contract, when executed, was to be one of lending and borrowing. Under

[11] Morris v. Nixon (1843) 1 How. (U.S.) 118, 11 L. ed. 69. The theory of a presumption seems to have also been adopted in Reitze v. Humphreys (1912) 53 Colo. 177, 125 Pac. 518.

[12] Jasper v. Hazen (1894) 4 N.D. 1, 23 L.R.A. 58, 58 N.W. 454; Banks v. Firth (1914) 97 S.C. 362, 81 S.E. 677.

"Negotiations begun with a view to a loan on security for a debt may fairly terminate in a sale of the property originally proposed for a security." Campbell v. Dearborn (1872) 109 Mass. 143, 12 Am. Rep. 671.

[13] In Mintz v. Soule (1914) 182 Mich. 564, 148 N.W. 769, the preponderance of evidence was held to be against the theory that the final arrangement has reference to a loan.

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these circumstances the inference that the transaction as finally consummated was a mortgage seems to be virtually conclusive.[14]

(*d*) *Refusal of transferee to accept proposition for a loan.*—As evidence tending to prove that the instrument of transfer, as executed, was not intended to operate as a mortgage, the following facts are relevant: That the grantee had refused to make a loan on security;[15] that he had refused to accept a formal mortgage,[16] or to be a party to a contract which he was led to believe would operate as a mortgage;[17] or that he had refused to advance money except on the terms that an absolute conveyance of the legal title should be executed.[18] The probative force of such facts is, of course, augmented where the testimony shews that the refusal was repeated several times,[19] or that it was induced by some special consideration, the dissuasive influence of which was certain or

[14]In Langton v. Horton (1841) 5 Beav. 9, 6 Jur. 357, a mortgage was held to be shewn by evidence to the effect that one Birnie had initiated the transaction by proposing to give Horton a bill of sale on a moiety of a ship, to deposit a policy of insurance on it, and to pay from time to time certain bills to be drawn upon Horton, and that this proposition was accepted by Horton.

In Papineau v. Gurd (1851) 2 Grant, Ch. (U.C.) 512, the testimony of the principal witness was to the following effect: "Some time before the sheriff's sale [of the plaintiff's property], the plaintiff came to me and asked me if I could help him by lending money to pay the debt. I said I could not; . . . that I thought Mr. Gurd, the defendant, could purchase the property and give him time to redeem it. Gurd had expressed his desire to help the plaintiff because he thought it a hard case that the plaintiff should lose his lands." The witness brought the plaintiff and defendant together at his house, and plaintiff, who could not speak good English, asked Gurd, through the witness, to let him have the necessary money. The proposition made was that Gurd should buy the property, and give Papineau one year to redeem it, and if he could not redeem it in one year it must go. Gurd said he would do it on certain terms, to which Papineau consented. When the year was nearly up plaintiff came to the house of the witness and said he could not pay Gurd; whereupon the witness begged Gurd "to give plaintiff another year to pay what was due, saying plaintiff was a poor and industrious man, and if he, the defendant, got the interest it was enough. I begged him to let him have another year, and defendant agreed to give it." This evidence was corroborated by the testimony of two professional gentlemen. One of them, at whose office the parties met prior to the sale and in relation to it, testified: "I understood that Gurd advanced the money and took the sale and sheriff's deed to secure himself, and that plaintiff had the right of redeeming it." Held, that the transaction was a mortgage.

[15]England v. Codrington (1758) 1 Eden (Eng.) 169; Alderson v. White (1858) 2 De G. & J. 97, 4 Jur. N.S. 125, 6 Week. Rep. 242; Bullen v. Renwick (1860) 9 Grant's Ch. 202; Monroe v. Foster (1873) 49 Ga. 514; Flagg v. Mann (1833) 14 Pick. (Mass.) 467; Cornell v. Hall (1871) 2 Mich. 377; Cake v. Shull (1888) 45 N.J. Eq. 208, 16 Atl. 434.

[16]Helbreg v. Schumann (1894) 150 Ill. 12, 41 Am. St. Rep. 339, 37 N.E. 99; Bacon v. National German-American Bank (1901) 191 Ill. 205, 60 N.E. 846.

[17]Haussknecht v. Smith (1896) 11 App. Div. 185, 42 N.Y. Supp. 611, affirmed in 161 N.Y. 663, 57 N.E. 1112.

[18]Morris v. Nixon (1843) 1 How. (U.S.) 118, 11 L. ed. 69; Chicago & C. Rolling Mill Co. v. Scully (1892) 141 Ill. 408, 30 N.E. 1062.

[19]Douglass v. Moody (1885) 80 Ala. 61.

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very likely to be permanent—as that a mortgage could not be executed on the given property without violating a statute.[20]

But manifestly evidence of the descriptions above stated is not conclusive against the theory of a mortgage transaction.[21] Its effect may be overcome by other evidence which shews with the requisite degree of certainty that the actual intention of the parties was to create a mortgage.[22]

(e) *Negotiations commenced and carried on with reference to a sale.*—Testimony to the effect that the transferor opened the negotiations by proposing that the transferee should buy the property in question obviously indicates that the transferor, when he applied to the transferee for the money which he desired to raise, did not contemplate a mortgage transaction. It is apparent that, in all jurisdictions, when such testimony is offered with respect to a contract which does not include any written stipulation as to reconveyance, and, so far as most jurisdictions are concerned, where it is offered with respect to a contract which does include such a stipulation, it is in its nature corroborative of a presumption raised by the language of the contract itself. Having regard to this consideration, it would seem not unreasonable to take the ground that, in relation to the particular conclusion to which the fact of an initial proposal to sell and the fact of an initial proposal to borrow are respectively directed, the former fact should be regarded by the majority of the courts as always possessing a higher probative value than the latter, irrespective of whether one class of contract or the other is under discussion. But, so far as the writer has been able to ascertain, no comparison between these two probative elements has ever been made in this point of view. From the authorities as they stand no more can be deduced than this: that if the original offer to sell was accepted by the person to whom it was made, and all the subsequent negotiations proceeded upon the same footing, the transaction will be treated as a sale, unless there is some affirmative evidence that the intention of the parties underwent a change before the written contract was actually executed.[23]

The inference that the transaction contemplated was a sale is, of course, strengthened proportionably by the presence of any of those elements, the absence of which is regarded as having a tendency to shew that the transaction was a mortgage.[24]

[20]Vincent v. Walker (1888) 86 Ala. 333, 5 So. 465.

[21]Bullen v. Renwick (1860) 9 Grant, Ch. (U.C.) 202, reversing 8 Grant, Ch. (U.C.) 342.

[22]Morris v. Nixon (1843) 1 How. (U.S.) 118, 11 L. ed. 69.

[23]See Hubert v. Sistrunk (1910)—Ala.—, 53 So. 819; Everett v. Estes (1914)—Ala.—, 66 So. 615; Moss v. Green (1839) 16 Leigh (V.A.) 251; Sadler v. Taylor (1901) 49 W. Va., 104, 38 S.E. 583.

[24]In Neal v. Morris (1818) Beatty, Ir. Ch. Rep. 597, the court said: "It appears very clearly from the evidence in the cause that the dealing between

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(*f*) *Informal statements* made by the parties during the progress of the negotiations may sometimes constitute relevant evidence respecting the quality of the transaction which was contemplated.[25]

34. Statements made by parties at the time when the written contract was executed. — In one Illinois case certain statements made by the parties on the occasion when the written contract was executed seem to have been regarded as wholly incompetent evidence.[26] Such incompetency has also been affirmed explicitly by a Federal judge, sitting in one of the inferior courts.[27] But in a later Illinois case, it was laid down that statements of this sort, "while admissible, may or may not be controlling. It may be that the declarations are but a device to cover usury, or to conceal hard and unconscionable bargains, driven by a relentless or sharp and designing creditor, or the debtor may be misled into the execution of the deed, or, from the peculiar circumstances shewn, incapable of understanding his relations to his creditor thereunder."[28] The doctrine thus laid down is obviously that which was taken for granted in such cases as those cited in the footnote.[29] But the probative weight of such statements

these parties was not for a further mortgage, but for the absolute sale and purchase of the equity of redemption. The reference to a notary public to ascertain the value of the equity of redemption, subject to the prior mortgage, his report upon it, and the sum paid being the very sum estimated as such value, appear to me decisive to shew that it was a . . . sale." It was further remarked that the memorandum which had been drawn up, giving the vendor an opportunity of repurchasing the estate within three years, had been stated by a witness to have been for the purpose of protecting the vendor from the possibility of having sold his property at less than its value.

[25]Lincoln v. Wright (1859) 4 De G. & J. (Eng.) 16, where a mortgagee's conveyance of a life estate in real property and an insurance policy was held to have been made as a security merely, Turner, L. J., said: "The question then, as I view it, is whether there was such an agreement as this bill alleges; and, upon the evidence, I am perfectly satisfied that there was. The conversations, which are proved, referring as they do to the question whether the investment would be safe, and to the payment of the interest and the repayment of the principal, are, to my mind, more satisfactory than if the evidence had been more direct; and I can see no sufficient ground to doubt the testimony of the witnesses. Indeed, the evidence on the part of the defendant seems to me to confirm it. If there was no such agreement as the plaintiff alleges, to what are Mr. Beck's [guardian of Wright's daughter after his death] and Mr. Wright's offers of £10 a year, as the plaintiff says, and it is not denied, to be ascribed? It was said for the appellant that the plaintiff was to be tenant, paying the premiums upon the insurance; but there is no proof of any such agreement." The offer here alluded to was that Beck would pay Lincoln £10 a year for the premises, if he would give up the possession of the premises.

[26]In Sutphen v. Cushman (1864) 35 Ill. 186.

[27]Richmond v. Richmond (1871) Fed. Cas. No. 11, 801.

[28]Darst v. Murphy 119 Ill. 343, 9 N.E. 887. See also Whitney v. Townsend (1869) 2 Lans. (N.Y.) 249.

[29]Campbell v. Durkin (1870) 17 Grant's Ch. 80 (statements made by grantee that he was to hold the property in question to secure the money which he was to advance); Babcock v. Wyman (1856) 19 How. (U.S.) 289, 15 L.

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however is apparently not much greater than those made after the execution of the contract (see following section). They "should be received with great caution."[30]

In one instance evidence of this description was excluded on the general ground that the declarations to which it related were self-serving.[b] But, whatever theory may be adopted with respect to the admissibility of declarations, when made subsequently to execution of the given instrument or instruments, it is submitted that an objection based solely upon the self-serving character should not be accepted as valid, where they were made in the presence of the other party and amounted simply to a final and precautionary assertion of the idea entertained by the speaker

ed. 644 (grantor's brother, who was present when the given deed was executed, testified that, when the grantor hesitated to sign it, the grantee said he could have the land again at any time he should pay the debts secured by it); Morgan v. Shinn (McLellan v. Shinn) (1872) 15 Wall. (U.S.) 105, 21 L. ed. 87 (evidence of scrivener at whose office the parties called to have the given bill of sale prepared); Hudson v. Isbell (1833) 5 Stew. & P. (Ala.) 67 (evidence of subscribing witness to bill of sale held to have been properly admitted); English v. Lane (1835) 1 Port. (Ala.) 328 (witness recollected that after the deed conveying slaves had been passed, he heard the transferor say to the transferee that if the latter would refund the money within a certain period, he would restore the negroes); Turnipseed v. Cunningham (1849) 16 Ala. 501, 50 Am. Dec. 190 (grantor in bill of sale of slaves deliberately declared, in the presence of men called upon to witness the formal delivery to him, that the grantee had the right to redeem); Page v. Vilhac (1871) 42 Cal. 75 (evidence of attorney employed by both parties); Spence v. Steadman (1873) 49 Ga. 133 (affidavit of scrivener who drafted the given deed and stipulation as to reconveyance); Tillson v. Moulton (1860) 23 Ill. 648 (statements to agent employed by grantor to attend to the transaction); Preschbaker v. Feaman (1863) 32 Ill. 475 (testimony of scrivener); Campbell v. Dearborn (1872) 109 Mass. 130; Cobb v. Day (1891) 106 Mo. 278, 17 S.W. 323 (grantor said she did not want to sell, but wanted the property for a home); Bryant v. Lazarus (1911) 235 Mo. 606, 139 S.W. 558 (grantor's brother testified that he heard grantee's agent tell grantor's wife, to induce her to sign the deed that it was only a mortgage); Gilchrist v. Cunningham (1832) 8 Wend. 641 (when assignor objected to executing the assignment, the assignee told him that, though absolute in its terms, it was merely to perfect an antecedent agreement, as security for an advance); Edwards v. Wall (1884) 79 Va. 321 (testimony of notary who prepared the given deed).

In Bernard v. Walker (1862) 2 U.C. Err. & App. 121, where a person who witnessed the execution of the deed testified that the grantor, upon finding that a certain person's name was not specified as a grantee, insisted upon its being inserted, Robinson, C.J., said: "If there had been no such intention or understanding in Walker's mind, as that he was only making this deed as a security, and he was about to execute the deed as a final and absolute transfer of all his right in the land, it could not have signified to him whether Thompson's name was in the deed or not. If both had agreed to give up all claim upon him for indemnity, on his executing the deed which Thompson placed before him, he might, as we may suppose, have been content to make the conveyance either to one or both, as they might have agreed between themselves. If he had been led by what had passed between him and Thompson to believe that the deed was only to be made use of as a means of enforcing payment of the debt due by him to the two, it was natural that he should desire Thompson's name in the deed, for he had confidence in him, and would feel more secure that the understanding on which he was about to convey would be more certainly carried out."

[30]Rodgers v. Burt (1908) 157 Ala. 91, 47 So. 226.

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concerning the quality of the contract which he was on the point of executing.

In some instances the admissibility of the statement in question was expressly predicated upon the ground that it was a part of the res gestæ;[31] and apparently this conception might with propriety have been relied upon in a considerable number of the cases already cited.

35. Statements made by the parties after the execution of the instrument.—(*a*) *Generally.*—The doctrine distinctly adopted in a considerable number of American cases is that an instrument which on its face imports an absolute transfer of property cannot, under any circumstances, be converted into a mortgage by testimony which relates merely to the subsequent statements of the parties, unless that testimony is corroborated by circumstantial evidence.[32]

But the position that the probative force of evidence of this description can never be sufficient to warrant the inference that a mortgage was intended seems to be clearly untenable. Such a theory, when tested by its application to an extreme case, involves the impossible, not to say preposterous, conclusion that a finding in favour of the party who alleges that the given instrument of transfer was executed as a security must be set aside even in a case where the allegation is sustained by definite testimony, unimpeached and uncontradicted, that the transferee had deliberately, and with a full comprehension of the legal effect of his words, declared that the transaction was a mortgage. If parol evidence is to be received at all, there is plainly no satisfactory logical ground upon which the sufficiency of evidence of this character and strength can be denied. The supposed situation is no doubt one that very seldom occurs. But this consideration obviously has no bearing upon the theoretical question of the soundness or unsoundness of the doctrine.

The correct theory, it is apprehended, is one which may be stated in this form: The intention of the parties that an absolute instrument of transfer was intended to operate as a mortgage may be proved by testimony as to their statements alone, if it proceeds from trustworthy witnesses and is unambiguous in its import; but the required standard of reliability and certainty

[31]Wilcox v. Bates (1870) 26 Wis. 465; Lawrence v. Du Bois (1880) 16 W. Va. 443.

[32]The following will serve as sufficient illustrations: Marks v. Pell (1815) 1 Johns. Ch. (N.Y.) 594; Allen v. McRae (1846) 39 N.C. (4 Ired. Eq.) 325; Todd v. Campbell (1858) 32 Pa. 250; Couch v. Sutton (1854) 1 Grant, Cas. (Pa.) 120; Nicolls v. McDonald (1882) 101 Pa. 514;

In Linton v. Sutherland (1896) 40 N.S. 149, the declarations of a grantor, made two years after the deed in question had been executed, to the effect that the instrument was intended as a mortgage, were pronounced inadmissible.

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is so seldom satisfied that, as a general rule, it is insufficient, unless corroborated, to warrant the conclusion that the transaction contemplated was a mortgage, and must be disregarded, if the rest of the evidence is distinctly antagonistic to such an inference. There is some specific authority for a doctrine of this tenor,[33] and it may apparently be regarded as constituting the ratio decidendi of nearly all the cases cited in the present subtitle. In this point of view it is permissible to infer the intention to create a mortgage from evidence consisting of parol declarations, if those declarations are sufficiently precise and established by reliable testimony.

In Ontario, testimony as to the statements of the parties is held not to be admissible at all, unless a foundation for it has first been laid by the introduction of circumstantial evidence which tends to shew that the transaction was a mortgage. See §§ 20, 21, ante, where this doctrine is criticized as being not only illogical, but opposed to the English authorities. Some slight traces of this doctrine may also be found in American cases.[34]

(*b*) *Probative value.*—Whatever view may be adopted as to the general question of the competency of subsequent statements, it is clear, both upon principle and authority, that less probative force should be conceded to them than to either of the two descriptions of statements discussed in the preceding subtitles. "Declarations of this character are regarded as loose and uncertain testimony, and as the most dangerous species of evidence."[35]

The probative value of such evidence varies in proportion to the degree of deliberation with which the statements in question were made,[36] the frequency with which they were reiterated,[37] and the extent to which the party who made them was acquainted with legal phraseology.[38] It is, of course, especially cogent where the statements ascribed to both the parties are of a similar tenor;[39] though such a coincidence may by some special consideration—

[33]Harp v. Harp (1902) 136 Cal. 423, 69 Pac. 28; Vangilder v. Hoffman (1883) 22 W. Va. 20; Sadler v. Taylor (1901) 49 W. Va. 104, 38 S.E. 583.

[34]For example, in Aborn v. Burnett (1827) 2 Blackf. (Ind.) 101, it was remarked: "The cases where courts have admitted parol evidence to interfere with written contracts have generally been where there exists some equity dehors the deed. There is nothing in this record which goes to show any equitable circumstances dehors the deed, which would open the door to the admission of parol evidence."

[35]Barrett v. Carter (1870) 3 Lans. (N.Y.) 68; See also Mobile Bldg. & L. Asso. v. Robertson (1880) 65 Ala. 386; Edwards v. Wall (1884) 79 Va. 321; Bascombe v. Marshall (1908) 129 App. Div. 516, 113 N.Y. Supp. 991, affirmed in 198 N.Y. 538, 92 N.E. 1077.

The verbal admissions of a party in interest "should be received with great caution." Rodgers v. Burt (1908) 157 Ala. 91, 47 So. 226.

[36]Maples v. O'Brien (1908) 116 N.Y. Supp. 175.

[37]Stephens v. Allen (1883) 11 Or. 188, 3 Pac. 168; Sewell v. Holly (1914) —Ala. —, 66 So. 506; Jackiewicz v. Siwka (1915)—Mich. —, 153 N.W. 688.

[38]Johnson v. Woodworth (1909) 134 App. Div. 715, 119 N.Y. Supp. 146.

[39]Hicks v. Hicks (1832) 5 Gill & J. (Md.) 75.

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such as collusion for an improper purpose—be deprived of the significance which is normally ascribed to it.[40]

Some of the reasons for mistrusting evidence of this description are clearly indicated by the following passage:—

"With our experience in courts of justice, we cannot doubt the possibility of procuring false testimony of alleged verbal understandings in regard to transactions where the property at stake is so valuable as to afford a strong temptation to a dishonest mind to resort to any artifice. We know, too, that witnesses, without actually intending to mislead others, may mislead them from having been misled themselves. They may fancy that they have heard what they did not hear; they may have misapprehended remarks and observations made in their presence about matters in which they had no concern; they may have mistaken suggestions and propositions for agreements; or expressions of kind gratuitous intentions for promises meant to be legally binding, and may have supposed that to have been spoken of as finally settled which was only the subject of a negotiation, and a negotiation which may, without their knowledge, have terminated at last in a manner very different from anything they were aware of."[41]

(c) *Necessary definiteness.*—In order that evidence of this description may be treated as one of the probative elements in a given case, it is manifest, in the first place, that the statement to which it relates must be of such a tenor as to shew that the party who made it regarded the transaction as being one of the character alleged. The words relied upon must also be sufficiently precise in meaning to warrant a definite inference with respect to the view of the person who used them.[42] This prerequisite is of course

[40]Ballard v. Jones (1846) 6 Humph. (Tenn.) 455.

[41]Matthews v. Holmes (1853) 5 Grant, Ch. (U.C.) 1.

[42]In Barton v. Bank of New South Wales (1890) L.R. 15 App. Cas. (Eng.) 379, Barton obtained on credit £600 from the respondent bank, giving a personal bond, and depositing the title deeds of three parcels of land. Some years afterwards he executed to the bank an absolute conveyance of the same land, which provided that the debt should be "reduced by the sum of £400." Two years after the execution of the deed, the bank sent a note in which they called his attention to the fact that he had paid nothing towards his indebtedness, and they asked for a remittance. In reply he reminded them that his indebtedness was for the balance over and above what he termed the value of the property, and that his only undertaking was to pay that difference if he was in a position to do so. He stated that his means had not improved, and that therefore they must not expect a remittance. Held, that there was nothing in this letter which bore out the idea that the relation of the parties was that of mortgagor and mortgagee. The appellant also relied upon the manner in which the bank dealt with this transaction in their books. Upon this point the court observed: "The entries in the books do not appear to shew more than this, that from a period shortly after the date of that transaction in July, 1874, the account was headed as in liquidation. In point of fact, the account was in suspense, because if the arrangement be taken as really having been made, part of it had been completed, and upon that part no claim could lie; and as to the other part the bank possibly treated it as irrecoverable,

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applicable, whether the words were those of the transferor or transferee. If they were those of the transferee, and relied upon as indicating that he admitted the transaction to be a mortgage, they must amount to a recognition of a pre-existing agreement, and not merely to a declaration of a present willingness to allow the property to be redeemed.[43] In some cases the attention of the courts was perhaps not sufficiently directed to the importance of distinguishing between these two situations. The statements relied upon must be "inconsistent with the transferee's having an indefeasible title, or establish a fact inconsistent with it."[44]

(d) Statements of transferor inconsistent with theory that trans-

because it was to be irrecoverable if their debtor was not in a position to pay. Then interest was calculated. That circumstance does not appear to their Lordships to be of much consequence, because, although the interest was calculated in decimals by a clerk who had charge of the books, merely for the purpose of convenience if it required to be debited, in point of fact no interest was ever debited to Mr. Barton."

The following passage in the judgment of Lord Cranworth in Alderson v. White (1858) 2 De G. & J. (Eng.) 97, may be appositely referred to in this connection "The point most relied on by the respondents was that the expressions used in Crump's will, made in 1842, were inconsistent with his being anything else than a mortgagee. Now, considering that Crump was not a solicitor, but a yeoman, I think that, on a question of this kind, but little attention is to be paid to the precise form of what he is made to say in a will drawn for him. I think, however, that his expressions are hardly to be called inaccurate, as applied to property which he had purchased, subject to a right of repurchase. The use of the word 'interest' was much relied on, but a solicitor drawing the will, and not knowing all about the facts, might put in the word 'interest' as a matter of course; and it is to be observed that the testator disposes of the 'rents and profits' of the estate in a way inconsistent with the motion that he was receiving them only as a mortgagee in possession. It is true he speaks of his 'security' on the estate, but I do not see in this any material inaccuracy; he might well regard it as a security; but the question is whether he shews that he regarded it otherwise than as a security which entitled him absolutely to the rents and profits till the repurchase."

[43]Plumer v. Guthrie (1874) 76 Pa. 441. Loyd v. Currin (1842) 3 Humph. (Tenn.) 462; Little v. Braun (1902) 11 N.D. 410, 92 N.W. 800; Cook v. Gudger (1855) 55 N.C. (2 Jones, Eq.) 172.

In Crowell v. Keene (1893) 159 Mass. 352, 34 N.E. 405, the court made the following remarks: "Evidence was introduced of oral admissions made by Keene that he held the title for the benefit of Michael Robinson, and his heirs; that he had advanced money from time to time, 'and was holding the land for the debts.' In May, 1880, Keene wrote to Michael Robinson, 'My only purpose is for your benefit, and have acted upon the advice of your friends in Wareham to let it remain as it is for the present, in order to save the farm for you.' In February, 1880, also, Keene wrote to Robinson: 'When you are in a position to pay my balance I will talk about a transfer. You say I can't have all. I only want my due, and if I you can find anyone to let you have money as cheap as I have in the past you are fortunate. It has not been my intention to deprive you [of] liberty of the farm in the least.' This last sentence, Keene testified, related to the fact that he gave Robinson the use of the farm. While these oral and written admissions have a strong tendency to support the plaintiff's theory, they are also consistent with the theory that the deed was intended as an absolute conveyance, and that Keene intended when he was made whole to reconvey the land, though under no obligation to do so."

[44]Todd v. Campbell (1858) 32 Pa. 250.

Annotation. *action was a mortgage.*—A few cases in which the weight of evidence of this description was considered are cited in the footnote.[45]

(*e*) *Statements of transferee inconsistent with theory that transaction was an absolute sale.*.—The few cases involving this situation are cited below.[46]

[45](*a*) *Statements made to the transferee or his privies.* Price v. Karnes (1871), 59 Ill. 276; Wilson v. Terry (1905) 70 N.J. Eq. 231, 62 Atl. 310, affirmed in 71 N.J. Eq. 785, 65 Atl. 983; Nicolls v. McDonald (1880) 101 Pa. 514; Todd v. Campbell (1858) 32 Pa. 250.

(*b*) *Statements made to third person.* Holmes v. Matthews (1855) 9 Moore P.C. 413; Rose v. Hickey (1878) 3 Ont. App. 309; Mitchell v. Wellman (1885) 80 Ala. 16; Knockamus v. Shepard (1870) 54 Ill. 500; Scanlan v. Scanlan (1891) 134 Ill. 630, 25 N.E. 652; Boomer v. Stone (1874) 38 Iowa, 685; Etheridge v. Wisner (1891) 86 Mich. 166, 48 N.W. 1087; Henry v. Davis (1823) 7 Johns. Ch. (N.Y.) 40, affirmed in Clarke v. Henry (1823) 2 Cow. 324.

[46](*a*) *Statements made to the transferor or his privies.* In Vernon v. Bethell (1761) 2 Eden (Eng.) 110, where A had granted a mortgage of anticipation to B of a West India estate, and, having been found upon an account taken to be greatly indebted to him, released the equity of redemption to B and his heirs, the following parol declarations of Bethell (grantee) were part of the evidence from which the inference of an intention to create a mortgage was drawn: To one person he said, "that he was bound in honour and conscience, as well as by promise, that the Major should have the estate again on his being paid, though he had got an absolute acquittance;" and at another time, "Let him pay me what he owes me, and he shall have his estate again;" to another he said, "that when he obtained the conveyance, he voluntarily promised the plaintiff, or his family, that they should have the estate again on paying the money; and that he thought himself bound in honour and conscience, though not in law; and that he had doubted in sending in the account, whether he should not admit the redemption." To another person he said, "that he had promised to return the estate again when he was paid."

In Lincoln v. Wright (1859) 4 De G. & J. (Eng.) 16, 28 L.J. Ch. N.S. 705, 7 Week. Rep. 350, the court relied upon evidence to the effect that, soon after the death of Wright, the grantee, Beck, the guardian of the minor child of Wright, called on Lincoln, the grantor, and offered him £10 per year for the premises if he would give up possession of them; that Lincoln refused this proposition; and that Beck thereupon threatened to have him turned out, and shortly afterwards began the action of ejectment which the pending suit was brought to restrain. (This portion of the evidence is stated more fully in 7 Week. Rep. 124, where the judgment of Kindersley, B.C., in the lower court, is reported).

For other cases in which evidence of this type was considered, see Goley v. State (1886) 87 Ala. 57, 6 So. 287; Klock v. Walter (1873) 70 Ill. 416; Pearson v. Sharp (1886) 115 Pa. 254, 9 Atl. 38.

(*b*) *Statements made to third person.* In McIlroy v. Hawke (1856) 5 Grant, Ch. (U.C.) 516, a portion of the evidence relied upon related to the statements of two disinterested witnesses that the grantee refused to sell the land in question to one of them, not because of any reluctance to do so, but upon the ground of some right in the grantor to which he felt himself bound to give effect.

For other cases involving this sort of evidence, see Russell v. Southard (1851) 12 How. (U.S.) 139, 13 L. ed. 927; West v. Hendrix (1856) 28 Ala. 226; Rodgers v. Burt (1908) 157 Ala. 91, 47 So. 226; Ross v. Brusie (1883) 64 Cal. 245, 30 Pac. 811; Ruckman v. Alwood (1873) 71 Ill. 155; Low v. Graff (1875) 80 Ill. 360 (grantee spoke several times of his intention to reconvey).

For cases involving written declarations, see Myers v. Willis (1855) 17 C.B. (Eng.) 77, affirmed in 18 C.B. 886, 25 L.J.C.P. N.S. 255, 4 Week. Rep. 637 (letter stating that the bill of sale in question had been executed as collateral security for an advance of money, and that on the repayment of this the chattel was to be returned); Whitlow v. Stimson (1909) 14 B.C. 321 (entries in grantee's diary).

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(*f*) *Statements supporting claim a defence of party who made them.*—Some of the cases in which there were statements which tended to support the allegations of the party who had made them would seem to have proceeded simply upon the broad doctrine that statements of this tenor were admissible in spite of their self-serving character.[47]

Other decisions are based upon the general ground that the antecedent declarations of a party are not admissible for the purpose of sustaining his own averments.[48]

The latter of these doctrines has been applied with respect even to the declarations of a transferor or transferee which were made while he was in possession of the property in question, and relating to the conditions under which that possession was held.[49] But the position has also been taken that the rule under which "the character of a possession may always be shewn by the contemporaneous declarations of the tenant"[50] overrides, in cases of the type discussed in this article, the operation of the general rule which excludes self-serving declarations.[51] Whether the general rule or the special doctrine should be treated as controlling is a nice point. But, having regard to the small probative force which is attributed to all subsequent declarations, it would seem to be safer to exclude entirely those which belong to the self-serving class, unless it appears that, although in form they were of that description, they were made under circumstances indicating that they really represented a reluctant acknowledgment of an obligation regarded by the declarant as burdensome and disadvantageous.[52]

In other cases the admissibility of the given statements was regarded as being dependent upon the question whether they had or had not been made in the presence of the transferor.[53] The rationale of the probative value ascribed to the evidence in this

[47](*a*) *Statements of a party by whom or at whose request the property was conveyed.* Hopkins v. Thompson (1835) 2 Port. (Ala.) 433; Parks v. Parks (1880) 66 Ala. 326; Downing v. Woodstock Iron Co. (1890) 93 Ala. 262, 9 So. 177; Ewart v. Walling (1867) 42 Ill. 453; Funk v. Harshman (1909) 110 Md. 127, 72 Atl. 665; Boocock v. Phipard (1889) 1 Silv. Sup. Ct. 407, 5 N.Y. Supp. 228.

(*b*) *Statements of party to whom the property was conveyed.* Rowand v. Finney (1880) 96 Pa. 192; Price v. Karnes (1871) 59 Ill. 276.

[48]This was the theory adopted in Helm v. Boyd (1888) 124 Ill. 370, 16 N.E. 85; Heaton v. Gaines (1902) 198 Ill. 479, 64 N.E. 1081; Wenske v. Kenneke (1913) 182 Ill. App. 558; Wilson v. Patrick (1872) 34 Iowa, 362.

[49]Hart v. Randolph (1892) 142 Ill. 521, 32 N.E. 517.

[50]Sheaffer v. Eakman (1867) 56 Pa. 144.

[51]Creighton v. Hoppis (1884) 99 Ind. 369.

[52]This qualification was recognized in Robinson v. Chisholm (1894) 27 N.S. 74, where the grantor's admission that he owed the grantee the amount paid by the latter, together with interest, was held to shew that he regarded that amount as a loan.

[53]See, for example, Bentley v. O'Bryan (1884) 111 Ill. 53.

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point of view is clearly that the absent party cannot warrantably be prejudiced by a statement which he had no opportunity of denying.

36. Indebtedness of transferor to transferee before execution of instrument of transfer.—(*a*) *Transferor indebted.*—In several American cases the fact that the relationship of debtor and creditor subsisted between the transferor and transferee before the time when the instrument of transfer was executed, and still subsisted at the time of its execution, has been adverted to as an element tending to shew that the parties intended to create a mortgage.[54] It is manifest, however, that, in the final analysis, this element is relevant only in so far as it bears upon the essential question to be determined, viz., whether the relationship continued after the execution of the contract. (See § 37, post.) With reference to this aspect of the matter the broad rule has been formulated that, "where the relation of debtor and creditor, or of mortgagor and mortgagee, exists, and conveyances are made, or property is delivered by the debtor to the creditor, the legal presumption is that the relation continues, and that the transfers were made as further security for the debt."[55] In certain American cases we find some authority for the doctrine so laid down, in so far as it applies to conveyances by mortgagors to mortgagees. But, as thus applied, the doctrine is plainly referable to the peculiar relationship of the parties, and is a natural, if not an inevitable, consequence of the attitude of the courts with regard to contracts for the sale of the equity of redemption. Some further discussion would seem to be required before it can be accepted as settled law in cases where no antecedent relationship of mortgagor and mortgagee is involved. It would perhaps not be unreasonable to take the position that, as an unsecured creditor can, by obtaining a judgment for his claim, secure a lien upon his debtor's property, the relationship between them is, in the present point of view, so essentially similar to the relationship between a mortgagor and a mortgagee, that the presumption of the continuance of the debt cannot logically be entertained with respect to the latter relationship, and not with respect to the former.

[54]Turnipseed v. Cunningham (1849) 16 Ala. 501, 50 Am. Dec. 190; Rose v. Gandy (1902) 137 Ala. 329, 34 So. 239; Winn v. Witzwater (1907) 151 Ala. 171, 44 So. 97; Miller v. Thomas (1853) 14 Ill. 428; De Wolf v. Strader (1861) 26 Ill. 225, 79 Am. Dec. 371; Wright v. Mahaffey (1888) 76 Iowa, 96, 40 N.W. 112; McRobert v. Bridget (1914) — Iowa, —, 149 N.W. 906; Dabney v. Green (1809) 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503. See also the cases cited in the following notes.

[55]Simpson v. First Nat. Bank (1899) 35 C.C.A. 306, 93 Fed. 309 (where none of the authorities cited go to the extent of predicating an actual presumption from the previous existence of an *unsecured* debt). See also, Sutphen v. Cushman (1864) 35 Ill. 186; Ruffier v. Womack (1867) 30 Tex. 332; Harrison v. Hogue (1911) — Tex. Civ. App. —, 136 S.W. 118; Wright v. Mahaffey (1888) 96 Iowa, 96, 40 N.W. 112.

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There is also authority for the doctrine that, where the consideration of a deed was a pre-existing debt, the prima facie inference is that the debt was extinguished upon the execution of the deed.[56]

Another view is that the fact of the pre-existing relationship of debtor does not raise any presumption either for or against the theory that the transaction was a mortgage.[57]

In one case it was expressly laid down that parol evidence was admissible to prove the fact of the pre-existing indebtedness,[58] and the same rule was taken for granted in all the others which have been cited in this section.

(*b*) *Transferor not indebted.*—In some cases in which the given transactions were held not to be mortgages, the circumstance that the transferor had not previously been indebted to the transferee was specified among the elements upon which the conclusions were based.[59] But this element obviously possesses, in respect of the issue to which it is relevant, an even smaller probative significance than that which is ascribed, in its appropriate sphere, to the fact of a pre-existing indebtedness.[60]

37. Subsequent indebtedness of transferor to transferee.—"In all cases the true test, whether a mortgage or not, is to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage."[61] In other words, "if the instrument be made as a security for the payment of a debt, or the performance of a duty, it is a mortgage."[62] From this fundamental conception it would seem to be a necessary deduction that a mortgage should be inferred, as matter of law, whenever it appears, either from the words of the written contract itself or from extrinsic evidence, that the transaction operated so as to create or continue, as between the transferor and transferee, the relationship of debtor and creditor,—the expression "debtor" being here used in its broader sense as connoting a person who is bound to perform some definite legal obligation for the benefit of another, and not merely one who is

[56]People ex rel. Ford v. Irwin (1861) 18 Cal. 117; former appeal in 14 Cal. 428.

[57]Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671; Crowell v. Keene (1893) 159 Mass. 352, 34 N.E. 405.

[58]Sutphen v. Cushman (1864) 35 Ill. 186.

[59]Conway v. Alexander (1812) 7 Cranch (U.S.) 218, 3 L. ed. 321; Freeman v. Baldwin (1848) 13 Ala. 246; Slutz v. Desenberg (1876) 28 Ohio St. 378.

[60]That the non-existence of an antecedent indebtedness is not necessarily decisive was recognized in Hughes v. McKenzie (1893) 101 Ala. 415, 13 So. 609. But this form of statement seems to reflect an excessively high estimate of probative value.

[61]Flagg v. Mann (1837) 2 Sumn. 486, Fed. Cas. No. 4,847, per Story, J.

[62]Lanfair v. Lanfair (1836) 18 Pick. (Mass.) 299.

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liable to pay a certain sum of money. But the cases do not all proceed upon this simple theory.

In some of them the fact of the subsistance of the relationship of debtor and creditor after the execution of the instrument of transfer has been adverted to merely as one of the two or more elements which were regarded as warranting the inference that the parties intended to create a mortgage.[63] The circumstance that a mortgage should have been predicated from a combination of elements, and not from the indebtedness alone, might perhaps be considered, in a strictly logical point of view, to import that the indebtedness was regarded as being insufficient of itself to establish the character of the transaction. But it would be unjustifiable to lay much stress upon this aspect of the matter. In fact, several of the decisions collected in the footnote were rendered in jurisdictions in which the theory that the subsistence or non-subsistence of a debt is a conclusive test has been explicitly recognized. See below.

In other cases we find various judicial statements which import more or less distinctly that the subsistence of an indebtedness possesses no higher probative value than that of an element which points very strongly to the inference that the transaction was a mortgage.[64] In any jurisdiction in which this theory prevails, the character of the transaction is not conclusively established when it is proved that the transferor and transferee stood in the relationship of debtor and creditor after the execution of the in-

[63](a) *Cases relating to contracts which did not include any written stipulations as to reconveyance.* Turner v. Wilkinson (1882) 72 Ala. 366; Douglass v. Moody (1885) 80 Ala. 61; Nelson v. Wadsworth (1911) 171 Ala. 603, 55 So. 120; Smith v. Cremer (1873) 71 Ill. 185; Froud v. Merritt Bros. (1896) 99 Iowa, 410, 68 N.W. 728; Stratton v. Rotrock (1911) 84 Kan. 198, 114 Pac. 224; Ferris v. Wilcox (1883) 51 Mich. 105, 47 Am. Rep. 551, 16 N.W. 252; Evans v. Thompson (1903) 89 Minn. 202, 94 N.W. 692; Farmers' & M. Bank v. Smith (1901) 61 App. Div. 315, 70 N.Y. Supp. 536; Shriber v. Le Clair (1886) 66 Wis. 579, 29 N.W. 570, 889.

(b) *Cases relating to contracts which include written stipulations as to reconveyance.* Crosby v. Buchanan (1886) 81 Ala. 574, 1 So. 898; Crismon v. Kingman Plow Co. (1913) 106 Ark. 166, 152 S.W. 989; Castillo v. McBeath (1915) 162 Ky. 382, 172 S.W. 669.

[64](a) *Cases relating to contracts which did not include any written stipulations as to reconveyance.* Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671; Pond v. Eddy (1873) 113 Mass. 149; Kinkead v. Peet (1908) 137 Iowa, 692, 114 N.W. 616; Holden Land & Live Stock Co. v. Inter-State Trading Co. (1912) 87 Kan. 221, L.R.A. 1915B, 492, 123 Pac. 733; Pace v. Bartles (1890) 47 N.J. Eq. 170, 20 Atl. 352; Lawrence v. Du Bois (1880) 16 W. Va. 462.

(b) *Cases relating to contracts which included written stipulations as to reconveyance.* In Bullen v. Renwick (1862) 9 Grant, Ch. (U.C.) 202, reversing on rehearing 8 Grant, Ch. (U.C.) 342, a stipulation that the grantor should pay, not at his option, but absolutely, led Spragge, V.C., "almost irresistibly" to the conclusion that the transaction was in substance and reality a loan of money."

See also Stinchfield v. Milliken (1880) 71 Me. 567; Robinson v. Willoughby (1871) 65 N.C. 520; Fowler v. Stoneum (1854) 11 Tex. 478, 62 Am. Dec. 490.

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strument of transfer, and it is still competent to shew that it was not their actual intention to create a mortgage.[65] This is presumably the theory with reference to which the Supreme Court of Georgia has answered in the affirmative the question: "Is it legally possible for an owner of realty to sell it outright for cash and at the same time, and as a part of the contract of sale, secure the right to repurchase, and become bound to do so, at a higher price payable in the future? or, must such a transaction necessarily and inevitably be treated as one of borrowing money and securing its payment by a deed in the nature of a mortgage?" But the arguments by which the position thus taken is sustained are scarcely convincing.[66]

In a third group of cases, the subsistence of the relationship of debtor and creditor after the instrument of transfer took effect is treated as being a circumstance which constitutes decisive proof that the transaction was a mortgage. This is the theory which is sustained by a preponderance of authority. In some of the instances in which it has been formally stated, the language specifically refers to that particular situation in which an antecedent debt continues to susbist after the execution of the written contract;[67] and this was the actual state of the evidence in many of the cases in which the conclusiveness of the element of a subsequent indebtedness has been affirmed.[68] But that conclusiveness has frequently been predicated with respect to cases in which the indebtedness was created by the transaction in question.[69]

[65]Hutchings v. Terrace City Realty and Securities Co. (1915)—Mo.—, 175 S.W. 905.

[66]Felton v. Grier (1899) 109 Ga. 320, 34 S.E. 601, 35 S.E. 175.

[67]"If the relation of debtor and creditor exists when the conveyance is made, and this relation is regarded as subsisting after the conveyance is made, the transaction will be regarded as a mortgage." Hooper v. Smyser (1900) 90 Md. 363, 45 Atl. 206.

For cases in which the explicit assumption by the transferor of an obligation to repurchase the property was treated as being conclusive proof that the transaction was a mortgage, see Bullen v. Renwick (1862) 9 Grant, Ch. 202; Hawke v. Milliken (1866) 12 Grant, Ch. 236.

[68](*a*) *Cases relating to contracts which did not include any stipulation as to reconveyance.* Murphy v. Taylor (1850) 1 Ir. Ch. Rep. 92; Shreve v. McGowin (1904) 143 Ala. 665, 42 So. 94; National Ins. Co. v. Webster (1876) 83 Ill. 470; Conant v. Riseborough (1891) 139 Ill. 383, 28 N.E. 789; Marshall v. Thompson (1888) 39 Minn. 137, 39 N.W. 309; O'Neill v. Capelle (1876) 62 Mo. 202; Judge v. Reese (1874) 24 N.J. Eq. 387; Budd v. Van Orden (1880) 33 N.J. Eq. 143; Rockwell v. Humphrey (1883) 57 Wis. 410, 15 N.W. 394.

(*b*) *Cases relating to contracts which included stipulations as to reconveyance.* Bentley v. Phelps (1847) 2 Woodb. & M. 426, Fed. Cas. No. 1,331 (circumstance that the parties stood in the relation of lender and borrower, both before and at the time of the execution of the deed, was said to be "very decisive in a court of chancery that the transaction was meant to be a mortgage"); Hickox v. Lowe (1858) 10 Cal. 197; Shaffer v. Huff (1873) 49 Ga. 589; Martin v. Duncan (1895) 156 Ill. 274, 41 N.E. 43; Pardee v. Treat (1879) 18 Hun (N.Y.) 298; Wilson v. Giddings (1876) 28 Ohio St. 554.

[69]Robinson v. Cropsey (1833) 2 Edw. Ch. (N.Y.) 143, affirmed in 6 Paige,

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The essence of the theory explained in the preceding paragraph is: "The transferor cannot at the same time hold the property absolutely, and retain the right to enforce the payment of the debt on account of which the conveyance was made."[70] In this point of view it follows that, if an indebtedness subsists, equity will regard the conveyance as a mortgage, whether the transferee so regarded it or not.[71]

The effect of proving the fact of a subsisting indebtedness is manifestly to establish that mutuality of remedy which is one of the essential incidents of a mortgage. One party "can redeem by paying or discharging the debt or obligation for which the security is given; the other can foreclose, and appropriate the property or proceeds to the same end."[72]

It is well settled that parol evidence is admissible for the purpose of proving that the relation of debtor and creditor subsisted between the transferor and transferee after the execution of the instrument of transfer.[73]

The inference that such a relation subsisted is strongly indicated by the circumstance that interest was paid on the money advanced.[74] In one instance, the court expressed the opinion that "the peculiar nature of this species of contract is such as renders payment of interest or payment of principal under the parol contract, such an act of part performance as takes the case

480; Voss v. Eller (1886) 109 Ind. 260, 10 N.E. 74; Mitchell v. Wellman (1885) 80 Ala. 16.

"The test of the distinction [between a mortgage and a conditional sale] is this: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt is extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, in a given time, and thereby entitled himself to a reconveyance, it is a conditional sale." 4 Kent, Com. *144, note (*d*), quoted in Saxton v. Hitchcock (1866) 47 Barb. (N.Y.) 220.

[70]Sutphen v. Cushman (1864) 35 Ill. 186.

[71]Fisher v. Green (1892) 142 Ill. 80, 31 N.E. 172; Le Comte v. Pennock (1900) 61 Kan. 330, 59 Pac. 641; Wallace v. Smith (1893) 155 Pa. 78, 35 Am. St. Rep. 868, 25 Atl. 807; Hamilton v. Flume (1884) 2 Posey, Unrep. Cas. (Tex.) 694.

[72]Niggeler v. Maurin (1885) 34 Minn. 118, 24 N.W. 369. See also Barnes v. Holcomb (1849) 12 Smedes & M. (Miss.) 306.

[73]Shreve v. McGowin (1904) 143 Ala. 665, 42 So. 94 (doctrine explicitly affirmed on demurrer).

[74]In Maxwell v. Montacute (1719) Prec. in Ch. (Eng.) 526, Lord Chancellor Parker observed: "So, where an absolute conveyance is made for such sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance." This passage (which is not found in the report of the case in 1 P. Wms. 618) was quoted in Conner v. Chase (1843) 15 Vt. 764.

For other cases in which the subsistence of a debt was held to be inferable from the payment of interest, see Allenby v. Dalton (1827) 5 L.J.K.B. (Eng.) 312; Papineau v. Gurd (1851) 2 Grant, Ch. (U.C.) 512; Robinson v. Chisholm (1894) 27 N.S. 74.

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out of the statute" of frauds.[75] Apparently this alternative conception has not been relied upon in any other case.

Another fact of great probative force is that an instrument evidencing an antecedent indebtedness was neither surrendered nor cancelled.[76] The conclusion to which this fact ordinarily points is, of course, repelled if other evidence shews that, as a matter of fact, the indebtedness was extinguished by the transaction.[77]

38. No subsequent indebtedness of transferor to transferee.—As the essential purpose and effect of a mortgage is to create a security for a debt, an instrument which, on its face, imports a complete transfer of the ownership of the given property, cannot operate as a mortgage, if the language of the written contract itself or the extrinsic evidence shews that, after the execution of the instrument, the relationship of debtor and creditor did not subsist between the party by whom or at whose instance the instrument was executed and the party to whom it was executed.[78] The courts have sometimes laid stress upon the fact that, under such circumstances, mutuality, one of the essential attributes of a mortgage, is lacking.[79] But obviously the significance of this consideration is merely subsidiary and derivative. The element which primarily determines the quality of the transaction is the nonexistence of the debt.

[75]Le Targe v. De Tuyll (1850) 1 Grant, Ch. (U.C.) 227.

[76]Babcock v. Wyman (1856) 19 How. (U.S.) 289; Calhoun v. Anderson (1908) 78 Kan. 746, 98 Pac. 274; Pond v. Eddy (1873) 113 Mass. 149; Sanborn v. Sanborn (1895) 104 Mich. 180, 62 N.W. 371; Sweet v. Mitchell (1862) 15 Wis. 642.

In Healey v. Daniels (1868) 14 Grant, Ch. (U.C.) 633, the fact that the grantee of land had retained notes previously given to him by the grantor was held not to be enough to counteravail the effect of the testimony of two witnessesthat the transaction was intended as an absolute purchase.

[77]In Todd v. Campbell (1858) 32 Pa. 250, the court said: "It is true that if land be conveyed in consideration of a pre-existing debt, due from the grantor to the grantee, and it is the understanding of the parties that the debt shall survive, the deed is but a mortgage. This understanding may be proved by parol. But the debt must survive. That the written evidences of it remain in the grantee's hands is not enough, if the liability be gone. They may afford a presumption of continued indebtedness, but it is a presumption easily rebutted."

See also Gomez v. Kamping (1871) 4 Daly (N.Y.) 77 (mere retention of vendor's note "did not continue it as a legal obligation"); Haley v. Daniels (1868) 14 Grant, Ch. (U.C.) 633 (retention of grantor's notes by grantee not enough of itself to shew mortgage; Brant v. Robertson (1852) 16 Mo. 129.

[78]"Every mortgage implies a loan; every loan a debt; and though there were no covenant or bond, the personal estate of the borrower must remain liable to pay off the mortgage." Lord Talbot in King v. King (1735) 3 P. Wms. 358, 18 Eng. Rul. Cas. 1.

"No loan, no debt, no mortgage." Lord Macnaghten in Manchester, S. & L.R. Co. v. North Central Wagon Co. (1888) 1 L.R. 13 App. Cas. 554.

[79]Swift v. Swift (1860) 36 Ala. 147; Hogan v. Jaques (1868) 19 N.J. Eq. 123, 97 Am. Dec. 644; Yost v. First Nat. Bank (1903) 66 Kan. 605, 72 Pac. 209; Flint v. Sheldon (1816) 13 Mass. 443, 7 Am. Dec. 162.

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The general rule enunciated in the preceding paragraph has frequently been affirmed, both in cases where the contract did not include any written stipulation as to the reconveyance of the property in question,[80] and in cases where such a stipulation had been made.[81]

In many of the American cases in which the nonsubsistence of the relationship of debtor and creditor has been adverted to, it has been specified in conjunction with other facts. But in such cases these additional facts were presumably regarded as being merely corroborative of an element which, even when taken by itself, would constitute adequate proof that the transactions in question were not mortgages, rather than as going to make up, in combination with that element, an aggregate composed of items none of which, if considered singly, would have been decisive. A different view would clearly be inconsistent with the doctrine which declares a debt to be an essential ingredient of a mortgage. That doctrine necessarily involves these consequences:—

(1) That evidence which affirmatively shews that no debt subsisted after the instrument of transfer was executed is sufficient of itself to justify a court in rejecting a claim which is founded on the theory that the given transaction was a mortgage. Any judicial statements which ascribe, or seem to ascribe, to such evidence a lower degree of certainty, may safely be pronounced incorrect.[82]

(2) That such evidence, being conclusive with regard to the intention of the parties, overcomes the effect of any other description of evidence which tends to shew that the given transaction was a mortgage.[83]

In respect of contracts which obligate the transferee to reconvey if certain conditions are fulfilled by the transferor, the operation of the general rule as to the effect of evidence shewing the nonsubsistence of an indebtedness is sometimes stated in language expressive of the doctrine that, when the relationship of debtor and creditor does not subsist after the execution of the

[80]Martin v. Martin (1898) 123 Ala. 191, 26 So. 525; Smith v. Smith (1907) 153 Ala. 504, 45 So. 168; Burgett v. Osborne (1898) 172 Ill. 227, 50 N.E. 206; Rogers v. Rogers (1888) 115 Ind. 413, 17 N.E. 609; Reed v. Reed (1883) 75 Me. 264; Cake v. Shull (1888) 45 N.J. Eq. 208, 16 Atl. 434; Fullerton v. McCurdy (1873) 55 N.Y. 637; Plumer v. Guthrie (1874) 76 Pa. 441.

[81]Williams v. Owen (1840) 5 Myl. & C. (Eng.) 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114; O'Reilly v. O'Donoghue (1875) Ir. Rep. 10 Eq. 75; Perdue v. Bell (1887) 83 Ala. 396, 3 So. 698; Henley v. Hotaling (1871) 41 Cal. 22; Flagg v. Mann (1833) 14 Pick. 467; Cornell v. Hall (1871) 22 Mich. 377; Reed v. Bond (1893) 96 Mich. 134, 55 N.W. 619; Jeffreys v. Charlton (1907) 72 N.J. Eq. 340; 65 Atl. 711; Glover v. Payn (1838) 19 Wend. (N.Y.) 518; Macaulay v. Porter (1877) 71 N.Y. 173.

[82]See for example, Fisher v. Green (1892) 132 Ill. 80, 31 N.E. 172; Spalding v. Brown (1899) 36 Or. 160, 59 Pac. 185.

[83]Hodge v. Weeks (1888) 31 S.C. 276, 9 S.E. 953; Smith v. Smith (1907) 153 Ala. 504; 45 So. 168; Hershey v. Luce (1892) 56 Ark. 320, 19 S.W. 963.

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contract, the mere fact of the insertion of the provision as to re-conveyance will not impart to the transaction the quality of a mortgage.[84] Under such circumstances a provision of this tenor confers upon the transferor merely an option or privilege in respect of the reacquisition of the property.[85] When the option or privilege so reserved is released or abandoned, the obligation of the contract is terminated, and the transferor has no equity remaining in the property that can be subjected to the claims of a creditor.[86]

The fact that, under the contract, the transferor is not subjected to any personal liability in respect of the repayment of the money received from the transferee has sometimes been regarded as an element which shews conclusively that the parties did not intend to create a mortgage.[87] As is shewn by one of the citations in the footnote, this theory is sustained by the high authority of the Supreme Court of the United States. But the view more generally accepted is that "personal liability, express or implied, is not necessarily incident to a mortgage. A charge by way of mortgage upon property may be so framed as to exclude all personal liability of the mortgagor."[88] The absence of such liability, however, and the consequent want of mutuality pro

[84]"Where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute conveyance into a mortgage." Glover v. Payn (1838) 19 Wend. (N.Y.) 518.

"If . . . the judgments and securities which constituted the consideration for the conveyance are satisfied and canceled, the mere fact that the grantee executed articles of agreement giving the grantor an option to repurchase the property within a certain time will not make the transaction a mortgage." Wallace v. Smith (1893) 155 Pa. 89, 35 Am. St. Rep. 868, 25 Atl. 807.

[85]If an existing debt "is treated as extinguished, and the vendor has the privilege merely of refunding the price, the transaction is a conditional sale." Hopper v. Smyser (1900) 90 Md. 363, 45 Atl. 206.

Phraseology alluding to the character of the transferor's right as being a mere option or privilege has frequently been employed by the courts. See, for example, Logwood v. Hussey (1877) 60 Ala. 417; Martin v. Martin (1898) 123 Ala. 191, 26 So. 525; Stahl v. Dehn (1888) 72 Mich. 645, 40 N.W. 922; Reed v. Bond (1893) 96 Mich. 134, 55 N.W. 619; Saxton v. Hitchcock (1866) 47 Barb. (N.Y.) 220.

[86]Yost v. First Nat. Bank (1903) 66 Kan. 605, 72 Pac. 209.

[87]"It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument." Conway v. Alexander (1812) 7 Cranch. (U.S.) 218, 237, 3 L. ed. 321, 328.

"It is a necessary ingredient in a mortgage that the mortgagee should have a remedy for his debt against the debtor, the mortgage itself being a mere security for the debt." McKinstry v. Conly (1847) 12 Ala. 678. The same language was used in Swift v. Swift (1860) 36 Ala. 147.

See also Desloge v. Ranger (1842), 7 Mo. 327; Hickman v. Cantrell (1836) 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; Rogers v. Beach (1888) 115 Ind. 413, 17 N.E. 609.

[88]Coote, Mortg. 8th ed. p. 11. See also Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671; Holmes v. Grant (1840) 8 Paige (N.Y.) 257; Wing v. Cooper (1864) 37 Vt. 169.

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tanto, is a circumstance which, though it is not of itself decisive, is proper to be considered with reference to the question whether the transaction was a mortgage or not.[89]

In one case an instrument which provided for redemption, and to that extent was a mortgage, was held not to be a mortgage, for the reason that it did not contain any stipulation for the repayment of the money.[90] But this decision, which was based upon the discredited theory that a transaction cannot be a mortgage unless the transferee has a personal remedy against the transferor (see preceding section), is clearly bad law. The accepted doctrine is to the following effect: The circumstance that the transferor did not stipulate in writing to repay the money in consideration of which the instrument of transfer was executed tends to shew that the transaction was not a mortgage,[91] but it is not conclusive evidence in that regard.[92] Its nonconclusiveness may be regarded as a corollary either of the general principle that parol evidence is competent to shew the character of the transaction, or of the doctrine that personal liability is not a necessary incident of a mortgage.

The general principle that a subsisting debt is an essential ingredient of a mortgage manifestly involves the corollary that the burden of proving the subsistence of a debt lies on the party who alleges that the transaction was a mortgage, unless the instrument of transfer includes, or is accompanied by, a stipulation

[89]Wing v. Cooper (1864) 37 Vt. 169; Quirk v. Rodman (1856) 5 Duer (N.Y.) 285.

[90]Desloge v. Ranger (1842) 7 Mo. 327.

[91]In Floyer v. Lavington (1714) 1 P. Wms. (Eng.) 268, it was observed: "As to the objection that here was no covenant for the payment of the principal or interest, he said that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz., for the mortgagee to compel the payment, as well as for the mortgagor to compel a redemption; since such conveyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage.

See also Mellor v. Lees (1742) 2 Atk. 496; Glagg v. Mann (1833) 14 Pick. (Mass.) 467; Flagg v. Mann (1837) 2 Sumn. 486, Fed. Cas. No. 4,847.

[92]In Lawley v. Hooper (1745) 3 Atk. 278, Lord Hardwicke, referring to a deed which provided for reconveyance, said that the absence of a covenant to repay the money furnished by the grantee did not render the instrument any the less a mortgage.

"It is quite clear that, if the intention were that it should be a mortgage, the absence of a covenant and collateral bond would not make it the less so." Goodman v. Grierson (1813) 2 Ball & B. (Ir.) 278.

"The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance." Conway v. Alexander (1812) 7 Cranch (U.S.) 218, 3 L. ed. 321."

The non-conclusiveness of this element was also affirmed in King v. King (1735) 3 P. Wms. 360, 18 Eng. Rul. Cas. 1; Douglass v. Moody (1885) 80 Ala. 61; Perdue v. Bell (1887) 83 Ala. 400, 3 So. 698; Rice v. Rice (1827) 4 Pick. (Mass.) 349; Matthews v. Sheehan (1877) 69 N.Y. 585; Morris v. Budlong (1879) 78 N.Y. 543.

binding the transferee to reconvey upon the fulfilment of certain conditions, and the theory that such a stipulation renders the transaction presumptively a mortgage prevails in the jurisdiction in which the rights of the parties are determined. See 37, ante.

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39. Quantitative relationship between the actual value of the property and the consideration paid.—(*a*) *Generally.*—One of the recognized tests of the character of the transaction is the quantitative relationship between the consideration paid by the transferee to the transferor and the actual value of the property conveyed by the instrument of transfer.[93] In other words, "the relative value of the property and the price actually advanced or paid" are to be taken into account to determine the intent of the parties.[94]

(*b*) *Consideration inadequate.*—Among the elements which tend to shew that the transaction was a mortgage rather than a sale is evidence to the effect that the actual value of the property conveyed "greatly exceeded" the consideration received by the transferor from the transferee;[95] or that there was a "great disproportion" between the amount of the consideration paid and the value of the property;[96] or that the money paid by the transferee was "not a fair price for the absolute purchase of the estate conveyed to him, especially if it be grossly inadequate."[97]

The significance of this element was adverted to in several cases decided during the latter half of the seventeenth century;[98] and since that time its competency has been recognized in a very large number of cases.[99]

According to most of the authorities, the probative significance

[93]See cases cited passim in the ensuing sections.

[94]Robinson v. Cropsey (1837) 6 Paige (N.Y.) 480.

[95]Horn v. Keteltas (1871) 46 N.Y. 605.

[96]Watkins v. Williams (1898) 123 N.C. 170, 31 S.E. 388.

[97]Coventry's note to Powell on Mortgages, p. 125. A similar phraseology is found in Butler's note to Co. Litt. L. 3 C. 5, § 332.

[98]"If the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage." Lord Nottingham in Thornborough v. Baker (1675) 3 Swanst. 631, 18 Eng. Rul. Cas. 231.

See also Talbot v. Braddill (1683) 1 Vern. (Eng.) 183; Barrell v. Sabine (1684) 1 Vern. (Eng.) 268, 3 Salk. 241. Both of these cases are reviewed in § 15, note 1, ante.

In 2 Comyns's Dig. 727, Copleston v. Boxwill (1660) 1 Ch. Cas. (Eng.) 2, is cited as having decided that an absolute conveyance shall not be deemed a mortgage, though it be made for an under value, if it does not appear to be so intended at the time of the making, by condition in the same, or by other writing. But this was merely one of the points argued by counsel, and, so far as the report shews, no opinion with regard to it was expressed by the court.

[99]Atty.-Gen. v. Crofts (1708) 4 Bro. P.C. 136; Douglas v. Culverwell (1862) 4 De G. & J. 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327; Fee v. Cobine (1847) 11 Ir. Eq. Rep. 406; Papineau v. Gurd (1851) 2 Grant, Ch. 512; Stewart v. Horton (1856) 2 Grant, Ch. 45; Bullen v. Renwick (1860) 9 Grant, Ch. 202, reversing 8 Grant, Ch. 342; Fallon v. Keenan (1866) 12 Grant, Ch. 388.

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ascribed to this element is simply a deduction from the fact that an absolute sale of property for a price which is smaller than that which can be obtained in the open market is an unusual, and therefore improbable, occurrence.[100] But it has also been referred to the consideration that "if there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor."[101]

The accepted doctrine is that inadequacy of consideration is not an element which of itself, and independently of other evidence, will warrant the conclusion that the transaction was a mortgage.[102] At the most, therefore, its probative value is merely that of a corroborative circumstance of great weight. "Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists, and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so."[103]

(c) *Amount paid not inadequate.*—Evidence from which it appears that the consideration paid by the transferee to the transferor was equal, or approximately equal, to the actual value of the property conveyed, tends to shew that the transaction was not a mortgage.[104] The notion to which this rule is referable is

[100]Bentley v. Phelps (1847) 2 Woodb. & M. 426, Fed. Cas. No. 1,331; Ewart v. Walling (1867) 42 Ill. 456; Rich v. Doane (1862) 35 Vt. 125; Reed v. Reed (1883) 75 Me. 264; Hartley's Appeal (1883) 103 Pa. 23.

[101]Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671.

[102]In Bernard v. Walker (1862) 2 U.C. Err. & App. 121, Robinson, Ch.J., treated this element as being a fair ground of argument, where there are conflicting accounts of the real intention of the parties, but he also remarked: "I have no doubt that neither the want of a due proportion between the benefit which the plaintiff received from making the conveyance, nor the want of such steps as are ordinarily taken among men of business in conducting similar transactions, could be relied on as sufficient for shewing that the deed, absolute in its terms, must have been intended only as security, and should be so treated; but that part of the case is nevertheless material as being in accordance with, and tending to confirm what may be inferred from, other facts which have the same tendency."

See also Bogk v. Gassert (1892) 149 U.S. 17, 37 L. ed. 631, 13 Sup. Ct. Rep. 738; Rodgers v. Burt (1908) 157 Ala. 91, 47 So. 226; Rich v. Doane (1862) 35 Va. 125; Heald v. Wright (1874) 75 Il. 17.

[103]Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671, citing Story's Eq. §§ 239, 245, 246, and Kerr, Fr. & Mistake, 186, and note.

"Great stress is laid, in cases of this kind, on inadequacy of consideration, where there is a considerable disproportion between the price and the real value of the property." Coyle v. Davis (1885) 116 U.S. 108.

[104]Cotterell v. Purchase (1735) Cas. t. Talb. 61; Davis v. Thomas (1830) 1 Russ. & M. 506, Tamblyn, 416, 9 L.J. Ch. 232; Williams v. Owen (1840) 5 Myl. & C. 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114; Holmes v. Mathews (1855) 9 Moore, P.C.C. 413; Howland v. Blake (1878) 97 U.S. 624, 24 L. ed. 1027; Coyle v. Davis (1885) 116 U.S. 108, 29 L. ed. 583, 6 Sup. Ct. Rep. 314; Wallace v. Johnstone (1888) 129 U.S. 58, 32 L. ed. 619, 9 Sup. Ct. Rep. 243.

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that "no one would lend upon mortgage the full value of the estate mortgaged."[105]

40. Conduct of parties with respect to the property after the transaction.—(*a*) *Generally.*—The general rule, which is tersely expressed in the statement of Lord St. Leonards, "Tell me what you have done under a deed, and I will tell you what the deed means,"[106] has frequently been applied in cases of the type discussed in this monograph. "In ascertaining the original character of a transaction, it is ever to be borne in mind that no subsequent agreement can alter that character; but it does not therefore follow that we are to examine the original contract only, and shut our eyes to the subsequent acts and concessions of the parties tending to shew what was such original character in its inception. A question frequently arises whether an absolute deed was not really a security and mortgage as between the parties. Resort is always had to the conduct and concessions of the parties, both cotemporaneous and subsequent, and if anything can be found absolutely inconsistent with its being a sale, it shews it a mortgage."[107]

(*b*) *Transferor's continuance in possession of property.*—The circumstance that, after the execution of the instrument of transfer, the person by whom or at whose request it was executed continued in possession of the property conveyed, is held by all the authorities to be an indicium of an intention to create a mortgage. Its probative value in this regard was affirmed in several cases decided during the earlier part of the eighteenth century,[108] and since then it has frequently been treated as a significant element.[109] The probative value ascribed to it is obviously referable

[105]Neal v. Morris (1818) Beatty, Ir. Ch. Rep. 597.

[106]Atty.-Gen. v. Drummond (1842) 1 Drury & War. (Ir.) 353, Connor & L. 98.

[107]Campbell v. Worthington (1834) 6 Vt. 448.

[108]In Harris v. Horwell (1708) Gilb. Eq. Rep. 11, it was remarked that, "if a mortgagee afterwards gets an absolute deed, but suffers possession to go some time contrary to it, it will again make it but a mortgage."

In Atty.-Gen. v. Crofts (1708) 4 Bro. P. C. 136, as the grantor's retention of possession was one of the circumstances upon which counsel relied as proof that the deed in question was intended as a mortgage, the decision of the House of Lords upholding this theory as to the character of the transaction was presumably based to some extent upon this portion of the evidence; but the report of the judgment contains no explicit reference to it.

[109]In Cotterell v. Purchase (1835) Cas. t. Talb. 61, Talbot, L. Ch., remarked: "Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage, but she was not." This was one of the cases cited in Campbell v. Dearborn (1872) 109 Mass. 130, 12 Am. Rep. 671, as authority for the statement that a "circumstance that may and ought to have much weight is the continuance of the grantor in the use and occupation of the land as owner after the apparent sale and conveyance." The other case mentioned was Lincoln v. Wright (1859) 4 De G. & J. (Eng.) 16, 28 L.J. Ch. N.S. 705, 7 Week. Rep. 350. There, however, Turner, L.J., was the only member of the court who determined the rights of

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to the consideration that, as a general rule, the owner of property retains possession of property after he has mortgaged it, but does not retain possession of it after he has sold it outright[110].

As the simple fact of the transferor's retention of possession is one of equivocal significance, the party who alleges that the transaction was a mortgage usually attempts to impart greater definiteness and certainty to that fact by shewing that the possession was attended by one or more of the various incidents which are normally characteristic of and associated with ownership. Among the more material incidents of this character are the following:—

That the transferor continued to control, manage, and dispose of the property in the same manner as he had done before the instrument of transfer was executed.[111]

That he sold the property or a portion of it, and received the purchase price.[112]

That he made upon the real property conveyed permanent and

the parties with reference to the theory of a mortgage, and he did not specify the grantor's retention of possession as one of the elements tending to support his conclusion. That circumstance was relied upon by Knight-Bruce, L.J., but merely as evidence going to shew part performance of the verbal contract.

One of the circumstances which, in Coventry's note to Powell on Mortgages, p. 125a, are specified as being indicative of an intention to create a mortgage, is stated in the words, "if the grantee be not let into possession of the estate immediately after the pretended purchase." Similar phraseology is used in Butler's note to Co. Litt. L. 3, chap. 5, § 332.

[110]McIlroy v. Hawke (1856) 5 Grant, Ch. (U.C.) 516; McDonald v. McDonell (1864) 2 U.C. Err. & App. 393; Marshall v. Steel (1874) Russell (N.S. Eq.) 116; and cases cited in pp. 413, *et seq.* of the mongraph on the L.R.A.

[111]In Wheatley v. Wheatley (1901) 85 L.T.N.S. 491, a bankrupt had, in compliance with the demand of one Driscoll, who had for some time financed his business, conveyed a portion of his personal property to Driscoll. At the same time the parties entered into a hire-purchase agreement. Discussing the legal effect of the transaction, Wright, J., said: "I have no doubt that both parties intended that the property in the goods should pass to Driscoll, and that he should become their legal owner, but only on the terms that the bankrupt should retain them in his possession, use them for the purposes of his business, and buy them back on the terms of the hire-purchase agreement. There was no attempt to ascertain the actual value of the horses, carts, etc., and it was clearly not intended that Driscoll should have them as absolute owner. Such an arrangement would have been of no use to the bankrupt; it would have stopped his business, which he was anxious to carry on. I am, therefore, bound, on the authorities, to hold that the hire-purchase agreements formed part of Driscoll's title, and are not consistent with any other inference except that the transactions were not sales, but loans, and that the chattels comprised in the hire-purchase agreements were intended as security for their repayment."

[112]Robinson v. Chisholm (1894) 27 N.S. 74, Adams, who had entered into a contract for the purhcase of land, procured a conveyance of the legal title to Zink, upon the latter's paying the residue of the purchase price. Adams afterwards sold a part of the property to his son-in-law, who built upon it and occupied it, presumably to the knowledge of Zink, and Adam's son also built upon another part of the land during his father's lifetime. The court said: "If old Mr. Adams supposed the property was not his, but belonged to Zink, one would be slow to believe that he would suffer his son and son-in-law to expend their means in building upon or cultivating it,—knowing, as he must have known in that case, that they ran the risk of losing all their expenditures."

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valuable improvements of a description that a mere tenant would not have been likely to make.[113]

That he defrayed the expense of insuring the property.[114]

That he was from time to time charged with the expenses of renewing bills which were from time to time drawn by him on the transferee, in pursuance of an agreement made between them when the instrument of transfer was executed.[115]

That he made payments and allowances to the families of the sailors on the ship covered by the instrument of transfer.[116]

Some of the circumstances which have been adverted to as tending to shew that the transferee himself regarded the transferor as the owner of the property after the execution of the instrument in question are as follows:—

That he had allowed the transferor to deal with the property as his own.[117]

That he made no objection to the transferor's performance of certain acts characteristic of ownership.[118]

That he authorized the transferor to perform acts of that character.[119]

That he allowed the transferor to remain in possession of the property without paying any rent,[120] or that he did this without making any demand for the payment of rent.[121]

That, instead of receiving the rents for his own benefit, he accounted for them to the transferor, and only retained the amount of the interest.[122]

That he refused to sell the property to a person who offered to purchase it, and that his refusal was put upon the ground of some continuing right in the transferor to which he was willing, or felt himself bound, to give effect.[123]

(c) Possession taken by transferee after execution of instrument

[113]Parks v. Parks (1880) 66 Ala. 326; Cox v. Ratcliffe (1905) 105 Ind. 374, 5 N.E. 5; Miller v. Miller (1905) 101 Md. 600, 61 Atl. 210; Winters v. Earl (1893) 52 N.J. Eq. 52, 28 Atl. 15; Wilson v. Giddings (1876) 28 Ohio St. 554; Gaines v. Brockerhoff (1890) 136 Pa. 175, 19 Atl. 958.

[114]Langton v. Horton (1841) 5 Beav. (Eng.) 9, 11 L.J. Ch. N.S. 233, 6 Jur. 357; Rubo v. Bennett (1899) 85 Ill. App. 473; Miller v. Miller (1905) 101 Md. 600, 61 Atl. 210.

[115]Langton v. Horton, supra.

[116]Langton v. Horton, supra.

[117]Bullen v. Renwick (1860) 9 Grant, Ch. 202, reversing on rehearing 8 Grant, Ch. 342.

[118]Jordan v. Garner (1892) 101 Ala. 411, 13 So. 678; Judge v. Reese (1874) 24 N.J. Eq. 387.

[119]Bartling v. Brasuhn (1882) 102 Ill. 441; Campbell v. Worthington (1834) 6 Vt. 448.

[120]Robinson v. Chisholm (1894) 27 N.S. 74.

[121]Lewis v. Wells (1898) 85 Fed. 896; Locke v. Palmer (1855) 26 Ala. 312.

[122]Butler's note to Co. Litt. L. 3 chap. 5, § 332.

[123]McIlroy v. Hawke (1856) 5 Grant, Ch. 516.

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of transfer.—The circumstance that the transferee took and retained possession of the given property after the instrument of transfer was executed is "always of weight in determining whether a conveyance . . . absolute in form was intended to pass the estate, or to be only a security for the debt."[124] This doctrine is obviously the complement of that which declares the continued possession of the transferor to be indicative of the intention of the parties to enter into a mortgage contract, and is founded upon a consideration of a similar character, viz., that the assumption of possession by the transferee is a usual incident of an absolute conveyance, and is not an ordinary accompaniment of a mortgage.[125]

The inference indicated by the fact of the transferee's having assumed possession of the property may be corroborated by any evidence which goes to shew that he performed with relation to the property acts which are normally characteristic of, or associated with, full ownership. The following circumstances have been specified as relevant:—

That he took over and conducted for his own benefit the business which the transferor had been carrying on with respect to the property in question.[126]

That he made upon the property permanent improvements of a description not usually made by mortgagees.[127]

That he sold the whole or a part of the property.[128]

That he refused to pay any part of the purchase money until the grantor had, in pursuance of a provision in the preliminary agreement to sell, given authority to a tenant holding under an existing lease to pay him the rent subsequently accruing.[129]

That he paid the taxes for which the property was assessed.[130]

Various circumstances have been adverted to as indicating that the transferor regarded the transferee as being the owner of the property after the instrument in question was executed, viz.:

[124]Todd v. Campbell (1858) 32 Pa. 250. For other cases in which this doctrine was applied, see Sevier v. Greenway (1815) 19 Ves. Jr. 413; Neal v. Morris (1818) Beatty, Ir. Ch. Rep. 597; Williams v. Owen (1840) 5 Myl. & C. 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114; Holmes v. Matthews (1855) 9 Moore P.C.C. 413, affirming 5 Grant, Ch. 1, which reversed 3 Grant, Ch. 379; Rose v. Hickey (1878) 3 Ont. App. Rep. 309.

[125]Hodge v. Weeks (1888) 31 S.C. 281, 9 S.E. 953; Hubby v. Harris (1887) 68 Tex. 97, 3 S.W. 558.

[126]Fisher v. Stout (1902) 74 App. Div. 97, 77 N.Y. Supp. 945.

[127]Conway v. Alexander (1812) 7 Cranch. (U.S.) 218, 3 L. ed. 321; Cotton v. McKee (1878) 68 Me. 486.

[128]Rich v. Doane (1862) 35 Vt. 125; Becker v. Howard (1890) 75 Wis. 415, 44 N.W. 755.

[129]Douglas v. Culverwell (1862) 4 De G. & F. J. 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327.

[130]Harris v. Hirsch (1907) 121 App. Div. 767, 106 N.Y. Supp. 631;

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That he acquiesced in the transferee's possession,[131] or, what is virtually the same thing in this connection, had not put forward any claim to the ownership of the property.[132] The weight of this kind of evidence increases, of course, in proportion to the length of time that elapsed before he took any steps to assert his rights.

That he made no objection to the transferee's performance of the particular acts relied upon as being indicative of the latter's ownership of the property.[133]

That third persons who had offered to purchase the property from the transferor were referred by him to the transferee.[134]

That he assented to a sale of the property by the trustees to whom the instrument in question had been executed by him.[135]

That he accepted a lease of the property from the transferee, or made with him an informal agreement entitling him to the use and occupation of the property for a stipulated consideration.[136] But this fact is not one of decisive significance.[137]

The possession of the transferee ceases to be a material element if it appears that the acquiescence of the transferor in that possession resulted from a misapprehension as to the effect of the written contract.[138]

[131]Cotterell v. Purchase (1735) Cas. T. Talb. 61, the Lord Chancellor remarked that the complainant's "long acquiescence under the defendant's possession is to me strong evidence that the deed was an absolute conveyance."

[132]McNamara v. Culver (1879) 22 Kan. 661.

[133]Carr v. Rising (1871) 62 Ill. 14; Hart v. Randolph (1892) 142 Ill. 521, 32 N.E. 517; Stratton v. Rotrock (1911) 84 Kan. 198, 114 Pac. 224; Cotton v. McKee (1878) 68 Me. 486.

In Munro v. Watson (1860) 8 Grant, Ch. (U.C.) 60, the court adverted to the facts that plaintiff did not resist the action of ejectment by which the grantee had obtained possession of the land in question, and subsequently acquiesced for many years in all that was done by him in the exercise of his control over the property.

[134]Rose v. Hickey (1878) 3 Ont. App. Rep. 309.

[135]Conway v. Alexander (1812) 7 Cranch (U.S.) 218, 3 L. ed. 321.

[136]In Mitchell v. Wellman (1885) 80 Ala. 16; Reeves v. Abercrombie (1895) 108 Ala. 538, 19 So. 41 (continued occupancy of one of houses conveyed "not such a retention of possession as would indicate the retention of an equity of redemption"); Tappen v. Eshelman (1904) 164 Ind. 338, 73 N.E. 688; Cotton v. McKee (1878) 68 Me. 486; Barton v. Lynch (1893) 69 Hun, 1, 23 N.Y. Supp. 217; Todd v. Campbell (1858) 32 Pa. 250 (lease of land by grantor's heirs); Null v. Fries (1885) 110 Pa. 521, 1 Atl. 551.

[137]Marshall v. Steel (1874) Russell (N.S. Eq.) 116.

[138]In Bullen v. Renwick (1862) 9 Grant, Ch. (U.C.) 202, reversing 8 Grant, Ch. (U.C.) 342, one of the circumstances which led the court to doubt whether the transaction was not in reality a purchase was the assumed right of the grantee, apparently acquiesced in by the grantor, to deal with the property as his own upon the expiration of the period allowed for repurchase. But it was observed that this course of dealing "sometimes occurs even in cases of ordinary mortgage, and would be more easily accounted for where the transaction took the shape which it took in this case, when a man might very well suppose that his right to redeem would be gone as soon as the time limited by the agreement had expired."

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(*d*) *Periodical payments of money by transferor to the transferee.*—The fact that the transferor, while in possession, made periodical payments of money to the transferee, does not necessarily shew that his possession was that of a tenant. The essential question still remains whether the payments were understood to be compensation for the use of the property, or were regarded as interest on a loan. If they were of the former description, the conclusion ordinarily indicated is that the transaction was a sale, accompanied or succeeded by an agreement under which the transferor became the tenant of the transferee. On the other hand, if they were made on account of interest, they will "furnish strong evidence that a mortgage was understood to be existing, and meant to exist, rather than a sale."[139] To which category they belong is a question to be determined with reference to the particular circumstances of each case.[140] The circumstance that they were equal or approximately equal to the current rate of interest in the given locality upon the sum received by the transferor from the transferee is regarded as tending strongly to shew that they were actually made as interest, and not as compensation for the use and occupation of the property.[141] But to treat this equality or approximate equality as conclusive evidence of the character of the transaction as a mortgage would obviously be unwarranted, for it is apparent that on the average the rent of property tends to correspond with the rate of interest which is obtainable by bargain or fixed by statute. A more decisive circumstance is that the periodical payments, as stipulated or actually made, were appreciably less than the amounts which would have been paid under a contract of tenancy[142].

(*e*) *Various other descriptions of evidence.*—Among the circumstances which have been held to negative the intention of the parties to create a mortgage are these:—

That a grantor who had the right of repurchase gave, while he still considered himself to be interested in the property, various notices of his desire to avail himself of this right.[143]

That, while correspondence was passing between the grantor's attorney and the grantee during the period allowed by the contract for repurchase, as well as after its expiration, the grantor

[139]Bentley v. Phelps (1847) 2 Woodb. & M. 426, Fed. Cas. No. 1,331.

[140]See Hubert v. Sistrunk (1910) — Ala. —, 53 So. 819; Smith v. Cremer (1873) 71 Ill. 185; Miller v. Miller (1905) 101 Md. 600, 61 Atl. 210; Winters v. Earl (1893) 52 N.J. Eq. 52, 28 Atl. 15.

[141]Turnipseed v. Cunningham (1849) 16 Ala. 501, 50 Am. Dec. 190; Sears v. Dixon (1867) 33 Cal. 326; Conlee v. Heying (1895) 94 Iowa, 734, 62 N.W. 678; Griswold v. Fowler (1857) 6 Abb. Pr. (N.Y.) 113; Pace v. Bartles (1890) 47 N.J. Eq. 170, 20 Atl. 352.

[142]Bentley v. Phelps (1847) 2 Woodb. & M. 426.

[143]Alderson v. White (1858) 4 De G. & J. 97, 6 W.R. 242, 4 Jur. N.S. 125.

made no objection to the construction placed by the grantee upon the transaction.[144] Annotation.

X. Competency and effect of evidence with regard to quality of instrument of transfer executed by mortgagor to mortgagee.

41. Generally.—Where the instrument in question is one which purports to be a conveyance of a mortgagor's interest in the mortgaged property to the mortgagee, parol evidence regarding the character and incidents of the transaction may have a bearing upon one or other of two distinct questions:

(1) Was the transaction valid, when tested by those high standards of fair dealing to which contracts which involve a surrender of a mortgagor's equity of redemption to the mortgagee must conform?

(2) If the transaction was valid in that sense, was it intended to create a new mortgage, or to transfer the property unconditionally to the mortgagee?

These two questions are essentially distinct; for the essence of one is whether relief shall be granted by releasing the transferor entirely from the obligations of the written contract while the essence of the other is whether relief shall be granted by superadding to the contract a stipulation which does not appear upon its face. It is desirable, therefore, that the distinction between the questions should be clearly marked in every case in which both are presented for consideration.[1] But the portions of the evidence which are relevant to each question are often so closely interwoven as to render it extremely difficult to separate them, and judicial statements are apt to pass from one question to the other in a manner which is, to say the least, not conducive to logical precision.[2]

42. Parol evidence as to the validity of the transaction.—(*a*) *Attitude of the courts, generally.*—So far as regards the former of the questions adverted to in the preceding section, the accepted doctrine is that a contract for the transfer of a mortgagor's interest to the mortgagee is not in itself invalid.[3] But in view

[144] Roscoe v. McConnell (1913) 29 D.L.R. 121, 5 Ont. Week. N. 172.

[1] As was done, for example, in Baugher v. Merryman (1869) 32 Md. 185; Walker v. Farmers' Bank (1888) 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 819.

[2] A noteworthy illustration of this remark is furnished by the opinion in Villa v. Rodriguez (Alexander v. Rodriguez) (1870) 12 Wall. (U.S.) 323, 20 L. ed. 406. The court begins by explaining the conditions precedent to the validity of a conveyance of a mortgagor's equity of redemption to the mortgagee, and afterwards, without any reference to the shifting of the ground, passes to a consideration of certain circumstances which were regarded as shewing that the absolute deeds in question were intended as mortgages.

[3] Reeve v. Lisle (1902) A.C. 467, 71 L.J. Ch. N.S. 768, 87 L.T.N.S. 308, 18 Times L.R. 767, 51 Week. Rep. 576; Russell v. Southard (1851) 12 How. (U.S.) 139, 154, 13 L. ed. 927, 933; Randall v. Sanders (1882) 87 N.Y. 578.

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of the peculiar relationship existing between the parties concerned, such a contract is always regarded with a good deal of jealousy, and closely scrutinized.[4]

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shewn that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hope; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him."[5]

(*b*) *Burden of proof.*—In England the burden of proving the unfairness of the transaction rests upon the mortgagor, unless the case involves some special circumstances which indicates the propriety of applying a different rule.[6]

The American courts, on the other hand, have generally taken the position that the mortgagee must discharge the burden of proving that the transaction was a fair one.[7] In doubtful cases

In Gossip v. Wright (1863) 32 L. J. Ch. N. S. 648, 2 New Reports, 152, 9 Jur. N.S. 592, 8 L.T.N.S. 627, 11 Week. Rep. 602, it was unsuccessfully contended that a release of the equity of redemption, subject to a right of redemption within a given fixed time, was illegal. Kindersley, V.C., stated that not a single case had been cited in which it had been decided that a release may not be executed on these terms.

[4]Hickes v. Cooke (1816) 4 Dow, 16, 16 Revised Rep. 1; Webb v. Rorke (1806) 2 Sch. & Lef. 661, (Ir.) 9 Revised Rep. 122; Ford v. Olden (1864) L.R. 3 Eq. 461, 36 L.J. Ch. N.S. 651, 15 L.T. N.S. 558; Peugh v. Davis (1877) 96 U.S. 332.

[5]Villa v. Rodriguez (Alexander v. Rodriguez) (1870) 12 Wall. (U.S.) 323.

[6]The proposition that "whenever a release by a mortgagor to a mortgagee of an equity of redemption, in consideration merely of the amount of the debt, is impeached, the burden of justifying it rests upon the mortgagees," was disapproved in Melbourne Bkg. Corp. v. Brougham (1882) L.R. 7 App. Cas. 315, where the court referred to the statement of Lord Cottenham in Knight v. Majoribanks (1849) 2 Macn. & G. 10, 2 Hall & Tw. 308, that such a case must be shewn as would have impeded the transaction if it had taken place in the ordinary manner between parties who were strangers to each other. See also Coote, Mortg. 8th ed. p. 21.

(*a*)In Prees v. Coke (1870) L.R. 6 Ch. (Eng.) 645, it was laid down by Lord Hatherley that, where the mortgagor is a man in humble circumstances (day laborer), without any independent legal advice, and the mortgagee is a solicitor, "the onus of justifying the transaction, and shewing that it was a right and fair transaction, is thrown upon the mortgagee."

[7]Bradbury v. Davenport (1896) 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062; Baugher v. Merryman (1869) 32 Md. 185; Holridge v. Gillespie (1816) 2 Johns. Ch. (N.Y.) 30; Bornkamp v. Boehm (1888) 50 Hun, 604, 19 N.Y. S.R. 227, 3 N.Y. Supp. 28; Hall v. Lewis (1896) 118 N.C. 509, 24 S.E. 209. The English doctrine was followed in Walker v. Farmers' Bank (1888) 8 How. (Del.) 258, 14 Atl. 819.

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a continuance of the relationship of mortgagor and mortgagee is inferred.[8]

(c) *Various evidential elements bearing upon question of validity.* —A contract for the transfer of the mortgagor's interest to the mortgagee may be attacked on any of the following grounds, which, it is obvious, are all of such a character that parol evidence is competent and appropriate for the purpose of establishing them.

That the mortgagor did not receive any new consideration distinct from that for which the mortgage was given.[9]

That the consideration was inadequate. The English doctrine is that this circumstance is not enough, of itself, to invalidate a release of the equity of redemption.[10] But in the United States the position taken nearly, if not quite, universally is that a release must be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.[11] This remarkable conflict of opinion has apparently not been discussed by any American court. It must be admitted that the theory under which mere inadequacy of price is treated as a sufficient ground for setting aside the transaction involves one difficulty which seems to have escaped notice. Such inadequacy is not of itself sufficient to warrant the inference that an absolute instrument of transfer was intended to operate as a mortgage. See § 39, ante. The effect of the American doctrine, therefore, is this,—that a mortgagor who asks for an annulment of the transaction is entitled to relief if his evidence shews that the consideration was inadequate, while a mortgagor who seeks to have that transaction declared a mortgage cannot succeed upon such evidence alone. In a logical point of view there would seem to be a certain anomaly in treating as a good ground for the total rescission of the written contract an element which is deemed to be insufficient to warrant its modification.

[8]Villa v. Rodriguez (Alexander v. Rodriguez) (1870) 12 Wall. (U.S.) 523, 20 L. ed. 406; Dougherty v. McColgan (1834) 6 Gill & J. (Md.) 275; Lynch v. Ryan (1907) 132 Wis. 271, 111 N.W. 707, 112 N.W. 427.

See also Odell v. Montross (1877) 68 N.Y. 499.

[9]De Bartlett v. De Wilson (1906) 52 Fla. 497, 42 So. 189, 11 Ann. Cas. 311; Dougherty v. McColgan (1834) 6 Gill & J. (Md.) 275; Perkins v. Drye (1835) 3 Dana (Ky.) 170; Baugher v. Merryman (1869) 32 Md. 185; Miller v. Peter (1909) 158 Mich. 336, 122 N.W. 780; Hudkins v. Crim (1913) 72 W. Va. 418, 78 S.E. 1043.

[10]Leach, M.R., in Purdie v. Millett (1829) Tamlyn 28, 31 Revised Rep. 60, Lord Cottenham, L.C., in Knight v. Majoribanks (1849) 2 Macn. & G. 10, 2 Hall & Tw. 308.

[11]Peugh v. Davis (1877) 96 U.S. 332, 24 L. ed. 775. For other cases in which the invalidating effect of inadequacy of consideration was recognized, see monograph in L.R.A. p. 451.

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That the transfer was induced by fraud, actual or constructive.[12]

That the transfer was procured by the exercise of that undue influence to which a creditor is able to subject an embarrassed debtor who is offered the alternative of parting with his interest, or of losing his property by foreclosure proceedings.[13]

43. Circumstantial evidence as to character of transaction.—(*a*) *Elements of general applicability.*—It is clear that each and all of the elements which are deemed to be indicia of the character of the transaction in cases in which the relationship of mortgagor and mortgagee did not exist between the parties at the time when the instrument in question was executed are equally competent in cases in which such a relationship existed. The probative value of those elements has been fully discussed in the preceding subtitles, and it will not be necessary in the present connection to make any further reference to them except in one particular point of view. So far as regards cases in which there was no antecedent relationship of mortgagor and mortgagee between the parties, the authorities are, as is shewn in § 37, ante, not harmonious with respect to the question whether the subsistence of an indebtedness after the execution of the instrument of transfer is conclusive proof, or merely strong evidence, that the transaction was a mortgage. There is a similar diversity of opinion concerning the precise significance of that fact in cases of the class now under discussion. In some of them it has been treated as decisive.[14] But the theory that it is not invariably so has also been enunciated.[15]

There is no disagreement whatever as to the doctrine that the nonsubsistence of an indebtedness after the transaction is a circumstance absolutely inconsistent with any other inference than that of the discontinuance of the relationship of mortgagor and mortgagee.[16]

[12](*a*) Russell v. Southard (1851) 12 How. (U.S.) 154, 13 L. ed. 933.

[13]"The principle upon which the courts act is not that the mortgagor is unable to enter into a contract of this kind, but that the transaction ought to be looked upon with jealousy, especially when the mortgagor is a needy man, and when there is pressure, and inequality of position, and the sale has been at an undervalue." Stuart, V.C., in Ford v. Olden (1867) L.R. (Eng.) 3 Eq. 463. See also Villa v. Rodriguez (Alexander v. Rodriguez) (1870) 12 Wall. (U.S.) 323, 20 L. ed. 406.

[14]Hays v. Emerson (1905) 75 Ark. 551, 87 S.W. 1027; Holden Land & Live Stock Co. v. Interstate Trading Co. (1912) 87 Kan. 221, L.R.A. 1915B, 492, 123 Pac. 733; Gibson v. Morris State Bank (1914) 49 Mont. 60, 140 Pac. 76; Budd v. Van Orden (1880) 33 N.J. Eq. 143; Duerden v. Solomon (1908) 33 Utah, 468, 94 Pac. 978.

[15]Bearss v. Ford (1883) 108 Ill. 24.

[16]Such was the doctrine applied in Perdue v. Bell (1887) 83 Ala. 396, 3 So. 698; Shays v. Norton (1868) 48 Ill. 100; Bridges v. Linder (1882) 60 Iowa, 190, 14 N.W. 217; Randall v. Sanders (1882) 87 N.Y. 578, affirming 23 Hun, 611; Whitney v. Townsend (1869) 2 Lans. (N.Y.) 249; Neeson v. Smith (1907) 47 Wash. 386, 92 Pac. 131; Kunert v. Strong (1899) 103 Wis. 70, 79 N.W. 32.

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(b) *Elements having special relation to pre-existing relationship of parties.*—There are also certain other elements which, being consequential upon, as associated with, that relationship, demand special notice in this subtitle.

A consideration which must always be taken into account as tending to shew that the absolute instrument of transfer was really what it purported on its face to be is the improbability that the mortgagee should have consented to enter into an arrangement which would eventuate in giving him merely a new mortgage.[17] This consideration, of course, is one of special materiality where it appears that the contract was executed after the mortgagor was in default, and foreclosure proceedings had been actually commenced;[18] or that the instrument in question did not cover the whole of the mortgaged property.[19] But manifestly the probative value of this latter element of improbability, possessing, as it does, a merely prima facie significance, is nullified wherever it appears that the mortgagee gained some additional advantage by the transaction.[20]

XI. Miscellaneous evidential elements.

44. Generally.—In the American reports are to be found a very large number of decisions in which the significance of various miscellaneous elements, not coming under any of the heads discussed in the preceding sub-title, has been determined. Of these only the few which are noticed in the two following sections have been as yet referred to by the English and Colonial courts.

45. Circumstances tending to shew that the transaction was a mortgage.—That the risk of loss or damage rested on the transferor.[1]

That the transferor was illiterate.[2]

That the transferor was in financial difficulties at the time when the instrument of transfer was executed. This fact has

[17]McAlpine v. How (1862) 9 Grant's Ch. (U.C.) 376. See also McKinstry v. Conly (1847) 12 Ala. 678; Adams v. Pilcher (1890) 92 Ala. 469, 8 So. 758; Shays v. Norton (1868) 48 Ill. 100; Whitney v. Townsend (1869) 2 Lans. (N.Y.) 249; Wilson v. Parshall (1891) 129 N.Y. 223, 29 N.E. 297.

[18]In Hughes v. Sheaff (1865) 19 Iowa, 335; Phipps v. Munson (1882) 50 Conn. 267.

[19]Randall v. Sanders (1882) 87 N.Y. 578.

[20]See, for example, Castillo v. McBeath (1915) 162 Ky. 382, 172 S.W. 669.

[1]See Coventry's note to 1 Powell on Mortg., p. 138a, where the authority cited is Verner v. Winstanley (1805) 2 Sch. & Lef. 393.

[2]In McDonald v. McDonell (1864) 2 U.C. Err. & App. 393, a portion of the evidence adverted to as tending to shew that the transaction was a mortgage was that the grantor in the deed was illiterate and had no professional advice, that the grantee prepared the instrument, and that his representations as to its purport and effect were relied upon by the grantor.

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been treated in some cases as one of the indicia of a mortgage.[3] But, strictly speaking, it would seem to be pertinent in respect of the question of fraud or undue advantage, rather than in respect of the character of the transaction. There is apparently no logical ground upon which it can be maintained that a circumstance, the probative value of which is based upon the conception of a will subject to constraint, has a tendency to establish a conclusion, the essence of which is that both the parties intended that their obligations should be different from those specified on the face of the written contract itself. It may reasonably be argued, therefore, that the sole evidential significance of such constraint is merely that of an element which tends to establish the right of the transferor to be released from the contract altogether.

That the transferee was the legal adviser of the transferor. Where the given instrument of transfer was executed at a time when this relationship existed, the contract will be treated as a mortgage, unless the grantee discharges the burden which the relationship casts upon him, of proving that the transaction was clearly understood, and that the full value of the property was paid.[4]

That the expense of preparing the instrument of transfer was borne by the transferor.[5] But the conclusion to which this fact normally points is sometimes repelled by the particular evidence in the given case.[6]

[3]Douglas v. Culverwell (1862) 4 De G. F. & J. (Eng.) 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327; Stewart v. Horton (1850) 2 Grant, Ch. (U.C.) 45.

[4]In Denton v. Donner (1856) 23 Beav. (Eng.) 285, where the grantee was the grantor's solicitor, Lord Romilly, M.R., said: "It is to be observed that the plaintiff got no advantage from this transaction as a sale, beyond that which he would have obtained by giving proper security. In this state of things, I think the burden of proof necessarily falls upon the defendant to shew the bona fides of the transaction throughout, and that everything was done for the plaintiff which could have been done if the property had been sold to a stranger, and that the utmost that could possibly have been produced was obtained."

In McIlroy v. Hawke (1856) 5 Grant, Ch. (U.C.) 516, where the right to a free grant of land was conveyed to the plaintiff's solicitor, in compliance with a suggestion made by the solicitor in a letter, that he could procure a deed from the government, it was held that the solicitor had the burden of proving that he had ceased to act as the plaintiff's agent between the time when the letter was sent and the time when he sold the land to a third person.

[5]It is one of the probative circumstances specified in Coventry's note to Powell on Mortgages, p. 25a, and in Butler's note to Co. Litt. L. 3, chap. 5, § 332.

In Douglas v. Culverwell (1862) 4 De G. F. & J. 20, 31 L.J. Ch. N.S. 543, 6 L.T.N.S. 272, 10 Week. Rep. 327, the court adverting to the fact that the agreement provided for the vendor's paying all the expenses of the conveyance and investigation of title, remarked that this is "ordinary in the case of a mortgage, but unusual in the case of a sale."

See also Robinson v. Chisholm (1894) 27 N.S. 74.

[6]In Alderson v. White (1858) 2 De G. & J. (Eng.) 97, Lord Cranworth

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That the alleged mortgagor, a person holding a contract for the sale of the land in question, had purchased it as a home for himself and family, and, before the deed in question was executed at his request to the alleged mortgagee, had already made a substantial payment on account with his own money.[7]

46. Circumstances tending to shew that the transaction was not a mortgage.—That the grantee, as purchaser, paid the expenses of preparing the deed in question.[8]

That the defendant, who had taken a deed of land which the plaintiff had contracted to purchase, not only discharged a debt of £40 which the plaintiff owed to him for merchandise supplied, but gave the owner of the land £25 as an additional consideration.[9]

That the transferor and transferee knew that the instrument of transfer could not take effect as a mortgage without rendering the transaction illegal.[10]

That the transferor delayed for a long time to put forward a claim that the transaction was a mortgage.[11]

46a. Transferor the successor in business of the transferee.—The manner in which the existence of this relationship between the parties may create circumstances which tend to shew that the given transaction was or not a mortgage is indicated by the facts involved in the case cited below.[12]

made the following remarks: "Much stress was laid on the fact that the costs of the transaction were paid wholly by Newman [grantor], which, it was said, would be the case in a mortgage, but not on a sale. After a lapse of thirty years, it is not to be expected that a point of this kind should be quite satisfactorily explained. I do not, however, see any reason for supposing that it is incapable of explanation. A special stipulation that the expenses shall all be paid by the vendor is not, I believe, very unusual in transactions between persons in the lower ranks. Much weight is also due to Mr. Wigram's observation that this was in substance an annuity transaction, and that if it had been one in form, it would have been in the ordinary course that Newman should pay the costs."

[7]Robinson v. Chisholm (1894) 27 N.S. 74.

[8]Williams v. Owen (1840) 5 Myl. & C. (Eng.) 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114.

[9]Munro v. Watson (1860) 8 Grant, Ch. (U.C.) 60, reversing 6 Grant, Ch. (U.C.) 385. Robinson, Ch. J., remarked that it was hardly credible that, in order to secure a debt of such an amount, a merchant would make such an arrangement.

[10]For cases in which the materiality of this element was recognized, see North Central Wagon Co. v. Manchester, S. & L.R. Co. (1886) L.R. 35, Ch. Div. 191 and Yorkshire R. Wagon Co. v. Maclure (1882) L.R. 21 Ch. Div. 309, both reviewed in § 52, note 7, post.

[11]Robinson v. Chisholm (1894) 27 N.S. 74 (no proceedings taken by grantee during the period of eleven years that elapsed between the execution of the deed and his death).

[12]In Shaw v. Jeffery (1860) 13 Moore P.C.C. (Eng.) 432, the effect of a contract which included a stipulation as to reassignment was thus discussed:

"The defendant having been a shipbuilder, and desiring to retire from that business, and the plaintiffs, one of them his brother, who had been in his em-

Annotation. *XII. Illustrative decisions as to the quality of instruments of transfer.*

47. Introductory.—In the foregoing subtitle the various evidential elements have been considered with reference to the significance which each of them, when taken singly, is deemed to carry in cases falling within the scope of this article. From an examination of the authorities, it is apparent that the theory

ploy in a prominent capacity in that business, having formed a partnership, the former is content to let, and the latter to take, the shipyard for a short term, and the former sells, and the latter purchases, the materials therein. They commence the business, but obviously with insufficient capital; the defendant assists them in the purchase of more materials, and the two ships are begun; the money market turns against them and they are, in a short time, in difficulties which they cannot surmount. They desire to retire from the business. The defendant, who has strong motives to secure the advances already made, and not improbably actuated by the personal regard, comes to an arrangement with them; he agrees to take the vessels as they are, and the materials, in consideration of those advances; and take on himself their liabilities to certain trade creditors, and to release them from their lease of the shipyard; and here the arrangement might have ended. If it had stopped here, it is probable that some more minute examination would have been made as to the respective values on either side; the unfinished vessels and materials on the one hand, the advances and liabilities on the other; whether that would have made any considerable difference is not clear, nor is it important to inquire, because the arrangement did not end here. The defendant, on his part, had probably no desire to resume permanently the business which he had only just withdrawn from, and they who alleged that their present inability to go on arose from the temporary state of the money market were obviously desirous of resuming it at a future or more favourable period. They, therefore, agree to give their personal attendance gratuitously in the completing the vessels, and bind him to spend to the extent, first, of £10,000, and, subsequently, in a certain event, to apply an additional £1,000 to that purpose. Thus, they secure the completion of the vessels; and though they were not their vessels, and they might seem at first to have no interest in what became of them, yet they acquire a contingent interest by the stipulation following, that, when finished, the defendant shall reassign the vessels to them. To this the defendant agrees, but, as might be expected, he stipulates not only for repayment of his loans, advances, and liabilities by a condition precedent to the assignment, but also that the repayment shall be made before the ships sail; in substance, he agrees to resell on payment, in which case he is to be considered as having advanced the money, and requires interest and commission as on an advance; but he does not agree to do this indefinitely; a time is fixed, the sailing of the vessels, which, after their crews, outfit, and cargoes are on board, cannot in usual course be any longer delayed; the payment is to be made before that, or the right to a reconveyance will be gone. Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, their lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of repurchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties. . . . It remains then to consider the subsequent conduct of the parties. Now, it appears that the vessels were completed as the instrument would have led one to expect, the plaintiffs continuing to act in the yard as before, and the defendant interfering from time to time, giving directions, finding money for the wages, and occasionally paying the men; the defendant's name or sign being put up over the gate of the yard, and the vessels registered in his name. All this, it is true, might be consistent with what the plaintiffs contend for; it is also perfectly consistent with the view which their lordships take. They do not rely on it as substantive proof; it is enough that it is not inconsistent with what the instruments on their face import."

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upon which the courts have proceeded is that, with the exception of the facts of a subsisting or nonsubsisting indebtedness, none of those elements possesses in itself sufficient probative value to overcome the presumption arising from the language of the instrument of transfer, and that two or more of them must concur in order to warrant the inference that the transaction was a mortgage. The review of the descriptions of admissible parol evidence would, therefore, be deficient, and even misleading, if it were not supplemented by a statement of the precise purport of a sufficient number of decisions to shew what combinations of the individual elements which have been analyzed are regarded as pointing to or repelling the conclusion that the transactions in questions were mortgages. This additional information will be furnished in the present subtitle.

In the summaries of the evidential elements, no mention has been made of any of that part of the testimony which related directly and specifically to the character of the transactions. For the purposes of this part of the discussion, such testimony is assumed to have been introduced in every instance, and, to have been always conflicting. The object of the summaries is to indicate the groups of elements which have been regarded as possessing sufficient probative value to justify the adoption of one or other of the opposite conclusions to which such testimony pointed.

48. Decisions as to contracts not including written stipulations with respect to reconveyance.—(*a*) *Intention to create mortgage inferred.*—Possession of property was retained by the grantor in the given deed;—property was of considerably greater value than the amount paid by the grantee.[13]

Value of property was considerably greater than the amount received by the grantor in the given deed;—possession was retained by the grantor.[14]

Value of property was considerably greater than the amount paid by the grantee;—deed was executed by an imprisoned debtor to his creditor.[15]

Deed in question was executed by a necessitous debtor, who had asked his solicitor to obtain a further sum on the security of property previously mortgaged, but who, after some hesitation, was induced by the solicitor to execute an absolute deed to a third person, upon the assurance of both of them that he would have a right to redeem, and that the instrument should be in substance a mortgage;—documentary evidence indicated that the transaction was not an ordinary sale;—value of equity of redemption conveyed by the grantor considerably exceeded the amount paid

[13]Fallon v. Keenan (1866) 12 Grant, Ch. (U.C.) 388.
[14]Halfey v. Egan (1873) 4 Australian Jur. 147.
[15]Stewart v. Horton (1850) 2 Grant, Ch. (U.C.) 45.

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by the grantee;—grantee refused to pay any part of the consideration until the grantor had, in pursuance of a provision in the preliminary agreement to sell, given authority to his tenant to pay the rent to the grantee.[16]

Grantor was an illiterate man who had had no professional advice, and had relied on the grantee's statement regarding the character of the given deed;—grantee had drafted the contract;—relationship of debtor and creditor subsisted between the grantor and grantee after the contract took effect;—grantor retained possession of the property.[17]

B, the alleged mortgagee, furnished money to A, the alleged mortgagor, to pay the balance of the price of land which A had contracted to purchase from C, and took an absolute conveyance of the property to himself, on the understanding that the property was to be conveyed to A when the money advanced to him was

[16]Douglas v. Culverwell (1862) 4 De G. F. & J. 20. Varying judgment in 3 Giff. 251, 31 L.J. Ch. N.S. 65, 8 Jur. N.S. 29, where the transaction had been set aside as an absolute sale, Turner, L.J., said: "There was a conflict of evidence as to what really took place at the time of this transaction, the defendant denying that he had ever given any assurance plaintiff should be at liberty to redeem, and maintaining that the transaction was an absolute sale, and setting up the statute of frauds. It appeared, however, that on 4th of August, 1842, a memorandum of agreement was signed, by which the plaintiff agreed to sell, and the defendant to buy, the equity of redemption in the property for £101, and the plaintiff agreed to make a good title and execute a conveyance with the usual covenants, and give authority to the tenant to pay the rent to the defendant, his heirs and assigns, and it was also agreed that £101 should be paid on the execution of the conveyance, and that the expenses of the conveyance and of investigating the title should be paid by the plaintiff. The purchase deed was executed on the same day, and a letter written by the plaintiff to the tenant, directing him to pay his rent to the defendant, the defendant refusing to complete until such a letter was given." After stating that the main question, which was to be considered was whether the plaintiff had proved an agreement on the part of the grantee that he should be at liberty to redeem, the learned judge proceeded thus: "I am of opinion that he has. First. I think that the documentary evidence sufficiently proves that this was not an ordinary transaction of sale. The agreement for the purchase, the conveyance of the estate, and the direction to the tenant to pay the rents to the purchaser, were all prepared, made, and executed on the same day. There was plainly no investigation of the title, although the agreement provides for it, and the agreement not only provides for the vendor paying all the expenses of the conveyance and of the investigation of the title (a provision quite in the ordinary course, as I apprehend, in the case of a mortgage, but quite unusual, as I conceive, in the case of a purchase), but it also contains this remarkable provision, that the vendor shall give authority to the tenant to pay the rents to the purchaser, and accordingly we have the agreement and the conveyance followed by the authority given to the tenant. It is impossible, I think, not to observe how well adapted this provision was to such a case of conditional sale as is alleged by this bill, and how unusual (if not unprecedented) such a provision is in the case of a bona fide contract for an absolute sale. Then observe the conduct of the defendant: According to his own statement, he refused to pay any part of the purchase money until the authority to the tenant was given. Surely this is conduct referable to a contract that he was to receive the rents, rather than to a contract that he was to become purchaser of the estate, in which character he would, of course, be entitled to the rents without any such authority."

[17]McDonald v. McDonnell (1864) 2 U.C. Err. & App. 393.

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repaid;—A purchased the property, intending to be a home for himself and family, and made a substantial payment on account with his own money;—A went to B for the avowed purpose of borrowing from him the amount needed to discharge the balance of the purchase;—A also paid the costs of the conveyance from C to B;—A, for several years, paid B interest on the money advanced;—written memorandum made by B tended to shew that he regarded the transaction as a loan, and that he owned not the farm, but the sum which A owed him;—A retained possession for a long time without paying rent, and apparently without any claim for rent or demand of possession being made, or any intimation from B or his heirs that the property belonged to them;—A sold a part of the property to his son-in-law, who built upon it and occupied it presumably to the knowledge of B's heirs as well as of his executor;—A's son also built upon another part of the farm during his father's lifetime;—no time was specified within which the purchase, assuming the transaction to have been a conditional sale, was to be completed by A, nor was there any proof of a stipulation fixing a time at which, upon default being made, he was to surrender possession.[18]

(*b*) *Intention to create mortgage negatived.*—Amount paid for the equity of redemption was precisely equal to the value at which it was estimated by a referee;—grantee went into possession of the lands conveyed.[19]

After the execution of the given deed, assigning a contract for the grant of certain public land, the grantor made statements inconsistent with the theory that he still had an interest in the contract;—after the grant was perfected, possession of the land was taken and retained by the grantee;—affidavit of debts and assets, filed after the transaction, by the grantor, in bankruptcy proceedings, did not specify any equity of redemption;—amount paid by the grantee was equal to the actual value of the property.[20]

[18]Robinson v. Chisholm (1894) 27 N.S. 74.

[19]Neal v. Morris (1818) Beatty, Ir. Ch. Rep. 597.

[20]Holmes v. Mathews (1855) 9 Moore, P. C.C. 413, affirming 5 Grant, Ch. 1, which reversed 3 Grant, Ch. 379. In that case Jones contracted for the grant of certain lots of land from the government in Upper Canada, and subsequently assigned his interest in the lots to his creditor Mathews, in consideration of the sum of £100. Mathews took possession of the lots, and afterwards obtained a governmental grant of them in fee. Jones subsequently became bankrupt. Mathews was appointed assignee of his estate. Mathews remained in possession until his death, after which Jones filed a bill against his devisee for redemption of the lots in question, upon the ground that the original transaction was one of mortgage, and not of absolute sale. The original deed of assignment was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties, made by the solicitor who acted for A and B, upon which the arrangement in the deed was based. Parol evidence was admitted to prove the nature and terms of the transaction. In the judgment delivered for the privy council, it was said: "It would be the greatest importance to see this deed; but it has been lost.

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49. Decisions as to contracts including stipulations with respect to reconveyance.—(*a*) *Intention to create mortgage inferred.*—Grantor was in embarrassed circumstances when the deed in question was executed;—property was of considerably greater value than the amount paid by the grantee;—same attorney acted for both parties.[21]

No draft or copy of it is in evidence, and we must collect its terms and the contract between the parties from the evidence of Wilson, the solicitor employed by Mathews on the occasion, the fairness and accuracy of whose statement is not open to the least suspicion, and is sufficiently established by the documents to which he refers. By this evidence it sufficiently appears that the intention of the parties was that within some time, and upon some terms, Alfred Thomas Jones should have the power of putting an end to Mathews' interest under the assignment; but what were the particular terms of this agreement is left entirely in the dark. The inference from the indorsement on the memorandum, as well as Wilson's testimony, is that the transaction, as a loan, was to end at the expiration of one year. The probability, therefore, is, that at the end of that period some arrangement would take place between the parties, by means of which either the money would be repaid, or the property be taken in payment of the debt. It appears from Wilson's evidence, that Mathews contemplated the probability of the latter alternative; and it is sufficiently clear, from all the evidence, that the property was of little, if at all, more value than the £100, at the time of the assignment, and for more than thirteen months afterwards. . . . The year during which, according to Wilson's evidence, the money was to remain on loan would expire in September, 1841. Dealings had continued to take place between Jones and Mathews, in the course of which, if any arrangement was necessary, it might be made. It is distinctly sworn both by two witnesses, McDonnell and Morrison, that in 1842 Jones told them he had sold the lots to Mathews. The evidence of Alexander Griffiths to the same effect cannot be relied on. On the 20th January, of 1843, a grant by letters patent of the lots in question is made by the Crown to Mathews as the absolute owner, with the privity of Jones, and from that time Mathews remains in possession of the land as owner. No claim is made for the £100, and interest, on the one hand, or any right on the part of Jones asserted on the other. Early in 1844, Jones became a bankrupt, and Mathews was appointed the assignee under the commission. At this time, if the appeal is well founded, the bankrupt was inddebted in the amount of the £100 to Mathews, and the estate in question, subject to the mortgage, constituted part of his assets. In May, 1844, he makes an affidavit stating in detail his debts and his assets, yet no allusion is made to this debt due to Mathews, nor to this equity of redemption. Can there be stronger evidence that the transaction had been closed? That the estate had been given up in discharge of the debt? What makes the inference stronger is that the bankrupt in his affidavit mentions a claim for a sum of money which he says is due to him from Mathews."

[21] Fee v. Cobine (1847) 11 Ir. Eq. Rep. 406. There A, being in prison as an insolvent, assigned to B a leasehold interest for a sum of money which discharged all A's debts, including debts to B and head rent, but was less than the value. The deed purported to be absolute, but there was an indorsement that if A paid B upon a day named the purchase money and costs and all expenses of cropping the farm, B would reassign the lands and the deed should be void. B also, a few days after, gave a bond to surrender the premises if paid on the day. Brady, L. Ch., said: "On the entire of the case, however, I cannot come to the conclusion that the plaintiff intended to make an absolute sale of the property and to tie up his hands. The proviso indorsed in the deed is certainly ambiguous; it does not contain the words of repurchase, but it is very like to the proviso contained in mortgage deeds. The words are not a contract giving a right to repurchase, but they give the grantor a right to repayment and nullification of the instrument. . . . In this case the party who was in possession of the property was just about being discharged

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Initial proposition made by the grantor was that a sum of money equal to the amount specified in the deed, less the amount which would be payable as interest at the rate spoken of, should be advanced by way of loan;—bond to reconvey recited an express agreement on the part of the debtor to pay the sum which was to be the consideration of a reconveyance;—property was worth considerably more than the amount received by the grantor.[22]

(b) *Intention to create mortgage negatived.*—Memorandum was made by grantee of land, acknowledging receipt of money from the grantor on account, and binding grantee to reconvey on payment of the balance;—other memoranda were in evidence, shewing that the grantee had treated the given deed as a mortgage;—grantor remained in possession of the land for several years; —property was of considerably greater value than the amount paid by the grantee.[23]

No indebtedness subsisted of which the grantee could have enforced the payment after the execution of the deed in question; —possession of the property was taken by the grantee;—inadequacy of consideration was not proved;—alleged fraud and misrepresentation were not established;—grantee was shewn to have been entitled to keep the rents accruing from the property;—grantee had paid the cost of preparing the deed in question.[24]

Grantor in the given deed was a young man in embarrassed circumstances, who, after having nearly exhausted the income of his property by charging it with annuities, had applied to the grantee to advance him money on the security of his life interest; —preponderance of direct evidence as to the intention of the parties was in favor of the conclusion that this application was refused, and that the transaction was finally consummated on the footing of an absolute sale of the life interest subject to a right of repurchase;—grantor subsequently made, with regard to recon-

as an insolvent, and the property would be taken by the assignee and sold by him for the payment of the insolvent's debts. In what better position would he be by this transaction if it were to be considered as a sale, than he would have been in by a sale by the assignee? It would give him nothing more than he would have through the insolvent court."

[22]Bullen v. Renwick (1860) 9 Grant, Ch. 202, reversing on rehearing 8 Grant, Ch. 342. These elements, combined with the direct evidence of the solicitor employed in the matter, who expressed the opinion that the transaction contemplated was a mortgage, were deemed sufficient to overcome the force of the circumstance that the grantee had assumed, apparently with the acquiescence of the grantor, to deal with the property as his own after the expiration of the period allowed for repurchase.

[23]Marshall v. Steel (1874) Russell (N.S. Eq.) 116. The opinion was expressed by Ritchie, C.J., that the cumulative effect of the evidence was not overcome by the circumstance that the grantor had, after retaining possession of the land for seven years, accepted a lease from the grantee.

[24]Williams v. Owen (1840) 5 Myl. & C. 303, 12 L.J. Ch. N.S. 207, 5 Jur. 114.

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veyance, propositions which indicated that he regarded his interest in the property as being restricted to such a right.[25]

XIII. Practice.

50. Functions of court and jury with regard to determining the effect of parol evidence.—As the question whether the parties to an instrument of transfer absolute on its face intended to create a mortgage is one of fact, and determinable upon the same footing as any other question of that description, the decisions with regard to that question illustrate simply the application of certain general rules to the cases of the particular type discussed in this article.

Where the trial court is composed of a judge and jury, it is the province of the judge to determine the competency of the evidence which is offered for the purpose of shewing that the transaction under review was a mortgage. If it is declared to be competent, or its competency is not disputed, the question whether it is sufficient to sustain the allegation that a mortgage was intended is primarily one for the jury. The proper procedure, therefore, is to submit that question to the jury whenever the testimony is conflicting, and that which is offered on behalf of the party who alleges the transaction to be a mortgage is sufficient, if true, to warrant the inference that it was of that character.[1] But, such a submission is erroneous where the evidence offered to prove the intention of the parties in this regard clearly falls short of the requisite standard of certainty.[2]

It is clear that the judgment based upon the findings should

[25] Alderson v. White (1858) 2 De G. & J. 97. Lord Cranworth thus discussed the evidence: "Was it improbable that Newman [grantor] should agree to these terms? I cannot see that it was. It has been urged that he got nothing, but he might well think that it was better for him to get rid of the estate than to have it subject to the claims of the annuitants. Such an idea would not be unreasonable, and the language of the deeds is so clear that something very strong would be required to shew that they did not express what the parties intended. It is said, however, that there are other circumstances shewing that they did not. First, there is Newman's direct testimony. The credibility of his evidence has been impeached on account of the disgusting transactions, to which I need not more particularly allude; but I think it right to say that such conduct does not, in my opinion, render him wholly unworthy of credit on a point like the present. When, however, I look at his evidence, along with the other evidence in the cause, I think that the result is in favor of the view that the deeds express what they were intended to express. Packwood's testimony is positive. It has been said that it cannot be supposed that after such a length of time he really remembers all the details to which he deposes, but his evidence has not been impeached.

[1] Hopkins v. Thompson (1835) 2 Port. (Ala.) 433; Church v. Cole (1871) 36 Ind. 34; Sloan v. Becker (1884) 31 Minn. 414, 18 N.W. 143; Pearson v. Sharp (1886) 115 Pa. 254, 9 Atl. 38; Lamson v. Moffat (1884) 61 Wis. 153, 21 N.W. 62.

[2] Sloan v. Becker (1884) 31 Minn. 414, 18 N.W. 143; Munger v. Casey (1889) 1 Monaghan (Pa.) 688, 17 Atl. 36 (verdict properly directed for defendant).

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be reversed if, upon a review of the testimony, the appellate court "is satisfied that the evidence was insufficient, and that the case should not have been submitted to the jury, or that the instructions of the court below were inadequate."[3] In other words, such a reversal is proper where the findings are "against the weight of evidence."[4]

Where the action is instituted before a single judge, he may, except in cases where only a single inference can reasonably be drawn from the circumstances presented by the testimony,[5] direct an issue to be tried by a jury. If he takes this course, the jury sits in a merely advisory capacity, and he may in his discretion accept or reject their verdict.[6]

In any jurisdiction in which the distinction between legal and equitable actions, and the doctrine that parol evidence is not admissible in actions of the former description, is still accepted (see § 51 (b), post), a feigned issue is tried and determined with reference, not to that doctrine, but to the equitable rule.[7]

In proceedings on appeal the conclusions of the jury with regard to the character of the transactions will be sustained, if they are deemed by the court of review to be permissible inferences from the testimony set out in the record,[8] or, in other words, are not clearly against the weight of evidence.[9] The general rule, that a

[3]Rowand v. Finney (1880) 96 Pa. 192.

[4]Williams v. Bishop (1854) 15 Ill. 553.

[5]Vangilder v. Hoffman (1883) 22 W. Va. 1.

[6]Todd v. Campbell (1858) 32 Pa. 250; McGinity v. McGinity (1869) 63 Pa. 38; Rowand v. Finney (1880) 96 Pa. 192.

In Munro v. Watson (1860) 8 Grant, Ch. (U.C.) 60 Robinson, Ch. J., thought it "probable that, after the discussion and consideration which this case has undergone, it would be thought better not to direct an issue at law in any similar case. I mean not an issue in order to take the verdict of a jury upon the main question in the cause upon the merits. . . . We must all be of opinion, I think, that it would weaken very much the protection which the statute of frauds was intended to afford, to call upon a jury to give their verdict upon the existence or non-existence of a fact which is required by that statute to be proved by a particular description of evidence. They may not understand that they are not at liberty to pronounce a verdict one way or the other according to their moral convictions, but must be governed by certain statutes and rules of evidence, which exact that the proof of the fact should be of a certain description." The considerations thus relied upon seem to be scarcely decisive, when we advert to the fact that, under the rules of evidence in criminal cases, the proof must be of a "certain description." The only authority cited by the learned judge was Yates v. Hambly (1742) 2 Atk. 360, where Lord Hardwicke held that it was not proper to direct an issue to try a trust. But it is submitted that a ruling as to a trust cannot warrantably be invoked as a precedent in a case involving the admissibility of parol evidence to establish a mortgage.

[7]Brown v. Clifford (1872) 7 Lans. (N.Y.) 46 (appeal dismissed in 54 N.Y. 636).

[8]Rawson v. Plaisted (1890) 151 Mass. 71, 23 N.E. 722; Jones v. Blake (1885) 33 Minn. 362, 23 N.W. 538; Barrow v. Paxton (1810) 5 Johns. (N.Y.) 258, 4 Am. Dec. 354; Carr v. Carr (1873) 52 N.Y. 251.

[9]Halloran v. Halloran (1891) 137 Ill. 100, 27 N.E. 82.

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verdict rendered upon conflicting testimony will ordinarily be upheld, has frequently been applied.[10]

When the action is tried by a chancellor or a judge sitting without a jury, his judgment will be sustained if the findings of fact upon which it is based are reasonably deducible from the whole testimony;[11] that is to say, if they are not clearly against the weight of evidence.[12] "Due weight is to be given to the decision of the trial judge, and it is not to be set aside unless it appears to be clearly erroneous. Properly and necessarily, great consideration must be given to the conclusions of fact reached by the judge who hears the evidence, where it is in large part oral, for he has opportunities to pass upon the degree of credibility to be given to the testimony of the witnesses which no appellate tribunal possesses."[13]

51. Remedies of transferor. — (*a*) *By suit in equity.* — The preliminary question in all cases in which the aid of a court is invoked by a claimant who relies upon the theory that an absolute instrument of transfer executed by him was intended as a mortgage is whether the transaction was in point of fact one of that description. The appropriate remedy, therefore, for such a claimant, is to apply to a court of equity for a declaration that this was the intention of the parties to the contract, and for such specific relief as may be asked for, or as may be deemed suitable in the premises. Even if a prayer for such a declaration is not inserted in the bill, petition, or complaint, his right to such relief is obviously determinable upon the same footing as if it had been inserted.

The particular descriptions of relief to which he is entitled as against the transferee or persons claiming through the transferee are those which are predicable as a necessary deduction from the general rule (see § 4, ante), that the juristic incidents of an instrument of transfer which is shewn by parol evidence to have been intended as a mortgage are, on the whole, identical with those of a formal mortgage.

On general principles, it is clear that no relief will be granted

[10]See, for example, McMicken v. Ontario Bank (1891) 20 Can. S.C. 575; Bogk v. Gassert (1892) 149 U.S. 17, 37 L. ed. 631; Knight v. Hartman (1892) 93 Mich. 69, 52 N.W. 1044; Huoncker v. Merkey (1883) 102 Pa. 462; McCormick v. Herndon (1893) 86 Wis. 451, 56 N.W. 1097.

[11]Daniels v. Lowery (1890) 92 Ala. 519, 8 So. 352; Todd v. Todd (1912) 164 Cal. 255, 128 Pac. 413; Roberts v. Norton (1895) 66 Conn. 1, 33 Atl. 532; Hanks v. Rhoads (1889) 128 Ill. 404, 21 N.E. 774; Barry v. Colville (1891) 129 N.Y. 302, 29 N.E. 307; Parish v. Reeve (1885) 63 Wis. 315, 23 N.W. 568.

[12]Burgett v. Osborne (1898) 172 Ill. 227, 50 N.E. 206; Brown v. Johnson (1902) 115 Wis. 430, 91 N.W. 1016.

[13]Jennings v. Demmon (1907) 194 Mass. 112, 80 N.E. 471. For a Canadian case in which the importance of the fact that the trial judge has the opportunity of hearing and seeing the witnesses was emphasized see Rose v. Hickey (1878) 3 Ont. App. 309.

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to a transferor, where the evidence shews that the instrument in question was executed for the purpose of defrauding his creditors.[14]

(*b*) *By action at law.*—In every jurisdiction in which parol evidence is admissible in actions at law for the purpose of converting an absolute instrument of transfer into a mortgage, the transferor may assert his rights in any action of that description which necessarily involves a determination of the main question, whether the legal title to the property was vested in him or the transferee after the instrument was executed. For the purpose of the present article, it will be sufficient to insert the following summarized statement of the doctrines adopted in the various jurisdictions:—

In all but one of the English cases which were decided before the fusion of law and equity under the judicature act, parol evidence was held or assumed to be admissible. See § 17, ante.

In many of the American cases decided with reference to the rules of common-law procedure, a position similar to that of the English judges was taken. In Pennsylvania parol evidence was uniformly received in actions of ejectment and assumpsit. The authorities with regard to the general question of the admissibility of such evidence are conflicting so far as regards the following states: Illinois, Kentucky, Maine, Michigan, New York, Oregon, Tennessee, Texas, Vermont. In other states such evidence has been pronounced incompetent: Alabama, Connecticut, Indiana, Maryland, Massachusetts, Missouri, New Jersey, Virginia.

On the other hand, in all the states in which practice acts and Codes of Procedure have been adopted, it has almost invariably been held that such evidence is admissible. Such is the situation in Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kansas, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Washington, Wisconsin.

XIV. Competency of parol evidence considered with reference to statutes as to the registration of instruments.

52. English enactments as to bills of sale.—The general object of the English Bills of Sale Acts, passed in 1854 (repealed),

[14] In Mundell v. Tinkis (1884) 6 Ont. Rep. 625, the evidence shewed that the deed in question, which the grantor sought to cut down to a mortgage, had been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract. Held, that under these circumstances evidence was not admissible to rectify the form of the instrument, for the court never assists a person who has placed his property in the name of another to defraud his creditor; nor does it signify whether any creditor has been actually defeated or delayed.

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1878, and 1882, is to prevent fraud upon creditors by secret bills of sale of personal chattels.[1]

By § 9 of the Act of 1882, it is declared that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule annexed to the act.[2]

The only cases decided with reference to this legislation which are relevant to the subject of the present article are those in which a controlling question was whether the unregistered documents under review were invalidated because given by way of security. The intention of the parties has sometimes been inferred from the language of the documents themselves.[3] But is is well settled that "the real truth of the transaction must be applied to the construction of documents for the purpose of the act, and, if a document, construed according to the true nature of the transaction, be within the act, then it will not be protected by its form."[4] In other words, the principle adopted is that, "for the purpose of seeing whether the act applies, the court is to look through or behind the documents, and to get at the reality; and if, in reality, the documents are only given as a security for money, then they are bills of sale."[5] The actual intention of the parties, therefore, may be shewn by extrinsic, including oral, evidence. The essential question to which such evidence is directed in each instance is whether the given transaction was a loan upon security or a sale.[6] The character of the negotiations which preceded the

[1]Bowen, L.J., in North Central Wagon Co. v. Manchester, S. & L. R. Co. (1887) L.R. 35 Ch. Div. 206.

[2]For a case in which this provision was applied, see Ex parte Finlay (1893) 10 Morrell 258.

[3]See Ex parte Odell (1878) L.R. 10 Ch. Div. 76, 39 L.T.N.S. 333, 27 Week. Rep. 274.

[4]Fry, L.J., in Beckett v. Tower Assets Co. [1891] 1 Q.B. 638. One of the earlier cases referred to by the learned judge was Cochrane v. Matthews (1878) reported only in a note to L.R. 10 Ch. Div. 80.

[5]Lord Esher in Madell v. Thomas [1891] 1 Q.B. 230.

[6]In Madell v. Thomas (Eng.) supra, Kay, L.J., said: "How can it be known with regard to documents coming within the species so enumerated, which are not expressly given by way of security for money, whether they are so given or not? It can only be ascertained by external evidence. Therefore, looking to the terms of the two acts, and to the definition of a bill of sale, I think that, when the inquiry is whether a document which, on the face of it, does not shew whether it is given as a security for money, is or is not so given, external evidence must, and the act contemplated that it should, be admissible. In many cases in courts of equity where it was sought to shew that an assignment which purported to be absolute was really intended to be a mortgage, external evidence has been admitted for that purpose, but on the ground that the court had power to rectify the instrument, and that it would be a fraud to insist on the absolute form of the instrument if it were only intended to be a security for money. Possibly, therefore, those cases do not carry us very far with relation to the present question. Here we have to deal with a particular act of Parliament, the object of which could not be carried out unless it could be shewn by external evidence that the document in question was really

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execution of the document under review is regarded as an element which has a material bearing upon that question. In a case where the grantee was a company, it is plain that, whatever course these negotiations may have taken at the outset, the fact that the company had not power to lend money is a circumstance which tends strongly to shew that the contract finally entered into was a sale rather than a loan.[7]

only given as a security for money, and which must, therefore, have intended that this might be done."

In Re Watson (1890) L.R. 25 Q.B. Div. (Eng.) 27, where an application was made by the trustee in bankruptcy of Mary Watson, a bankrupt, for an order declaring that certain household furniture and effects, which had been seized by one Love, were the property of the trustee, the transaction purported to be a sale of personal chattels, followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums as for such hire, until a certain amount was paid, when the chattels were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default in payment. Held, that, upon the evidence, the agreement was a bill of sale within the statutes. Lord Esher said: "I do not deny that people may evade an act of Parliament if they can, but, if they attempt to do so by putting forward documents which effect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the court will go through the documents in order to arrive at the truth. So, when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring. . . . The document itself must be looked at as part of the evidence; but it is only part, and the court must look at the other facts, and ascertain the actual truth of the case."

See also Maas v. Pepper [1905] A.C. (Eng.) 102, 74 L.J.K.B.N.S. 452, 53 Week. Rep. 513, 92 L.T.N.S. 371, 21 Times L.R. 304, 12 Manson 107, affirming Mellor v. Maas [1903] 1 K.B. 226, 72 L.J.K.B.N.S. 82, 88 L.T.N.S. 50, 18 Times L.R. 139, 10 Manson, 26, which affirmed [1902] 1 K.B. 157, 71 L.J. K.B.N.S. 26, 85 L.T.N.S. 490, 18 Times L.R. 40, 50 Week. Rep. 111 (action by trustee in bankruptcy to have hire-purchase agreement declared void for want of registration).

[7] In North Central Wagon Co. v. Manchester, S. & L. R. Co. (1880) L.R. 35 Ch. Div. 191, the action was brought by the North Central Wagon Co. against the Manchester, S. & L. R. Co. in consequence of the detention of certain wagons on which the plaintiffs claimed a lien for tolls. The defendants argued that the documents involved amounted to a bill of sale, and that, not being in accordance with the provisions of the act of 1882, they were invalid, and the title of the plaintiffs consequently avoided. Two questions were thus raised, viz., whether the documents constituted a bill of sale within the acts, and, if so, whether they were security for the payment of money by the grantor. Bowen, L.J., and Cotton, L.J., did not discuss the latter question, being of opinion that the decision of the court below (L.R. 32 Ch. Div. 477) should be reversed on the ground that, inasmuch as there was a separate and distinct oral agreement for the purchase of the wagons by the plaintiff company, the invoice and receipt sent by the Blacker Company (vendor) to the plaintiff company, not being an assurance of the chattels either at law or in equity, did not constitute a bill of sale within the acts. But Fry, L.J., made the following remarks: "It appears to me, having attended to the arguments for the respondents, that the true transaction was that which found expression in the instruments themselves, and that the very incapacity of the plaintiff company to make a loan, coupled with its capacity to enter into a transaction for the purchase of wagons and the leasing of wagons, was a very strong reason why the contracting parties never in-

Annotation.

Under the act of 1878 a bill of sale "was not avoided for want of registration as between the grantor and grantee."[8] But under the act of 1882 the consequences of the want of registration are the same, whether the contest is between the parties themselves,[9] or between a trustee in bankruptcy or an execution creditor and the party specified in the document as the purchaser.[10] The theory of an estoppel based upon the conception that the transferor contradicts his own deed if he is allowed to set up the true nature of the transaction is no more applicable in the former case than in the latter.[11]

The burden of proving that the sale in question was a real and bona fide one rests on the party who alleges it to be of that description.[12]

Where the defendants really have a title to the goods by some transaction the effect of which is independent of any document, and afterwards a document is executed which would come within the definition of a bill of sale, if their title depended upon it, the non-registration of that document will not deprive them of their independent title.[13]

tended to come to a contract for loan, whereas they intended to come, and in this case did in fact come, to a contract for sale and hire." The decision of the court of appeals was affirmed by the House of Lords (L.R. 13 App. Cas. 554, 5 Eng. Rul. Cas. 42).

In Yorkshire R. Wagon Co. v. Maclure (1882) L.R. 21 Ch. Div. (Eng.) 309, the agreement made was that a railway company should sell rolling-stock to a wagon company and take a lease of it from the vendee. Commenting upon the evidence, Lindley, L.J., said: "The original idea [i.e., of a loan] was bona fide dropped and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the railway company just as well. All they wanted to do was to get £30,000. That was the real transaction between the parties, and that transaction was one which was embodied in the deeds upon which his action was brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal?"

[8]Kay, L.J., in Madell v. Thomas [1891] 1 Q.B. 230, 60 L.J.Q.B.N.S. 227, 64 L.T.N.S. 9, 39 Week. Rep. 280.

[9]Ibid.

[10]In re Watson (1890) L.R. 25 Q.B. Div. (Eng.) 27, 59 L.J.Q.B.N.S. 394, 63 L.T.N.S. 209, 38 Week. Rep. 567, 7 Morrell, 155; Maas v. Pepper [1905] A.C. 102, 74 L.J.K.B.N.S. 452, 53 Week. Rep. 513, 92 L.J.N.S. 371, 21 Times L.R. 304, 12 Manson, 107, affirming Mellor v. Maas [1903] 1 K.B. 226, 72 L.J.K.B.N.S. 82, 88 L.T.N.S. 50, 18 Times L.R. 139, 10 Manson, 26, which affirmed [1902] 1 K.B. 137, 71 L.J.K.B.N.S. 26, 85 L.T.N.S. 490, 18 Times L.R. 40, 50 Week. Rep. 111.

For another case in which the agreement was held void as against a trustee in bankruptcy, see Wheatley v. Wheatley (1901) 85 L.T.N.S. 49.

[11]Lopes, L.J., in Madell v. Thomas supra.

[12]Lord Halsbury in Maas v. Pepper [1905] A.C. 104, 74 L.J.K.B.N.S. 452, 53 Week. Rep. 513, 92 L.T.N. 371, 21 Times L.R. 304, 12 Manson. 107.

[13]Fry, L.J., in Beckett v. Tower Assets Co. [1891] 1 Q.B. 638, reversing [1891] 1 Q.B. 1 (action for trespass to goods in respect of their seizure). Discussing the contention that the defendants had an independent title, the learned judge said: "Whether that was so or not depends on the real intention of

Annotation.

53. Colonial enactments as to bills of sale.—In Nova Scotia it has been held that a parol agreement for the return of property transferred under an absolute bill of sale is not a "defeasance" within the meaning of the provision in the Bills of Sale Act which requires that every defeasance shall be filed with the bill of sale.[14]

54. English enactments requiring the registration of ships.—It is well settled that the provisions of these enactments do not preclude the introduction of parol evidence for the purpose of shewing that a bill of sale which purports to transfer absolutely a ship or an interest therein was intended to operate as a mortgage.[15] In other words, "the court is at liberty to look behind the register to the real character of the transaction, and to treat as a mortgage that which is, on the face of it, an absolute transfer, if it should appear that such was the intention of the parties."[16]

the parties, and . . . in determining what their real intention was, we must have regard to both the form and the substance of the transaction, to the position of the parties, and to the whole of the circumstances under which the transaction came about."

"It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact, and afterwards the goods are hired, the case is not within the bills of sale act." In re Watson (1890) L.R. 25 Q.B. Div. 27, per Lord Esher (p. 37).

See also United Forty Pound Loan Club v. Bexton (1890), an unreported case, reviewed by Fry, L.J., in Beckett v. Tower Assets Co., supra.

[14]Fraser v. Murray (1901) 34 N.S. 186, construing Rev. Stat. ch. 92.

[15]In Langton v. Horton (1841) 5 Beav. (Eng.) 9, 11 L.J. Ch. N.S. 233, 6 Jur. 357 (an equitable action decided with reference to Stat. 3 & 4 Wm. IV. chap. 55, §§ 35, 42, 43), the facts that the vendor was from time to time charged with the expenses of renewing the bills drawn by him on the vendee, that he continued the insurance on the ship, and that he made payments and allowances to the families of the sailors, were considered to be consistent with the vendor's being owner, subject to a mortgage or security, but wholly inconsistent with the notion of the vendee's having become the owner by breach of condition.

See also the following cases, which involved actions at law: Gardner v. Cazenove (1856) 1 Hurlst. & N. (Eng.) 423, 26 L.J. Exch. N.S. 17, 5 Week. Rep. 195; Myers v. Willis (1855) 17 C.B. (Eng.) 77; Ward v. Beck (1863) 13 C.B.N.S. (Eng.) 668.

[16]In The Innisfallen (1866) L.R. 1 Adm. & Eccl. (Eng.) 72, where the evidence relied upon as proof of the real character of the transaction was a letter from the vendee to the vendor, in which it was stated that the transferred shares in the ship were held as security and were to be re-transferred in due payment of the vendor's drafts.

C. B. LABATT.

QUE.

S. C.

GELINAIS v. CITY OF MONTREAL.

Quebec Superior Court, Martineau, J. September 12, 1916.

MUNICIPAL CORPORATIONS (§ II G 3—236)—*Liability for flooding from sewers—Force majeure—Presumption of fault.*]—Action for damages by the flooding of a cellar on account of the bursting of a water main.

MARTINEAU, J., rendered a judgment, in which he said: Article 1054 of the Civil Code, under which the action was brought, creates a presumption of fault against the guardian of the article from which the damage or injury arose. It is incumbent upon the said guardian to repel such presumption by proof. The city in this case has not repelled the local presumption of fault. On the contrary, there is proof of imprudence in using this water-pipe. In effect, the city knew that several conduits of the dimensions of the one in question had previously been broken after being laid down and put into service. That fact indicates a vice either in the material itself or in the manufacture. Ignorance of the nature of such a vice or lack of knowledge to effect a remedy does not relieve the city of responsibility for damages arising from accident to the pipe.

If the city had been specially authorized to use conduits of the dimensions of the pipe brought into this case, just as the C. P. R. in *Roy* v. *C. P. R.*, 1 Can. Ry. Cas. 196, was authorized to use engines driven by steam, the Superior Court would have been obliged to be guided in this case by the decision in the case quoted, as such a decision had been upheld in the Court of Appeal. But authorization to establish an aqueduct does not include authority to put into the service of that aqueduct all kinds of conduits. Then as to the decision in the case of *Dumphy* v. *The Montreal Light, Heat and Power Co.*, [1907] A.C. 454, that would have been applicable in this case, too, if the Privy Council, who pronounced the judgment, had decided that the authorization to place wires underground meant that the wires could be placed at so shallow a depth that they would be a constant danger to people passing over them. The responsibility was not removed by the fact that the water main had been laid efficiently, that it was apparently without defect, and that the break was caused by unknown and uncontrollable causes, so that the accident really amounted to a case of *force majeure*.

Judgment for plaintiff.

LAIDLAW v. HARTFORD FIRE INS. CO.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, and McCarthy, JJ. June 30, 1916.

1. INSURANCE (§ VI D 1—371)—INTEREST IN PROCEEDS—MORTGAGEE—JOINDER OF PARTIES.

A mortgagee named as the beneficiary in a policy of fire insurance, to the extent of his interest in the property insured, has a *locus standi* to take suit against the insurance company in case of loss by fire. In most cases the Court will insist upon the mortgagor being made a party to the proceedings, but under certain circumstances, as for instance, where the mortgagor assigns to the mortgagee the balance of the insurance moneys over and above the amount of the mortgage, the Court will not insist upon the assured being joined.

2. INSURANCE (§ VI A—249)—ASSIGNMENT TO MORTGAGEE—NOTICE TO AGENT.

Notice of the standing of the mortgagee as assignee of the surplus insurance moneys was held sufficient when given to the local agents of the insurance companies concerned.

[*Laidlaw* v. *Hartford*, 24 D.L.R. 884, reversed.]

Statement.

APPEAL from the judgment of Hyndman, J., 24 D.L.R. 884.

C. S. Blanchard and *I. C. Rand*, for plaintiff, appellant.

H. P. O. Savary, and *A. H. Clarke*, K.C., for defendants, respondents.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Ferdinand F. Kohlruss and Anton Kohlruss being the owners of the Dunmore Hotel gave a mortgage for the sum of $14,000 to the plaintiff as a trustee for a number of their creditors. They insured the building in the defendant companies in amounts aggregating $20,000; in each case either the loss was made payable to the plaintiff as his interest might appear or the policy was assigned to him and in each case "a mortgage clause" was attached. All these policies were in force at the time of a fire which occurred on June 2, 1914.

Anton Kohlruss having died in August, 1914, letters of administration were granted to The Trusts & Guarantee Co. Proofs of loss were sent to the companies. On February 15, 1915 (that is after the loss had occurred) Ferdinand F. Kohlruss and The Trusts & Guarantee Co. assigned the insurance moneys to the plaintiff and notice thereof was given to the defendant companies. The action is brought by the plaintiff, therefore, for the whole of insurance moneys by virtue of his right both as mortgagee and assignee of the surplus moneys. The trial Judge gave judgment in favour of the plaintiff for the amount owing to him as mortgagee but held that he was not entitled to recover, as assignee, the surplus moneys. Upon this latter branch of the case he said:

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As to the second part of the plaintiff's claim, as assignee of the balance of the insurance moneys, the most serious defence raised was that the fire mentioned in the statement of claim was caused through the wilful act or neglect, procurement, means or contrivance of Ferdinand F. Kohlruss and Anton Kohlruss, the owners and mortgagors or one of them. I have had great difficulty in arriving at a decision on this point. The plaintiff claims for the balance of the insurance by virtue of the assignment. I am quite free to admit that the evidence adduced would not be at all sufficient to sustain a verdict for arson against either of the owners, but I think in the case of fire insurance the utmost good faith and readiness to explain any suspicious circumstance, if explanation is possible, should be expected of the claimants or beneficiaries. It is true, Anton Kohlruss, who was present at the fire, has since died, having committed suicide, and was not available as a witness, and Ferdinand Kohlruss, the other mortgagee, was not in Medicine Hat when the fire took place, but, apart from other circumstances of a suspicious nature, it was adduced that on the day previous to the fire Ferdinand Kohlruss took from the hotel a box of valuable silver, and on the same day shipped a heavy box, presumably the silver, to his wife in Saskatchewan. It may or may not have been perfectly proper and honest for him to have done so and there may have been no evil motive actuating him, but, in my opinion, under all the circumstances of this case it was the duty of Ferdinand Kohlruss (sitting in Court as he was throughout the trial) to have gone into the witness-box and have given a complete and full explanation of this occurrence or of any other features of which he had knowledge. I think a set of suspicious circumstances was made out by the defence, making it incumbent on the beneficiaries to explain away such events with regard to which they had any knowledge, however unimportant any particlar circumstance might appear to be standing alone. As I said before, I do not think such a case has been made out as to justify the conclusion that a crime was committed, but when peculiar or suspicious occurrences have been proved to have taken place of which the claimant or beneficiary has any knowledge, I am strongly of the opinion that it is his duty to make the fullest explanation and not sit mute as Ferdinand Kohlruss did in this case.

The plaintiff as assignee of the balance of the moneys over and above the amount of the mortgage is bound by the same defence as might have been urged against the owners had they been plaintiffs to the action. Finding, therefore, as I do, that the owners would not have been entitled to recover, the plaintiff is therefore not entitled to recover under the second part of his claim, namely, under the assignment from Ferdinand Kohlruss and The Trusts and Guarantee Co. as administrators of the estate of Anton Kohlruss.

The Judge also held that upon payment by the defendant companies to the plaintiff of the amount owing to the plaintiff as mortgagee they were entitled to be subrogated to his rights as mortgagee and directed that he make an assignment of his mortgage to them.

The plaintiff appealed. His grounds are:—(a) That the trial Judge having correctly found that there was not such a case made out by the defendants as to justify the conclusion that the crime of arson was committed, erred in law in dismissing the plaintiff's

action in regard to that portion of his claim. (b) That the trial Judge erred in law in directing that the defendants should be subrogated to all the rights of the plaintiff, under his mortgage, against Ferdinand Kohlruss, to the extent of the amount to be paid by the defendants to the plaintiff under the judgment, or at all. (c) That the finding of the trial Judge that the fire was caused by Ferdinand and Anton Kohlruss, or one of them, was against the weight of evidence.

The defendants gave notice in pursuance of the rule in that behalf that on the hearing of the appeal they would contend that the plaintiff's action ought to have been wholly dismissed.

As to the defence that the fire was caused by the wilful neglect or act, procurement, means or contrivance of the Kohlrusses or one of them, I am of opinion that the rule applicable in criminal cases, namely, that a person cannot be found to have committed a criminal offence unless his guilt be established beyond a reasonable doubt ought not to be applied on civil cases.

The decisions so far seem to leave the question in doubt. In Phipson on Evidence, 5th ed. p. 6, a number of text books and cases are cited and the weight of opinion is said to be against the application to civil cases of the rule in criminal cases. The weight of American decisions seems to be to the same effect. There is in Ontario one decision the other way, *Richardson* v. *Canada West Farmers Ins. Co.*, 17 U.C.C.P. 341; but the correctness of that decision is questioned, *U.S. Express Co.* v. *Donohoe*, 14 O.R. 333. Perhaps the case which most satisfactorily discusses the question is the Irish case of *Magee* v. *Mark*, 11 Ir.C.L.R. 449. The unwisdom of the burdensome rule of evidence appears, it seems to me, when one considers the modern extensions of the criminal law and that many cases of fraud and even of negligence may be crimes.

Notwithstanding that in this respect I differ from the trial Judge I am of opinion, on the whole evidence, that, although there are a number of circumstances which create some suspicion against the owners of the hotel, there is not sufficient, even estimating the evidence by way of considering merely the preponderance of evidence, to justify a finding against the plaintiff in this issue.

Another question is that of the right of the plaintiff to sue and

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this is questioned on the two grounds that a mortgagee, though on the face of the policy the loss, if any, is made payable as his interest may appear, cannot sue on the policy and that the assignment of the insurance moneys to the plaintiff is ineffective because no such notice as is required by the statutory provision as to assignment of choses in action was given. I do not think it is worth while considering the cases referred to in the various text-books on contracts as to the right of action by a third party who is not a party to the contract, but for whose benefit the contract is made. The decisions vary in different jurisdictions, and inasmuch as there is always a remedy it would seem that the question of how that remedy is to be obtained is one purely, not of substantive law but of practice and procedure which any superior Court can settle for itself. At all events in the very commonly occurring case of policies of fire insurance, in which either as part of the policy as originally issued or by way of subsequent amendment thereof by way of addition, the loss is made payable to a mortgagee or other person having a pecuniary interest in the property insured, the third party has clearly a right, which he may enforce on the ground either that the existing contract is a tripartite one, to which he is a party or that he is the principal and the assured his agent or that he is a *cestui que trust* of the assured.

Having an interest he may take legal proceedings to protect that interest. Were a mortgagee in such a case to sue in his own name without either joining the mortgagor either as co-plaintiff or as a defendant, I think the Court under r. 28 would in most cases insist that the mortgagor should be made a party in order that the insurance company might not be subjected to more than one action over the same matter and in order to bind the assured to the finding of the amount owing to the mortgagee; but, without such joinder, I think it could not be said that the plaintiff had no cause of action and I can conceive such circumstances arising as would lead the Court not to insist upon the assured being joined.

I hold, therefore, that the plaintiff had a *locus standi* as the beneficiary under the policies sued upon.

As to his standing as assignee of the surplus moneys it was contended that express notice of the assignment was not given before action. I agree with the trial Judge that notice given

to the local agents of the several insurance companies was sufficient but even if it were not so, I think the objection is not a serious one. To avoid reference to well known decisions I refer generally to the article on Assignments of Choses in Action in the Enc. of the Laws of England, 2nd ed.

Notwithstanding the statutory provision an assignment good in equity is still good and notice is not essential to its validity, though it may give the assignee some advantage which he otherwise would not have. The assignment in the present case was certainly a good assignment, giving the assignee a right of action, and though it may be said that strictly speaking the assignors ought to have been made parties so as to be bound, the Courts do not always insist upon this technical requirement. In fact, here the assignors' written consents to be added as co-plaintiffs were presented at the trial. Their absence may well be disregarded.

The plaintiff, as assignee of the insured, represented their interests and was seeking to recover in that capacity as well as in the capacity of mortgagee, the insurance moneys. The defendants by their defence disputed the right of the plaintiff to recover on grounds which, if sustained, would have precluded the insured from recovering had they been suing. If this defence fails, as I hold it does, the facts on which a right of subrogation would arise not only do not arise but are *res judicata* against the defendants. (See *Bull* v. *Imperial Fire Ins.*, Cameron's Canada S.C.Cas 1.)

I think I have dealt with all the questions seriously pressed during the argument. In the result I think the plaintiff entitled to recover the whole amount sued for with interest and costs and I would therefore allow the appeal with costs and dismiss the defendants' motion by way of cross appeal, giving the plaintiff the costs of the appeal. *Appeal allowed.*

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Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 25, 1916.

CONTRACTS (§ V A—379)—NOT TO ENGAGE IN SAME BUSINESS—ASSENT—INJUNCTION.

A party to an agreement that he shall not carry on a certain business within a particular locality, will not be restrained from doing so where the other party's conduct amounts to a release from the obligation.

[*Freeth* v. *Burr*, 43 L.J.C.P. 91, considered.]

Statement.

APPEAL from the judgment of the Chief Justice dismissing an

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action for injunction to restrain the carrying on of a business contrary to a contract. Affirmed.

G. A. Cruise, for plaintiff, appellant.

H. F. Thomson, for defendant, respondent.

The judgment of the Court was delivered by

BROWN, J.:—The parties hereto carried on business at Saskatoon under the name of the Saskatoon Welding Co. Difficulties arose and litigation followed all of which was settled by an agreement dated July 22, 1914. By this agreement the defendant undertook *inter alia* to transfer all the accounts of the business to the plaintiff and to refrain from carrying on the welding business at any place within 150 miles from Saskatoon. The plaintiff on the other hand agreed to pay the defendant $600; of this amount $400 was to be paid out of the accounts as soon as the same was collected, and the remaining $200 was to be paid $100 on October 1, 1914, and $100 on November 1, 1914. At the time of the execution of this agreement the parties also executed a power of attorney authorising the manager of the Royal Bank at Saskatoon to collect a number of the accounts referred to and out of these accounts when collected the $400 aforesaid was to be paid to the defendant. By August 21, 1914, the bank had collected $293.35 on these accounts, and on that date this amount was paid out to the defendant by the bank, the plaintiff or his solicitor consenting thereto. A further sum of $82.15 was arranged by transfer of certain accounts to the defendant thus leaving $24.50 of the $400 still to be paid.

It appears that a solicitor's bill of some $20 had been incurred in the preparation of the agreement and the power of attorney above referred to. The plaintiff insisted that the defendant should pay this bill or at least part of same, but the defendant repudiated any liability whatever therefor. The bank, although they had the money, refused to pay any further sum to the defendant unless the plaintiff authorised such payment. The plaintiff refused such authorization on the ground that the defendant should first pay the solicitor's costs above referred to, and stated in effect that this balance would be retained for that purpose. The evidence of the defendant on this point is as follows:—

A. "Just about last of August, I went to Mr. Harris and told him I wanted the balance of my money, that the bank had the full amount collected so they could pay me what I had coming. Mr. Harris said, your money is

down at the bank for you. I says, is that so, and he says, yes, and the balance is to pay Cruise's bill. I said I am not going to pay Cruise's bill and he says he has Mr. Bence to pay. I said I want the balance of my money and want no truck. He says you have got every damned cent you are going to get. I says, there is no use in trying to argue with you, so I went out. Q. Did he say anything whether he would pay you or not? A. I told him at the time if I could not get money I was going to start up in business. He says: Go ahead, I don't care, so next day——Q. Was that the same occasion that he said you won't get another damned cent? A. Yes. Q. What did you do? A. So next day I took a witness and went back and demanded my money, and he says, I got every damned cent I was going to get, and I said, if that is all I am going to get I am going to start up in business and he said: Go ahead, I don't care, and I walked out. Q. Was that the last time? A. That was the last time I talked to him, the last conversation we had. Q. What did you do, did you start up in business? A. We started up in business, yes sir.

This evidence of the defendant, although in part denied by the plaintiff, is accepted by the Chief Justice who tried the action as correctly representing what took place. The defendant having started up in business again in Saskatoon the plaintiff brought this action to restrain him from continuing such business and for damages. The action having come on for trial was dismissed and this appeal followed. The defendant contends that the conduct of the plaintiff amounted to a repudiation of the contract, and entitled him to treat the contract as at an end and to start up business again. The statement made by the plaintiff "You have got every damned cent you are going to get" when examined in the light of the context and circumstances must, in my opinion, be held to refer only to the $24.50, payment of which was refused by the bank. Counsel for defendant contends that it referred to all money still unpaid under the contract, including the two $100 instalments. These two instalments were not yet due. The real difficulty between the parties seems to have been as to who should pay the solicitor's costs, and it was in connection with the defendant's request or demand for payment of the balance of the money from the bank that those words were used. I am of opinion, therefore, that this must be held, as I have already indicated, to apply only to the $24.50. Can it be said then that this statement of the plaintiff was a repudiation of the contract on his part? The law bearing on this point seems to be as stated by Lord Coleridge, C.J., in *Freeth* v. *Burr*, 43 L.J.C.P. 91 at 93, where he says:—

I think that in cases of this sort where the question is whether one party to a contract has been set free by the other the real point is whether the con-

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duct of the party relied on as setting the other free, does or not amount to an abandonment and refusal on his part to perform the contract, and I refer to this to explain what I believe is the true ground on which the cases on this subject have been decided.

This statement of the law was approved by the House of Lords in *General Bill Posting Co.* v. *Atkinson*, 78 L.J. Ch. 77. Can it be said that the plaintiff here in using the language which he did intimated an intention to abandon and altogether refused performance of the contract? I am clearly of the opinion that such interpretation should not be put upon the plaintiff's language.

This point, however, scarcely seems necessary of decision in view of the findings of the Chief Justice. His judgment is in part as follows:—

If there was not an actual repudiation of the agreement on his part there was at least such a line of conduct as to justify the defendant in going back into business. There was also a verbal statement on his part that he was willing that the defendant should go back into business.

The evidence of the defendant which I have quoted aforesaid fully supports this finding. The plaintiff having according to this finding consented to the defendant starting up in business again can scarcely expect an injunction from the Court restraining the defendant from doing the very thing which he willed should be done; no more can he expect damages in consequence thereof.

I am of opinion that the conduct of the parties was such that they were both released from the further performance of the contract; and that the appeal should, therefore, be dismissed with costs.

Newlands, J. McKay, J.

NEWLANDS and MCKAY, JJ., concurred.

Lamont, J.

LAMONT, J., dissented. *Appeal dismissed.*

MAN.

K. B.

SHIPMAN v. CANADIAN IMPERIAL TRUST CO.

Manitoba King's Bench, Mathers, C.J.K.B. December 21, 1915.

MORTGAGE (§ VI E—90)—MORATORIUM—SUSPENSION OF FORECLOSURES—PROTECTION OF VOLUNTEERS.

Sec. 2 of the Volunteers' and Reservists' Relief Act, 1915 (Man.) is intended for the relief and protection, not only of the volunteers, but also their wives and dependants, and no proceedings, during the continuance of the war, for the foreclosure of any mortgage or encumbrance, can be lawfully taken to recover property of which the wife is in possession.

[See Annotation on Moratorium in 22 D.L.R. 865.]

Statement.

ACTION for a declaration that the foreclosure proceedings taken by the defendant be annulled and all further proceedings restrained.

S. R. Laidlaw, for plaintiff.

E. L. Taylor, K.C., for defendant.

MATHERS, C.J.K.B.:—Motion by way of demurrer by the defendant to the plaintiff's statement of claim on the ground that it discloses no cause of action.

The plaintiff, Edith A. Shipman, is the registered owner in fee simple in possession of lot 1 in block 28, as shewn on a plan of survey of part of lots 31 to 33 of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as No. 208, except the most northerly 8 feet in depth of said lot, and commonly known as the Mulvey Apartments. When the plaintiff acquired the land it was subject to a mortgage, dated June 14, 1912, to the defendants for securing $19,000 and interest.

The plaintiff is the wife of Charles S. Shipman, a resident of Winnipeg since before August 1, 1914, who has enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in the war which exists between His Majesty and certain European powers.

After the enlistment of the plaintiff's husband, the mortgage being in arrear, the defendants took foreclosure proceedings pursuant to the provisions of the Real Property Act. The land was offered for sale and the sale proving abortive, the defendants applied for a foreclosure order. This action was brought on November 15, last past, for a declaration that all proceedings taken by the defendants under the said mortgage subsequent to the enlistment of the plaintiff's husband are contrary to law and void and for an order restraining the District Registrar from granting the defendants foreclosure and issuing a certificate of title to them under the said mortgage sale and foreclosure proceedings.

The District Registrar is not a party to the action and consequently the latter relief could not be obtained as the action is at present constituted.

The plaintiff relies upon the Act passed by the Manitoba Legislature and assented to on April 1, 1915, entitled an Act for the Protection of Volunteers serving in the forces raised by the Government of Canada in aid of His Majesty and of other persons. Sec. 2 of that Act is the one particularly relied upon. It provides that

> During the continuance of the said war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in

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any of the civil Courts of this Province or outside of such Courts, against a person who is, or has been at any time since August 1, 1914, a resident of Manitoba and has either enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada to join the army of His Majesty in said war or has left Canada to join the army of His Majesty or of any of his allies in the said war as a volunteer or reservist, or against the wife or any dependant member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependant member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war.

The defendant demurs to the statement of claim on the ground that the Act referred to does not apply to the plaintiff.

I assume that an order was obtained under r. 466 for the disposition of the question of law so raised before the trial of the action (although I find no such order amongst the papers), and that the demurrer is now regularly before the Court.

Both this Act and the former Act encroach on the rights of the subject and ought, therefore, to be construed in such a manner as not to interfere with such rights to any greater extent than is expressly or by necessary implication provided. That was the principle of construction applied to the former Act: *Fisher* v. *Ross*, 19 D.L.R. 69, 24 Man. L.R. 773; *Chapman* v. *Purtell*, 22 D.L.R. 860, 25 Man. L.R. 76, and the reasoning is equally applicable to the present Act.

It is quite apparent that the Act was intended for the relief and protection not only of the volunteer but also of his wife and dependants. The first part of the section describes certain proceedings that it shall be unlawful to take either in or out of Court against certain persons. Manifestly, I think, proceedings to foreclose a mortgage under the Real Property Act comes within the purview of the section. The section next designates the persons against whom such proceedings shall not be taken. The persons so designated are a volunteer and his wife or dependant member of his family. Reading thus far we see that it is unlawful to take proceedings either in or out of Court against either a volunteer or his wife. If there was no more the prohibition would be absolute. The balance of the section, however, limits the prohibition to proceedings taken for one or more of the three

following purposes, viz., (1) for the enforcement of payment by the volunteer of his debts; (2) for the enforcement of any lien, encumbrance or other security, or (3) for the recovery of possession of goods or lands in possession of either the volunteer or his wife. The proceedings which it is unlawful to take against either a volunteer or his wife are therefore, (1) proceedings to enforce payment by him of his debts; (2) proceedings for the enforcement of any encumbrance, or (3) for the recovery of possession of any land in possession of either the volunteer or his wife.

It is quite clear that the legislature intended to protect the wife against some proceedings. It could hardly have been intended to protect her against No. (1), *i.e.*, proceedings to enforce payment by her husband of his debts. I cannot conceive of what proceedings it would be possible to take against her for that purpose. It could not refer to a guarantee of his debt by her, because such a proceeding would be to compel payment of his debt by her and not by him. Then what about No. (2)? It will be observed that No. (2) is for the enforcement of any encumbrance generally without specifying whether the encumbrance is on the property of the volunteer or his wife. It seems to me the section up to this point, omitting everything except what is pertinent to the facts of this case, may be fairly paraphrased as follows: "During the continuance of the war it shall be unlawful to take proceedings either in or out of Court against the wife of a volunteer for the enforcement of any encumbrance." That it was intended to protect the wife in the enjoyment of her own property appears from a consideration of No. (3). Under it proceedings must not be taken to recover possession of property in the wife's possession, without confining the prohibited proceedings to property of his in her possession. Obviously, I think, it was intended to protect the wife in the possession of her own property during the war. In this case she is in possession, if not personally, by her tenants, and the result of the defendant's proceedings would be to deprive her of that possession.

In my opinion the Act makes it unlawful during the continuance of the war to take foreclosure proceedings against the wife of a volunteer on active service to enforce a mortgage or encumbrance upon her property or to recover possession of property of which she is in possession.

There will be judgment dismissing the demurrer with costs in the cause to the plaintiff in any event. *Judgment for plaintiff.*

QUE.

C. R.

PAGE v. CITY OF JOLIETTE.

Quebec Court of Review, Charbonneau, Demers and Guerin, JJ. January 8, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—MUNICIPAL WORKS—NOTICE OF ACTION—LIMITATIONS.

The Workmen's Compensation Act (R.S. Que. 1909, arts. 7321-47) applies to persons employed by a municipality in its works, and entitles an employee injured in the course of his work to his statutory indemnity, notwithstanding his failure to give notice of the action within the time prescribed by the municipal charter (2 Geo.V. 1912, ch. 65, sec. 4) or by a special statute applicable to actions against municipalities (Cities and Towns Act, R.S. Que. 1909, art. 5864); the provisions of the first named Act, in cases falling within it, override the provisions of the other statutes, and are governed by the prescription of one year provided therein. In awarding the indemnity under the Act, the Court cannot, if the capital of the annuity is preferred, condemn the employer to pay an annuity only.

2. LIMITATION OF ACTIONS (§ IV B—160)—INTERRUPTION OF PRESCRIPTION BY SUIT.

Service and filing of a petition to sue under the Workmen's Compensation Act operates, by virtue of art. 2224 C.C. (Que.), as an interruption of prescription..

Statement.

REVIEW of the judgment of Mercier, J., Superior Court of the District of Joliette, rendered June 30, 1915, which is modified.

On June 11, 1914, the plaintiff was in the employ of the defendant as labourer and was working at the digging of drains for the construction of an aqueduct. Whilst he was at a depth of about 6½ feet he was buried and crushed by a fall of earth. This accident caused him serious internal injuries of a permanent nature. He contended that his working capacity was diminished by half. His annual wages having been $560, he claimed an annuity of $140 and asked for the capital of this annuity, namely, the sum of $2,402. He also alleged inexcusable fault on the part of the defendant, and for this reason he asked that his indemnity be increased by $210 for additional damages.

The defendant contests the action for the following reasons: 1. The plaintiff has not given within the 60 days following the accident the written notice which it has a right to receive by virtue of the provisions of its charter (2 Geo. V. (1912) ch. 65, sec. 4); 2. This action is now prescribed; 3. The Workmen's Compensation Act does not apply to the case of a workman employed by a municipality in its works.

The Superior Court has resolved these questions in favour of the plaintiff by the following judgment:—

Whereas before deciding on the merits of the main question, it is necessary to decide on the merits of certain interlocutory

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questions raised by the contestation of the defendant, namely: 1. What right of action had the plaintiff against the defendant in the case before us? Is it an action by virtue of common law, based on art. 1053 C.C. of this province, or an action by virtue of the special law concerning responsibilities of accidents of which workmen are victims in their work? 2. Was the plaintiff obliged to give to the Corporation of the City of Joliette the notice required by art. 5864 of the R.S. of 1909, the text of which was put in its charter, in virtue of the statute 2 Geo. V. (1912) ch. 65 sec. 4? 3. Is the action of the plaintiff subject to the prescription of 6 months provided by art. 5864, or to the prescription of one year provided by sec. 25 of the statute 9 Edw. VII. (1909) ch. 66 (R.S. Que. 1909, art. 7345).

Deciding first on the first question:—

Considering that, since May 20, 1909, we have in this province, by virtue of the statute 9 Edw. VII. (1909) ch. 66, reproduced in arts. 7321 to 7347 of the R.S. of 1909 a special and exclusive law concerning the responsibility for accident suffered by workmen, apprentices and employees in the course of their work, and that, by virtue of sec. 15 of these statutes, the only legal remedy which gives a right to the latter to be idemnified for the consequences of such accidents is the recourse that is given to them by that statute and no other; that, in other words, the damages resulting from accidents suffered by reason of the work in the cases provided by that statute can only give a right of action against the employer to the profit of the victim, or his heirs, as defined by sec. 3 of that statute;

Considering that the first section of the statute of 9 Edw. VII. (1909) ch. 66 enacts, amongst other things, that accidents suffered by workmen, apprentices or employees in the work, construction, repairing or maintenance of aqueducts, sewers, canals . . . give right for the benefit of the victim or his representatives to an indemnity assessed in conformity with the provisions enacted in other sections of the said statute;

Considering that this first article is general and does not distinguish between enterprises of individuals or of corporations duly constituted, whether these corporations be industrial or municipal, and that where the law does not distinguish there is no reason to distinguish;

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Considering that this first article does not create any exception in favour of municipal corporations and that municipal corporations can, in certain cases, be considered as heads of enterprises and that this article equally governs enterprises of repair as of construction;

Considering that the accident of which the plaintiff was a victim happened to him in the course of his work, while he was employed by the defendant in working at an aqueduct belonging to it, and that consequently the case of the plaintiff would be, in virtue of the said sec. 15, exclusively governed by sec. 1 of the said statute;

Considering that the plaintiff, under the circumstances, has but one recourse at his disposal to be indemnified for the accident suffered by him on June 11, 1914, namely, the one which is given him by the statute 9 Edw. VII. (1909) ch. 66, and no other, the old recourse in virtue of art. 1053 C.C. being taken away from him by sec. 15 of the said statute;

Considering the decision rendered in the case of *Bernier* v. *City of Montreal*, 13 P.R. (Que.) 94; 18 Rev. Leg. (N.S.) 158;

For these reasons declares that the present action is governed by the Workmen's Compensation Act and that the only recourse that the plaintiff had, when instituting his action, was the one given him by this Act and no other;

Consequently declares that the first reason that the defendant invokes in its defence is ill founded and dismisses the same.

Deciding on the second question:

Considering that the statute 9 Edw. VII. (1909) ch. 66 is a special statute enacted with a special intent and for special purposes, and that every matter which falls under its jurisdiction must be governed by its provisions, whatever may be the prejudice suffered or benefits derived from it by the persons who fall under its provisions;

Considering that this statute does not contain any provision which obliges the workman, apprentice or employee to give within a specific delay to his employer, before instituting against him an action in virtue of the provisions of that statute, any kind of notice but the one required by sec. 27 of the said statute, to obtain from a Judge of the Superior Court the authority to sue the employer, and that in the opinion of this Court that notice must replace and replaces the notice which we find in other statutes

enacted in favour of certain city and town corporations or industrial companies;

Considering that under the Workmen's Compensation Act when workmen suffer accidents in the course of their work, there was no reason, on account of the constant and intimate relations existing between employers and employees, to require that a notice such as the one provided for by art. 5864 of the R.S. of 1909, in favour of towns, cities and corporations, be given within a specific delay, the employer being supposed to know what is going on in his premises and of being warned at once or at least within the following 24 hours of all the circumstances accompanying accidents happening to his men by the work of these latter, while it is different in the case of accidents happening to strangers for which a city or town corporation may be liable as *délits* or *quasi-délits* can be imputed to them on account of their own actions or those of their representatives or of those whom they employ and for which they are in law responsible;

Considering that art. 5864 of the R.S. of 1909, of which the defendant claims the benefit in virtue of its charter, is not applicable to this case, but only to cases which are not governed by the statute 9 Edw. VII. (1909) ch. 66, the latter statute neutralizing the effect of the application of this art. 5864 whenever there exists between a city corporation and the victim of an accident the relations of employer and workman, and that this accident happened through and in course of the work of the victim.

Considering, moreover, that the defendant has no reason to complain about no notice having been given when it is proved by its own clerk and treasurer that, from the seventh day after the accident up to the end of November, 1914, it has paid *proprio motu* to the plaintiff a sustenance allowance on account of the said accident, this fact of the defendant implying on its part a perfect knowledge of the circumstances which preceded, accompanied and followed the said accident and being equal to the notice which it alleges was not received;

For these reasons, declares that the notice mentioned in art. 5864 of the R.S. of 1909 was not necessary and that this art. 5864 is not applicable to the case; in consequence declines to accept this second ground mentioned in the defence.

Deciding on the third question:

Considering that the decision that this Court has just given in

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connection with the previous question resolves for the same reasons the point raised for this third question;

Considering that the prescription of 6 months enacted by the said art. 5864 does not apply in the present case, and that alone the prescription of one year enacted by sec. 25 of the statute of 9 Edw. VII. (1909) ch. 66 applies;

Considering that, in assuming that there could have been reason to apply the prescription of 6 months enacted by art 5864, the action would have been, at all events, instituted within the delay provided by the law, January 27, 1915, the prescription of 6 months having been interrupted since December 1, 1914, date of the filing of the inscription in review of the interlocutory judgment authorising the action of January 21, 1915, date of the renunciation by the defendant of its inscription in review, and this prescription would run again up to January 31, 1915, the date on which the 6 months in question expired;

Considering further that the service and filing of the petition to be authorized to sue the defendant, constitutes under the terms of art. 2224 of our C.C. a civil interruption of prescription, and especially when such a petition has been granted by a judgment of this Court, the prescription of which is, unless there are contrary provisions, prescribible by 30 years;

For these reasons declares this third ground of the defence ill founded in fact and in law and rejects the same; deciding on the main question;

Considering that the evidence discloses that the plaintiff was, on June 11, 1914, victim of an accident whilst in the employ of the defendant and that the accident in question having happened on account of the work given to him by one of the foremen of the defendant, and by the fact of this work he has, in consequence, a right under the restrictions provided for in this Act, to all the benefits resulting from it;

Considering that according to this Act, the workman, apprentice and employee employed in any of the industries provided for by art. 1 of the statute 9 Edw. VII. (1909) ch. 66, reproduced in art. 7321 of the R.S. of 1909, has always a right to be indemnified unless the accident of which he is a victim has been intentionally provoked by him;

Considering that the evidence adduced on both sides does not

establish that the accident which happened to the plaintiff was due to the inexcusable fault of the defendant, nor that the plaintiff has intentionally provoked the accident of which he was a victim, and that it is convenient to eliminate the provisions of sec. 5 of the statute 9 Edw. VII., reproduced in art. 7321 of the said Revised Statutes, as not applicable to this case;

Considering that the evidence in this case shews that the plaintiff is affected, as a consequence of the said accident, with incapacity at least partial and permanent and that he has from this fact, under par. B. of sec. 2 of the said statute, reproduced in art. 7322 of the Revised Statutes of 1909, a right to an annuity equal to half the reduction that this accident has caused to his salary;

Considering that it has been duly proved that the average wages of the plaintiff during the twelve months before the accident have been somewhere around $450;

Considering that it is well and duly proved that as a result of this partial and permanent incapacity the plaintiff has suffered a decrease of working capacity which this Court, considering the allegations of the declaration of the plaintiff, cannot put at more than 50 per cent. of its original capacity, although the evidence would establish a greater valuation;

Considering that this decrease in capacity of 50 per cent., calculated on the sum of $450 representing the annual salary of the plaintiff, as above defined, would give an annual loss of $225 to the half of which the said plaintiff would be entitled as an annual pension, which pension would then be of $112.50 payable, in virtue of sec. 10 of the said statute 9 Edw. VII., ch. 66, reproduced in art. 7321 of the Revised Statutes, by equal and quarterly payments of $28.12½ each;

In consequence maintains the action of the plaintiff; dismisses the defence and condemns the defendant to pay to the plaintiff a sum of $112.50 as an annuity, by quarterly payments of $28.12½ each, from June 11, 1914, the date of the accident, the said payments to be effectuated and continued every 3 months until complete extinction of the obligation which the law imposes on the defendant, if the defendant does not prefer to pay to the plaintiff as a complete, total and final indemnity, the capital that a life insurance company, duly authorized to do so, would be

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required to give to the plaintiff during his lifetime, provided, however, the capital does not exceed the sum of $2,000, the whole with costs, etc.

This judgment was confirmed by the Court of Review but the provision regarding the capital was modified as follows:

Considering that there is no error in the said judgment as to the merits of the question, but that there is error in the said judgment in that it should have condemned the defendant to pay the capital correspondent to the annuity of $112.50 and not leaving to the defendant the option to pay the capital in condemning it to pay the annuity only; dismisses the inscription in review of the defendant; alters, however, the said judgment and proceeding to deliver the judgment that the Court of first instance should have rendered, condemns the defendant to pay to the plaintiff the sum of $1,740 with interest since the institution of the action and the costs as well in the Superior Court as in the Court of Review on the inscription of the plaintiff.

J. A. Piette, for the plaintiff.

J. A. Guilbault, for defendant.

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Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 1, 1916.

PARTNERSHIP (§ VI—27)—RIGHT OF SURVIVING PARTNER TO ACQUIRE INTEREST OF DECEASED PARTNER—VALUATION—GOOD WILL.

The right of a surviving partner to take over the interest of the deceased partner need not expressly appear on the face of the partnership agreement, but such intention may be inferred from its general terms. Upon valuation of the interest of the deceased partner the actual value of the assets should be determined in the ordinary way, and not by the accounts struck at the end of each year under the partnership articles; the good will of the business is also to be included in the assets.

[*Re Wood Vallance & Co.*, 24 D.L.R. 831, 34 O.L.R. 278, varied.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, *Re Wood Vallance & Co.*, 24 D.L.R. 831, 34 O.L.R. 278, varying the decision on the hearing on an originating notice.

Washington, K.C., for the appellant.

E. F. B. Johnston, K.C., for the respondents.

Davies, J.

DAVIES, J.:—I agree with the conclusions reached by Middleton, J., who heard this case in the first instance and am not able to agree with the First Appellate Division in the variations made by them in those conclusions.

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The reasons given by Middleton, J., are quite satisfactory to me and I do not think I could hope to state them more clearly than he has done. I therefore concur in his judgment and in his reasons for the same.

In agreeing with his conclusion that the good will of the business is not to be taken into account in ascertaining the amount to be paid by Wood to the executors of Vallance, I am influenced largely by the decision reached in *Steuart* v. *Gladstone*, 10 Ch. D. 626, in 1879. That case was decided by a very strong Court of Appeal, Jessel, M.R., and James and Bramwell, L.JJ. Of course the facts are not identical with those of the case before us, but reading the observations made by these Judges in giving their judgments and applying the principle on which they acted to the facts of the case before us, I am forced to the conclusion that it never was intended by the parties to this partnership that in the event which has happened of the death of one of the partners during the term of 5 years for which the partnership was entered into, and the purchase by the surviving partner of his deceased partner's interest the intangible and uncertain asset called good will should be valued and paid for.

The articles of partnership are not only silent with respect to good will, but the balance sheets of the partnership business and assets made during the years 1911-12 and 1913, when both partners were alive, do not include anything of the kind. In these balance sheets the partners gave their own meaning to the word "capital" as used in the partnership articles. "Capital" was the balancing item. It was the difference between the total assets and the total liabilities. The share of each partner in the net assets was shewn by that balancing item. Construing the somewhat ambiguous language of these partnership articles in the light of the very short term of 5 years during which the partnership was to last and all the other facts and the conduct of both partners I conclude on the authority of the case referred to that good will should not be included in ascertaining the amount which the surviving partner should pay.

IDINGTON, J. (dissenting):—R. 605 of the Consolidated Rules of Practice in Ontario, upon which the proceedings herein in question are founded, reads:— Idington, J.

(1) Where the rights of the parties depend—

(*a*) Upon the construction of any contract or agreement and there are no material facts in dispute;

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(*b*) Upon undisputed facts and the proper inference from such facts; Such rights may be determined upon originating notice.

(2) A contract or agreement may be construed before there has been a breach thereof. (*New*).

Regard, however, may have to be had to the rules Nos. 604 and 606 in case the proceedings, taken under the r. 605, just quoted, give rise to the application of either or both.

I cannot find within the scope of the questions submitted and the admitted facts relevant thereto, any clear warrant for the Court making such declarations as are to be found in the 2nd sub-section of clause No. 2 of the formal judgment appealed from. It seems to pass upon a question that is not presented in the submission.

It may well be that the parties when before that Court desired its opinion on the question involved in the answer made. At present I see no reason why they might not have been well advised in thus enlarging the scope of the submission, if they did so, but for us having to pass thereon or pass it by, when no record is made of the fact, is, to say the least, embarrassing.

As a step in the reasoning involved in the construction of the document I can also understand the application of the proposition involved in the declaration, but am unable in that case to see why it should form part of the answers to the submission.

There is nothing in the opinion judgment explaining how it comes to be dealt with except as having been argued before that Court; or in the factum of either party dealing with this adjudication. I think we must, under such circumstances, rigidly observe the questions submitted and the undisputed facts and inferences from such facts and answer accordingly. I, therefore, express no opinion relative to this matter seeming to me beyond such questions.

By the notice of motion the following are the questions upon which the advice and order of the Court are desired.

1. Whether William Augustus Wood, surviving partner of Wood, Vallance & Co., is entitled to take over the interest of the William Vallance Estate in the said co-partnership assets by paying to his estate the amount of his capital with interest and profits.

2. Whether the good will of the business of Wood, Vallance & Co. enures to the benefit of the estate of the said William Vallance, as well as to the surviving partner, the said William A. Wood.

3. Whether, on a valuation of the assets of Wood, Vallance & Co., the value appearing in the balance sheet of 31st January, 1913, is binding on the

executors of William Vallance, or whether the actual value of such assets is to be ascertained.

To answer correctly these questions we must consider the articles of partnership, which are admitted, and so far as ambiguous must have regard to the undisputed surrounding facts and circumstances, and if any assistance to be gained thereby also the conduct of the parties immediately after the time when the said articles became operative.

William A. Wood, the appellant, and William Vallance, who died on November 28, 1913, had been members of an old firm composed of themselves and the late George Vallance and George Denman Wood, carrying on a hardware business in Hamilton, under the name of Wood, Vallance & Co.

On January 31, 1910, said appellant and the late William Vallance agreed to enter into co-partnership for the purpose of continuing the said business and bound themselves by articles of partnership to do so for 5 years from that date.

By the said articles they agreed to take over and assume all the liabilities of the said firm and transfer to the new firm all their respective interests in the old firm. I assume, as seems throughout to have been assumed, that there were other transfers got from those representing the other members of the old firm, and the title completed as is implied in what is submitted herein.

The parties then by said articles declare they are respectively interested in the capital and assets as follows: That is to say, Wood to the extent of $577,524 and Vallance to the extent of $479,243.

Clause No. 5 provided for interest on capital of each partner being allowed at 6% per annum and that being paid or credited to him at the end of each succeeding year.

Clause No. 6 provided after payment of such interest that the profits should be apportioned equally.

Clause No. 7 that each should devote his time and attention to the business in the manner specified.

Clause No. 8 is as follows:—

8. At the expiration of each succeeding year of the partnership an account shall be taken of the stock-in-trade, assets and liabilities of the partnership, and an annual balance sheet shall then be made out to the thirty-first day of January in each year, which shall be attested by each of the parties hereto.

It is upon this clause and what followed it in way of its observance that the answer to the third question must turn. There

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were statements made out each year which were probably intended to comply, so far as they went, with the terms of this clause, but none of them were signed by either partner.

The form of attesting is not provided for. I assume a signing or other deliberate act of approval such as could reasonably be said to fall within the word "attest" as used in such connection should be held sufficient. The mere tacit assent cannot be held as a compliance with the peculiar terms of this clause.

The existence of the statement and the fact that each partner was engaged actively in the business, and says nothing in way of objecting thereto, is very cogent evidence of assent, but falls short of what is expressly demanded. No one can ever be quite sure what the partner, so acting and refraining from acting, had in his mind. He may have desired to avoid needlessly doing anything to provoke a quarrel; or he may have been so anxiously desirous of peace that he was afraid to state his objections lest the doing so might lead to a quarrel, or rouse more or less of animosity either open or concealed; and to have recognized that so long as he had not "attested" the balance sheet, his rights of rectification would be preserved.

The fact, if it be a fact, that interest on capital was drawn on under such a basis and profits adjusted on such basis, may render it almost impossible to him acting in such a way, or his representatives, to dispute the correctness thereof, but as matter of law or inference of fact I cannot say so.

The results of payment and adjustment of profits may all need reconsideration. Except in one specified way, not followed, I fail to find undisputed fact.

The answer to the first part of the question then seems to be very obvious, but the alternative query of "whether the actual value of such assets is to be ascertained," in the view I take in answering the other questions, seems to need no further consideration.

When it is held as the Appellate Division held that appellant had no option to buy there obviously must be an ascertainment of the actual value of the estate.

I have come to the conclusion, contrary to impressions I had at the close of the argument, that the surviving partner is not entitled to take over the assets of the firm. There are certainly

some contingencies provided for in clauses 9 and 10 of the articles which look as if it had been contemplated that the survivor was expected to do so. But in construing any agreement we must look at it as a whole and see that consistently with the whole, each provision therein is, if at all possible, given at least some due operative effect.

Let us look at clauses 9 and 10 and see if and how such effect can be given the provisions therein.

It is to be observed that there is no obligation imposed upon the survivor to take over the assets and pay therefor to the executors of the deceased his or their share of the value of same.

It was so easy to have provided either for that or the contingency of his electing to do so that the omission is not to be lightly supplied. Was such a palpable consideration of their situation not disposed of, designedly, in the way we find it?

We must find an intention to provide finally for one or other of such contingencies, as sure to arise upon the happening of events within their view, as being implied in these articles, before we can give effect either to an obligation or alternative option to take over and pay.

Clause 9 is as follows:—

9. In the event of the death of any partner before the expiration of the term of these articles of partnership, the co-partnership hereby created shall not be dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is until January 31, following the date at which the death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of 12 months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of 6 per cent. per annum to the date of payment and the person or persons interested in such capital shall also receive the same share of the profits of the business up to the end of the current or financial year, that is until January 31, following the date at which the death of such partner occurs as would be paid to such partner so dying as aforesaid, if he were still living.

There is herein an obligation to continue the business at least to the end of its financial year. All in that clause relative to doing so is clearly a merely prudent provision that would enable the parties concerned to ascertain definitely in the usual appropriate way at the end of the financial year, the condition of the business with regard to which ulterior steps of some kind must of necessity be taken.

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Now in the option given the survivor to extend that period, is there any more implied? I think there is evidently this much, that it seemed to be a thing not unlikely to happen that the survivor might desire to buy and be given every opportunity to arrange for his doing so, as what would probably best accord with the interests of those representing the deceased as well as the survivor. But can it be said the provisions of this clause go further?

Giving thus due operative effect to all in the clause, relative to such probable contingencies does not seem necessarily to leave anything unfulfilled.

The provisions of the clause would be most helpful indeed to facilitate the parties in determining either to wind up the business or sell it out or in arranging that either or both should continue the business.

That the year allowed to executors to wind up the estate would probably run concurrently with the year provided for by the clause in a certain event herein may also have been present to the minds of the partners. It seems to me they never intended to go further than make the suitable, but merely, tentative provisions I have indicated. It was because they could not, that they omitted to provide any further.

And incidentally we see how he dying first had looked at the matter. His doing so, of course, should not affect our opinion of the true construction of the instrument, beyond making us pause to think before deciding.

Clause 10 is as follows:—

10. Should any dispute or difference arise between the said partners or between the surviving partner and the representatives of any deceased partner as to the amount which either partner is entitled to be credited with, or liable to be charged with, in making up any annual balance sheet of the co-partnership, or as to the valuation of any of the assets of the co-partnership, such dispute shall be referred to an arbitrator mutually chosen by the parties, or in the event of their failing to agree upon an arbitrator then to such arbitrator as a Judge of the High Court shall, upon application of either of the parties, on one week's notice, in writing, to the other, appoint, and the award or decision in writing of the arbitrator so chosen or appointed shall be binding upon all the parties interested.

It is this clause that Middleton, J., found (and I was for a time much inclined to hold correctly so) the item that conclusively points to the taking over by the surviving partner of the business.

Let us read this clause carefully and there is absolutely nothing

to be found in "the valuation of any of the assets of the co-partnership" being made a subject of reference as between the surviving partner and the representatives of the deceased which is inconsistent with a denial of the surviving partner's claim as of right to take over the business.

That reference fits into the very case of stock-taking that existed in January, 1914; and indeed inevitably must fit into some January stock-taking following a death in the firm. The one stock-taking which of all the series it was most important to have accurately done was that following the death of a partner.

Indeed, as already suggested, it was the chief reason for postponing absolutely the dissolution of the firm till that had taken place. I conclude that the appellant is not entitled to take over the business. I agree that the good will is an asset of the business. And already I have expressed my opinion that the balance sheet of January, 1913, does not bind.

The appeal should be dismissed. Nothing was said in argument in regard to costs.

I doubt the propriety of encouraging, at the expense of any estate, appeals here, by making, even if we can, the costs of such an appeal payable out of the estate. In the peculiar circumstances and, having regard to the insignificance in the difference in the ultimate result of whether the costs come out of the estate or each pay his own, I think each should be left to pay his own costs of this appeal.

Duff, J.

DUFF, J.:—I think there is sufficient in the articles of the partnership to evidence clearly the intention of the parties to the agreement that in the event of the death of one of the parties during the partnership term, the representatives of the deceased partner should be entitled to require the surviving partner to pay them a sum of money equivalent to the value of his interest in the business and that the correlative right of requiring them to accept such payment should be enjoyed by the surviving partner. The effect of the provisions of the partnership agreement touching the ascertainment of this sum I shall discuss in a moment.

The general effect of the contract in so far as it relates to the reciprocal rights of the surviving partner and the representatives of the deceased partner in the event mentioned is that a sum equivalent to the value of the deceased partner's interest (ascer-

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tained in the manner provided for in the deed) is treated, as between the parties (at the election of either of them) as a liability of the firm on payment of which the interest of the deceased partner's estate in the assets of the partnership is extinguished.

As to the mode of ascertainment, I think the effect of the deed is this; the partnership is deemed to have continued to the end of the financial year in which the death occurs (first sentence art. 9); by the operation of art. 8 an account and a balance sheet *as annual account and balance sheet* are then to be prepared (arbitration being provided for under art. 10 in case of difference) and from this account and balance sheet the value of the interest of the deceased partner is to be determined.

This appears to me to be the effect of the deed. I am, however, unable, to see how for practical purposes the acceptance of Mr. Tilley's contention should affect the rights of the parties, that contention being that for the purpose of ascertaining the value of the interest you are to start with the account taken at the end of the last preceding year, derive from that the value of the deceased partner's share at the date of his death and add the profits for the year in which the death occurred. I cannot see the difference in practical effect because the profits for the last year could only be ascertained by striking a balance between the value of the net assets at the beginning and at the end of the financial year; and for the purpose of ascertaining the profits you must, therefore, value the net assets as at the end of the financial year, and in either case in the event of difference resort must be had to arbitration.

If the final account, of course, were to be treated as an account of a species different from the annual account under art. 8 the point of construction might be of some importance; and (accepting Mr. Tilley's contention) the question would still remain open for consideration whether profits for the purpose of the final adjustment are necessarily to be computed upon the same principle as profits for the purpose of the annual account.

The point of substance is ultimately reducible to this: Is the account on the one construction to be taken or are the profits on the other construction to be determined on the same principle at the expiration of the last financial year for the purposes of the final settlement as during the previous years for the purpose of the annual accounting under art. 8?

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I think the question must be answered in the affirmative for this reason, namely, the method exclusively ordained by the articles for ascertaining the value of the interest of each for any of the purposes of the deed, for the purpose, for example, of computing interest payable under art. 5 is to be found in art. 8, which provides for an account and balance sheet made up through the co-operation of the parties at the end of each year, with a reference to arbitration in the event of disagreement, and it must, I think, be assumed that it is with reference to this provision that art. 9 was framed.

The result is that for the purpose of ascertaining whether or not good will is to be valued as an asset for the partnership we must consider the effect of art. 8. I think the evidence before us is conclusive against the respondent's contention as to the effect of this article. The accounts made up annually by the partners cannot be presumed to have been made up in total disregard of the effect of them in relation to a possible settlement under art. 9 and the omission of good will conclusively shews, in my view, that the partners did not regard it as one of the subjects constituting the partnership "assets" for the purposes of art. 8.

ANGLIN, J.:—With great respect for the learned Judges of the Appellate Division, I am of the opinion that the partnership agreement makes it clear that it was intended that the surviving partner should have the option to continue the business of the firm and to become the purchaser of the interest of his deceased partner. The clause providing for retention of the deceased partner's capital in the business for one year and the provision for a valuation by arbitration of assets as between the surviving partner and the representatives of the deceased partner are, I think, inexplicable on any other assumption. They make it clear—at all events they raise a case of necessary implication within the meaning of the dicta of Esher, M.R., and Kay, L.J., in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at 491, 494—that the surviving partner should have an option to acquire the interest of a deceased partner, and that, as Mr. Tilley conceded, upon the surviving partner exercising his declared right to retain the capital of the deceased partner for a year after his death, the option to purchase became an obligation. To this extent I would allow this appeal, but upon the other questions I think it should fail.

Anglin, J.

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There is nothing in the agreement which limits the interest of the deceased partner to such assets as the partners had seen fit for other purposes to treat as items of capital in their annual balance sheets. The agreement provides for a continuation of the partnership until January 31, following the death of either partner. During the intervening period the deceased partner's estate is to receive interest under clause 5, by virtue of the continuation of the partnership, on the basis of the share of the deceased partner in the capital as ascertained and defined by the annual balance sheet made at the beginning of the financial year, and in addition, a share of profits on the same basis as the deceased partner would have received them had he been living. But the partnership continuing, a new account of the stock in trade, assets and liabilities of the partnership and a new balance sheet were due under clause 8 of the agreement at the expiration of the partnership year on January 31, 1914. If the taking of that account and the making of that balance sheet should occasion disagreement, clause 10 provides for an adjustment by arbitration and, *inter alia*, for the valuation of the assets of the co-partnership. For what purpose? For none that I can believe the parties would have thus provided for, if it was intended that the value of the share of the deceased partner was for all purposes, including the fixing of his interest in the assets on dissolution, to be determined by the amount stated to have been his share of the capital in the last balance sheet prepared during his lifetime. I think it is clear that, from January 31, 1914, it was the surviving partner's capital as of that date, to be ascertained by agreement or by arbitration, involving a valuation of all the partnership assets, including good will as well as everything else which could be deemed an asset, which should thereafter bear interest at 6% and should be payable at the expiry of the year from the death of the deceased partner by the survivor to the representative of such deceased partner as the purchase price of his interest in the partnership. I find nothing in the agreement which warrants an inference that it was the intention of the parties that the survivor should receive as a present from the estate of his deceased partner the share of the latter in an asset such as the good will of the business with which we are dealing would seem to be, or in any other asset omitted from the balance sheet of 1913, which was prepared chiefly, if not solely, for the purpose of determining the

basis upon which interest should be computed for the ensuing year under clause 5 of the agreement.

In view of the divided success there should be no costs of this appeal.

BRODEUR, J (dissenting):—The most important point we have to determine in this case is whether the appellant, who is surviving partner of Wood, Vallance & Co., is entitled to take over the interest of his late partner, William Vallance, in the said partnership assets.

Middleton, J., in the Supreme Court, held that the survivor was entitled to exercise that right of pre-emption. The first appellate division, however, held a contrary view.

The co-partnership agreement was made on January 31, 1910, for a period of 5 years for the purpose of continuing the hardware business of Wood, Vallance & Co. The capital put in by Mr. Wood was $577,524.21, and the capital of the late Mr. William Vallance $479,243.32. Each partner was allowed interest upon the amount of capital from time to time at his credit in the books of the firm and the profits were apportioned equally between the partners. It was provided that an annual balance sheet should be made on January 31 each year which should be attested by each of the partners.

There is no provision as to the amount which could be paid weekly or monthly to the partners; but it is presumed that they were drawing money as they liked, affecting even to a certain extent their capital, since in the balance sheet of each year their capital was different, as appears by the following table:—

CAPITAL.

	Wm. Wood.	Wm. Vallance.
31st January, 1910	$577,524.21	$479,243.32
31st January, 1911	514,433.78	329,334.79
31st January, 1912	230,662.19	259,350.58
31st January, 1913	260,019.11	292,175.97

It is a rule of law that the capital put in by the partners should not be impaired. However, the figures which I have just given shew conclusively that the partners were drawing money out of their capital, and I may add also that the right to withdraw was implied from clause 5 of the partnership agreement which stated that

each of the partners shall be allowed interest at the rate of six per cent. per annum upon the amount of capital which may from time to time be at his credit in the books of the said firm. . . .

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The answer to the question which has been enunciated above turns mostly on the construction of clauses 9 and 10 of the partnership agreement.

In clause 9 it was provided that

in the event of death of any partner the co-partnership hereby created shall not be thereby dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is, until the thirty-first day of January following the date at which the death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of twelve months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of six per cent. per annum to the date of payment. . . .

By clause 10 it was provided that if a dispute arose between the partners or between one partner and the representatives of any deceased partner as to the amount to which each partner was entitled or as to the valuation of any assets, said dispute should be referred to an arbitrator.

It seems to me that if the partner had intended to give to the other partner a right of pre-emption, there should have been a formal stipulation to that effect. But no such stipulation is contained in the contract and then the question arises as to whether there is an implied right for the surviving partner to take over the assets of the firm.

Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at 491, stated as to when and how terms not expressed in a contract may be implied:—

I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation unless on considering the terms of the contract in a reasonable and business-like manner an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

In this case, what is simply provided for is, according to my construction of the partnership agreement, that at the death of one of the partners the partnership should continue to exist until January 31st then next, each partner being entitled to the same share of the profits and to the same interest on their respective capital. There is no allowance provided for in favour of the surviving partner. The latter, however, is empowered to have

the partnership continued for a further period not exceeding a year from the date of the death of the deceased. In such a case, however, the profits would belong exclusively to the surviving partner and he would be bound to pay only the interest on the capital of the deceased.

The following provision in clause 9, which declares that

> the surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital

should not be construed as meaning that the surviving partner has the right to purchase the assets of the firm, but that during the period of a year the representatives of the deceased partner would not be entitled to draw, as used to be done formerly, any money out of the capital.

To construe this provision as creating a right of pre-emption would, according to my opinion, create an implication that would not necessarily arise. These words have been put there simply for the purpose of preventing the representatives of the deceased from drawing on their capital the same as used to be done during the life of the two partners and that the capital should remain intact during that period. The parties had likely in contemplation hard times and they provided that the success of the business should not be impaired by any reduction of capital.

We are asked also to state whether the good will of the partnership would be considered as an asset.

This question does not become very important in view of the conclusion I have reached on the first question. If the surviving partner has no right of pre-emption, then it is very indifferent for both of them whether the good will should be included or not in the assets of the partnership. Clause 2 of the agreement defined what the capital of the partnership would be and they stated that it included their interest in the stock, trade, book debts and other assets.

Now, in the balance sheet which was prepared each year no mention is made of the good will. The good will is all the same an asset and sometimes a very good asset of the business. When you take a company like this one, which has been in existence for more than 60 years, it must be a very valuable asset. It is true that in their annual statement they were not including that good will and I understand it is not usually done in the inventory

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made by business firms. It is all the same an asset which could be disposed of when the winding-up took place.

Another question was whether in the valuation of the assets the value appearing on the balance sheet of January 31, 1913, is binding on the executors of William Vallance or whether the actual value of such assets is to be ascertained.

This balance sheet was evidently prepared every year with the concurrence and assent of both partners. It is true that it was not signed by them, but it was always considered as binding, since interest had to be paid on the capital shewn by that balance sheet. But when the business of the partnership is wound up, the assets have to be ascertained in the ordinary way.

The appeal should be dismissed with costs.

Appeal allowed in part without costs.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, and McCarthy, JJ. June 30, 1916.

1. PRINCIPAL AND AGENT (§ II A—7a)—AUTHORITY TO PURCHASE IN FEE SIMPLE.

A general authority to an agent to purchase lands is an authority to buy the whole estate in the lands in fee simple, to buy that only, and no less than that.

2. VENDOR AND PURCHASER (§ I E—27)—RESCISSION—MISREPRESENTATION BY AGENT—LEASE.

Where lands purchased by an agent for his principals upon authority, under a written agreement executed by the agent under power of attorney, subsequently proved to be subject to a lease to third persons for one hundred years, to mine and take minerals from the lands, the existence of such lease being known to the agent, but not known to his principals nor communicated by him to them, the rescission of the agreement, and the payment back to the purchasers of the instalments of purchase money paid by them under the terms of the agreement, was ordered.

[*Greig* v. *Franco-Canadian Mortgage Co.*, 23 D.L.R. 860, reversed.]

Statement.

APPEAL from the jugment of Hyndman, J., 23 D.L.R. 860. Reversed.

S. B. Woods, K.C., and *S. W. Field*, for plaintiffs, appellants.

C. C. McCaul, K.C., and *J. E. Wallbridge*, for respondents, defendants.

Scott, J.

SCOTT, J.:—This is an action for the rescission of an agreement entered into by the parties whereby the defendants agreed to sell and the plaintiffs agreed to purchase a certain quarter section of land near Edmonton, for the return of the moneys paid by the plaintiffs on account of the purchase money with interest thereon and for damages for the breach by defendants of their agreement

to sell the property. The ground upon which the plaintiffs claim to be entitled to rescission is that the defendant is not and never has been in a position to make title to the property.

Prior to the date of the agreement in question one Cassels, a solicitor practising in Edmonton, had been acting as agent for the plaintiffs in the buying and selling of properties for them in a small way but any big transaction was always referred by him to them. They appear to have given him a power of attorney but, as it was not put in evidence, his powers thereunder cannot be ascertained by this Court.

The first knowledge the plaintiffs had of the property which was the subject matter of the agreement was obtained from a cipher cable message to plaintiff Greig from Cassels dated October 10, 1912, to the following effect:

> The Government has electric power Edmonton to St. Albert. Have started the works. Would strongly advise purchase of quarter section adjoining railway, 160 acres, $425 per acre. Cannot get option. Immediate payment $20,000, balance payable 1 year, 2 years. Land is rapidly increasing in value. Can sell all at a large profit very soon. If you approve telegraph money to Bank British North America to be paid in exchange for documents.

After some further correspondence between Cassels and the plaintiffs and between him and one Hunter, who, with others, was interested in the purchase, Cassels was authorized to purchase the property and, by agreement bearing date October 22, 1912, executed by defendant and by Cassels purporting to act as attorney for the plaintiffs, the latter agreed to purchase the property, subject to the reservations and stipulations therein mentioned for $68,000, payable $20,000 on the execution of the agreement, $16,000 on October 22, 1913, and $16,000 on October 22, 1914, with interest at 7 per cent. per annum upon the unpaid purchase money.

The agreement contained a covenant by the defendant that, upon payment by the plaintiffs of the purchase money and interest, it would immediately convey and assure or cause to be conveyed and assured to the plaintiffs the lands mentioned "but subject to the conditions and reservations expressed in the original grant thereof from the Crown." The only other reservation mentioned in the agreement was a right-of-way for the Canadian Northern Railway and defendant company agreed to allow the

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plaintiffs $425 per acre for the lands taken by the railway for that purpose.

The patent from the Crown of the lands mentioned in the agreement was issued to one St. Jean and the only reservations contained in it was the use of the navigable waters thereon and certain rights and privileges relating to fisheries. On September 21, 1910, a certificate of title thereto was issued to one Brutinel without any reservations. By lease dated September 23, 1910, and registered on October 21, 1910, Brutinel leased to The St. Albert Collieries Co. Ltd. for a term of 100 years with the right to renewal upon certain conditions for a further term of 25 years "full free and sole the exclusive license to win and work all mines, seams and beds of coal in or underneath said lands." Among the privileges conferred upon the lessees were, to dig open and work excavations, pits, shafts, tunnels and other works and to construct and place such buildings, erections, machinery, and appliances necessary to work the mines.

I think it is unnecessary to follow the title of the property throughout. All that appears to me to be necessary to state is that, at the time the agreement was entered into, the title of The St. Albert Development Co. was subject to the lease to The St. Albert Collieries Co., that that leasehold interest was afterwards transferred by that company to the Canadian Coal and Coke Co. Ltd., and the latter company is now entitled either to a charge on the lands under that lease or as the holder of a certificate of title to the coal and mineral rights. The memoranda on the certificate of title of the St. Albert Development Co. shew that the Canadian Coal and Coke Co. is entitled to both. They appear to me to be inconsistent interests but, if they are, it is unnecessary to determine which it is entitled to.

On September 28, 1912, Brutinel gave to Bureau and Barbey an option in writing to purchase on or before November 28, 1912, the lands in question "reserving thereout and therefrom all coal and minerals and the right to work the same" and on September 28, 1912, he entered into an agreement to sell the property to them with the same reservation.

In giving this option and entering into the agreement to sell to Bureau and Barbey, Brutinel appears to have been acting for The St. Albert Development Co. in which he was a large share-

holder and on December 9, 1912, that company passed a resolution confirming and ratifying the agreement for sale made by him to Bureau and Barbey.

In entering into the agreement in question the defendant appears to have been acting as agent for Bureau and Barbey, and on February 24, 1913, the latter wrote defendant stating that they ratified the agreement entered into by it on their behalf and undertook to carry out all the conditions covenanted by the defendant.

It is apparent from what I have shown respecting the title to the property that the defendant is not now and never has been in a position to make title to the property. The best title it can make is the title to the surface rights only or, at most, a title to the whole property subject to the one hundred years' lease of the mining privileges to the St. Albert Collieries Co.

The defendant, among other defences, alleges that the agreement in question does not exhibit the true agreement between the parties but by a mistake common to both parties the reservation or exception of all coal and minerals and the right to work the same was omitted therefrom, the intention of all parties being that the agreement should be subject to such reservation or exception and it counterclaims for the rectification of the agreement in that respect. The learned trial Judge held that defendant was entitled to such rectification and directed it.

In my view the trial Judge erred in so holding. In order to entitle the defendant to rectification it must show that there was *consensus ad idem* between the parties that the coal and minerals should be reserved and that it was by mutual mistake that the reservation was omitted. Now there is not even a suggestion in the evidence that the plaintiffs were aware that the defendant company intended to reserve the coal and minerals or that the plaintiffs contemplated that such reservation should be made, and as the defendant has shown that it was its intention to reserve them, it is apparent that the parties never agreed upon the subject matter of the contract.

The trial Judge has found that Cassels, who executed the agreement on behalf of the plaintiffs, was aware at the time he executed it that the defendant did not own the coal and mineral rights and intended to reserve them and that the plaintiffs were bound by his knowledge.

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In my view the question depends entirely upon the authority conferred upon Cassels by the plaintiffs. The only authority he had from them was to purchase a certain property which he had recommended them to buy. That could not, I think, be reasonably construed as authority to buy anything less than the whole estate in the property. In Story on Agency, 8th ed., pars. 170, 171, the author, in referring to the general principle that the principal is not bound by the unauthorized acts of his agent, says:

> As for example, if a person should authorize his agent to buy a ship, it would be presumed that a purchase of the whole, not a part was intended. . . . The same rule would apply to the case of a commission or authority to buy a plantation. It would not be a good execution of the commission to buy a part thereof only, or to buy an undivided share of it, or any interest in it less than the fee.

See also Hals., vol. 1, pp. 201, 2, 3, and the cases there cited.

It is clear that the plaintiffs intended to purchase the whole interest in the property and nothing less than the whole interest and that they were under the impression that they were acquiring the whole interest and there is no evidence that there was any holding out by them that Cassels was authorized to purchase anything less than the whole interest.

The fact that Cassels had notice before the execution of the agreement that the defendant had not a title to the mines and minerals or the right to acquire title thereto and that the plaintiffs are bound by the notice to him is not of material importance as, in *Re Gloag and Miller's Contract*, 23 Ch. D. 320, it was held that where, as in this case, the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title notwithstanding that, before its execution, he had notice of defects therein.

Other defences raised by the defendant are that the plaintiffs have accepted its title and that they have waived all defects of title, if any.

If the parties to the agreement were not *ad idem* with respect to the subject matter, it follows that there was no concluded agreement between them and, if there was no agreement between them, it appears to me to be open to question whether there can be any breach or waiver of the conditions of a contract which has no existence. It may be that the subsequent conduct of one of the parties may be such as to imply the existence of a new contract

but, in the case of a contract for the sale of land, the Statute of Frauds, which the plaintiffs have raised in this case, may constitute a bar.

One of the grounds relied upon by the defendant company as constituting a waiver of defects in title is that the plaintiffs entered into possession of the lands and paid the taxes imposed thereon.

By the terms of the agreement the plaintiffs were entitled to possession forthwith and, such being the case, the taking of possession is not a waiver of defects in title. (*O'Keefe* v. *Taylor*, 2 Gr. Ch. 305, and *Gloag and Miller's Contract*, *supra*.) The payment of taxes would not constitute a waiver as the goods of the person in possession would be liable to seizure and sale therefor.

Another ground relied upon as constituting a waiver is that the plaintiffs through their solicitor, Mr. Woods, paid the instalment of purchase money due in 1913 and that, prior to such payment, he had acquired knowledge of the defect.

Shortly before the first deferred payment of $16,000 and interest became due, the plaintiffs appear to have become dissatisfied with the conduct of Cassels and they remitted to Mr. Woods the amount or nearly the amount of that payment with instructions to make the payment and to cause the defendant to forward a receipt therefor to Cassels. So far as appears from the evidence, these were the only instructions Mr. Woods received from them. He received them on November 6, 1913, and on that day he went to the office of the defendant and there saw Mr. Barry, its secretary, who states that he shewed him the file of documents relating to the transaction, among them being the option and the agreement between Brutinel and Bureau and Barbey for the sale of the property in which the former expressly reserved the coal and mineral rights, that Mr. Woods looked over the file with him and the latter admits that he saw them. Mr. Barry says that he also showed him the agreement between the plaintiffs and defendant but is unable to state positively that Mr. Woods read it. Mr. Woods states that he never saw the agreement until long afterwards. It is apparent that Mr. Woods looked over some of the documents and gathered from them that the title of the defendant was to be obtained through the St. Albert Development Co. After paying over the money he telegraphed the Land Titles Office and was informed that the St.

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Albert Collieries Co. was the registered owner. He thereupon asked Mr. Barry to return the cheque as he desired to make further enquiries and the cheque was returned to him but, upon being informed by the registrar the next morning that he had made a mistake and that the St. Albert Development Co. held the certificate of title, he again forwarded the cheque to the company.

The trial Judge has found that Mr. Woods had knowledge at that time that the defendant had not the title or the right to acquire title to the coal and minerals and there is sufficient evidence to support that finding, but he has not found that Mr. Woods knew at that time that, by the terms of the agreement between the plaintiffs and the defendant, the former was entitled to the coal and mineral rights as well as the surface rights. In my view the action he took points strongly to the conclusion that he entertained the opposite view. The documents he examined during the course of his enquiries showed that the defendant was not the owner and had no right to call for a title to the coal and mineral rights and if he had known that the plaintiffs were entitled to them under the purchase, it is only reasonable to presume that he would at once have taken the objection to the defendants' title. The defendant also relied upon the fact that the plaintiffs had offered the lands or a portion thereof for sale. I cannot find any evidence of this . . . It does appear that they were offered $500 per acre for the whole which offer they had refused, but, at that time, they were under the impression that the defendant was bound to convey to them the whole interest in the land.

The plaintiffs state that they bought the property for the purpose of subdividing it. It does not appear that they intended to mine the coal upon it, but even if they did not intend to do so, the right acquired by others to mine it with the accompanying right to interfere with the surface to the extent necessary for that purpose would be such a serious inconvenience to the owners of the latter that the plaintiffs would find it difficult to dispose of any portion of the property when subdivided. In *Lee* v. *Sheer*, 19 D.L.R. 36, this Court held that the bare minerals in a locality where the lands in question in that case added materially to their value and the absence of title thereto in the vendor was not a trifling defect in title, or such that it would be fair that the vendor should be permitted to hold his contract subject to compensation

or abatements of the purchase money. They appear to be of considerable value to the lands now in question and I see no reason why the principle laid down in that case should not be applicable.

As to the plaintiffs' claim for breach of defendants' covenant. If I am right in my conclusion that by reason of the parties not being *ad idem*, there was no concluded agreement between them, it follows that the plaintiffs can have a claim for damages.

I would allow the appeal with costs and direct that judgment be entered in the Court allowing for the amount paid by them on account of the purchase money with interest and the costs of the suit.

STUART, J.:—The plaintiffs say that the defendants agreed in writing to sell to them certain lands and covenanted upon payment of the purchase price in full to give a good title in fee simple free of encumbrances subject to the conditions and reservations contained in the grant from the Crown, that there were no reservations in the Crown grant, that the defendants do not own the mines and minerals under the land but that these and the right to work the same belong to third parties, and that the defendants are therefore unable to give the title covenanted to be given. They ask, therefore, for cancellation or rescission of the agreement and a return of payments made.

The defendants admit the execution of the written agreement as alleged but assert that the plaintiffs accepted the title which the defendants in fact had and waived all objections to the title by doing certain things, among others the payment of an instalment of the purchase price with knowledge of the defects.

As an alternative defence the defendants allege a mistake in the preparation of the agreement whereby the reservation of the mines and minerals was accidentally omitted and by counterclaim they claim (1) a declaration that the plaintiffs have accepted the title as it stands and specific performance on that basis; (2) a rectification of the written agreement; (3) specific performance of the rectified agreement.

The plaintiffs, who lived in England, acted through an agent, one Cassels, a solicitor. He was given by cable simply a general authority to purchase the lands in question on the plaintiffs' behalf at the price stated. In my opinion he had authority to

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buy the whole estate in the land in fee simple and to buy that only and no less than that. Story on Agency, pars. 170-179.

Now, it is true that a party may *allege in his pleadings* alternative defences, *even of fact*, but the facts when ascertained at the trial cannot possibly be alternative. There cannot have been two different agreements between the parties upon either of which the defendants may rely. It seems to me that when the evidence is given and the true facts revealed and found by the trial Judge the party must either accept the facts as found by the trial Judge as being the true facts or else appeal against the finding. Both at the trial and on the appeal the defendants insisted that the real agreement which they made with Cassels was that the mines and minerals were to be reserved. They insisted that Cassels knew about the reservation and agreed to it, but that by mistake it was not put in the written agreement. They obtained a decision by the trial Judge in their favour upon that point and the formal judgment which they are endeavouring to sustain directs a rectification of the agreement and specific performance of it as rectified.

In these circumstances I find it difficult to understand how the defendants can contend that they ever made with Cassels any different agreement than that contained in the rectified document. But where does that leave the defendant? The mind of a principal entering into a contract through an agent can only meet and agree with the mind of the other party through the mind of the agent. If the agent's mind and that of the other party meet and agree upon something as an essential term of a contract to which the principal has not authorized the agent to agree, can it be said that the other party is at liberty to say alternatively, "Oh, very well, then, we made an agreement without that essential term and I will stand upon that?" And that in the very face of his contention the real agreement contained the essential term and that it was omitted from the document by mistake and in the face of a finding and a judgment which he seeks to uphold that the real agreement did contain that essential term and that the written document should be so rectified as to contain it? How can there be an alternative agreement in very fact. The necessary consequence of this is, I think, that there never was any agreement between the parties at all, because there never was any *consensus ad idem*.

In my opinion it is not open to the defendants to cling to

the trial Judge's finding of fact that they had agreed with Cassels that they should not be bound to convey the mines and minerals and at the same time say: "We *did* make an agreement of which the written document is correct evidence and in which we did covenant to convey the mines and minerals, but you, the plaintiffs, waived that covenant, owing to what you did with knowledge that we did not have them to convey."

These considerations would seem to me sufficient in themselves to resolve the case in the plaintiff's favour, but there are several reasons why I rather hesitate to let the decision rest solely upon that ground. In the first place, the plaintiff's action is not framed suitably for such a result. It should have been for money had and received and as paid under a mistaken belief that there was an agreement instead of alleging a real agreement, as in fact existing, although, of course, the plaintiffs could not anticipate the true state of facts as found by the trial Judge and ought perhaps to be allowed to amend. In the second place, the plaintiffs did not upon appeal do their best to attack the finding of fact as to the agreement with Cassels, which seems to me for the reasons above given to help them rather than injure them. In the third place, it seems to me looking at the evidence that it is easily possible to confuse a mere notice or knowledge in Cassels that the defendants could not convey the mines and minerals with a specific agreement between him and them that they should not be bound to convey them. It is easy to see how the one situation sheers off into the other. Of course the very fact that the defendant company did not have power to convey the mines and minerals and that the agreement under which they themselves held, the terms of which their officers apparently were fully acquainted with, rather strengthened the view that they at any rate did not intend to agree to sell and convey the mines and minerals. On the other hand, it is difficult to find in the appeal book any evidence of the full terms of any agreement at all between the agents of the two parties by way of verbal arrangement. The only real evidence of the terms of an agreement is what is contained in the written document. If, then, we turn to the written document as it was drawn up and executed and proceed to consider the case upon that basis and so come to the questions of notice and waiver, it must surely be obvious that in doing so we are rejecting and reversing the finding of fact made by the trial Judge in respect to

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the omitted term, and rejecting and reversing the judgment appealed from which has directed a rectification of the written document by the insertion of an express term reserving the mines and minerals. I cannot understand how we can ever get to these questions of notice and waiver without first expunging the clause inserted by Hyndman, J., in rectification. With that clause there, all the argument about waiver and notice seems to be quite beside the mark and unnecessary. Moreover, though the appellant plaintiffs sought to reverse the trial Judge's finding on the question of rectification and the defendant to support it, the consequence of the view I have already expressed in the beginning is that it would be better for each to fail in their contention. The plaintiffs are, however, perfectly willing, apparently, to let the agreement as written stand, and the defendants for the reasons given have really no ground to stand upon except that agreement. I think it better, therefore, to treat the agreement as not rectified, first, because there was no authority in Cassels to agree to the inserted clause, secondly, because of the very slight shade of difference between notice to him and an agreement. The position then is that the plaintiff's agent Cassels had notice of the reservation before the contract was executed and their solicitor, Mr. Woods, as I interpret the language of the trial Judge, knew of the reservation before he paid over the second instalment.

In my opinion, neither of these circumstances can affect the plaintiff's right to insist upon the covenant which the defendants gave him. It was decided in *Christie* v. *Taylor*, 15 D.L.R. 614, a judgment of my own, but sustained on appeal and not reported, that the purchaser is not bound to search the title where he has secured a covenant from the vendor. He is entitled to rely upon that covenant. I think that the law goes farther and that even though the purchaser knows at the date of the agreement of some defect in title or learns of it afterwards, yet he may rely upon the vendor's express covenant to give him a good one, and only a new agreement can disentitle him to it. It would, indeed, be strange if a party by performing his own part of a contract with knowledge that the other could not perform some part of his should thereby deprive himself of the right to insist on the other performing what he had agreed to perform. This shows that the case is quite distinguishable from the case of waiver of mere misrepresentations which *induced* the contract, but are not part

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of it at all. To that case other considerations and principles apply.

I think this view is particularly true where the defect is rather a lack of all title to a substantial portion of the property than what is ordinarily called a defect in title. Where the agreement to give a good title is only implied by law on a mere open agreement, express notice of the existence of defects may rebut the implication in many cases. *Ellis* v. *Rogers*, 29 Ch. D. 661, 670.

I refer to *Cato* v. *Thompson*, 9 Q.B.D. 616, 620. *Barnett* v. *Wheeler*, 7 M. & W. 364; *Gloag and Miller's Contract*, 23 Ch. D. 320.

The existence of the reservation of coal rights under the property is, in this case, a much more serious matter than it is in many cases, and there can be no question of compensation.

I think the appeal should be allowed with costs and the judgment below set aside and judgment should be entered for the plaintiffs declaring the contract rescinded and for recovery of the money paid with interest at 7 per cent. The counterclaim should be dismissed with costs.

McCarthy, J., concurred in the result. *Appeal allowed.*

McCarthy, J.

HIVES v. IMPERIAL CANADIAN TRUST CO.

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Saskatchewan Supreme Court, McKay, J. April 22, 1916.

ASSIGNMENT FOR CREDITORS (§ VIII A—74*a*)—PREFERRED CLAIMS FOR WAGES—SALARY OF MANAGING DIRECTOR.

The manager of a company, who was also a director therein, is entitled to rank as a preferred creditor for salary due him, by virtue of sec. 27 of the Assignment Act, R.S.S. 1909, ch. 142, which provides a priority for 3 months "wages or salary of *all persons* in the employ."

[*Re Newspaper Syndicate*, [1909] 2 Ch. 349; *Re Ritchie-Hearn Co.*, 6 O.W.R. 474, distinguished. The Companies Act, R.S.S. (1909), ch. 72, sec. 54, considered. See also *Re Shirleys* (Sask.), 29 D.L.R. 273.]

CLAIM for wages under sec. 27 of the Assignment Act, R.S.S. 1909, ch. 142. Statement.

MacLean, for plaintiff.

Fisher, for defendant.

MCKAY, J.:—The plaintiff's claim is for balance of salary due to him as manager of a company which assigned to the defendant. McKay, J.

He claims under a resolution of the company passed on February 23, 1914, in the following words and figures:—

Moved by H. D. Brown, seconded by V. D. Stead, that the salary of Mr. Hives, as manager for the current year, shall be $3,600.—Carried.

Par. 3 of his affidavit is as follows:—

3. At the time of the said assignment and for 8 years immediately preceding the said date this deponent was in the employ of Stamco Ltd. as general man-

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ager, and from January, 1, 1914, at a salary of $300 per month, which said appointment as general manager was made and confirmed by resolution duly passed at a meeting of shareholders of the company properly called, a true copy of which said resolution is herewith produced and marked as exhibit "A" hereto.

He was cross-examined on this affidavit, and the cross-examination filed shows that this salary was continued for 1915, and he worked for the company up to the assignment on August 10, 1915.

Particulars of plaintiff's claim are as follows:—

Salary from Jan. 1, 1914, to July 31, 1915, 19 months at $300 per month, $5,700: Less amounts received on account, $2,090: Balance due, $3,609.93.

Of this he claims $900, being 3 months' salary as a preferred claim to be paid in priority to the claims of the ordinary or general creditors, and the balance, $2,709.93, to rank as an ordinary or general creditor, under sec. 27 of ch. 142 of R.S.S. 1909, the Assignments Act.

He was also president and director of the company during the period for which he claims salary as manager.

Counsel for the defendant makes two objections to the claim: 1. That the plaintiff, being a director of the assigning company, is not entitled to rank as a preferred creditor under sec. 27 above referred to. 2. That the resolution shews he was hired for the year 1914 only.

As to the first objection, the following authorities were submitted in support thereof. In *Re Newspaper Proprietary Syndicate Ltd.*, [1900] 2 Ch.D. 349. *Re Ritchie-Hearn Co.*, 6 O.W.R. 474.

The *Newspaper Syndicate* case was decided under the Preferential Payments in Bankruptcy Act (1888) sec. 1, sub-sec. (*b*). That section provides that:

All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order, or, as the case may be, the commencement of the winding-up, not exceeding fifty pounds

shall be paid in priority to all other debts. And in that case it was held by Cozens-Hardy, J., that a managing director was not a "clerk" or a "servant" of the company.

The *Ritchie-Hearn* case was decided under sec. 56, sub-sec. 2 of the Ontario Winding-Up Act, on the words, "clerks and other persons in or having been in the employment of the company in

or about its business." And at 6 O.W.R., p. 476, the Master states:—

> Then as to the expression in our Winding-up Act, clerks or other persons in the employment of the company, it must, I think, be conceded that the term "clerk" is the principal and ruling term, and that the maxim *noscitur a sociis* must be invoked to assist in ascertaining the meaning of the general term "other persons." Applying that maxim to this general term requires, I think, that it must be interpreted as meaning persons of a companionable class or associate occupations, in the employment of the company—of the servant and not of the executive class. And that therefore one holding the executive or master position of "managing director" could not be classed as a clerk or other similar person in the employment of the company.

Sec. 27 of our Assignments Act, under which the plaintiff claims, is very differently worded from the above referred to sections and reads:—

> In case of an assignment under this Act the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same *the wages or salary of all persons in the employ of such person at the time of the making of such assignment, etc., etc.*

Our section does not say "the wages or salary of clerks and servants," but "the wages or salary *of all persons.*" And, in my opinion, the above cases do not apply to the case at bar, and notwithstanding sec. 54 of ch. 72, R.S.S. 1909, the old Companies' Act, I think with some hesitation this sec. 27 is wide enough to admit the plaintiff's claim. And, as he has clearly established he was in the employ of the assigning company (which is covered by the word "person," Interpretation Act, ch. 1 of R.S.S. 1909, sec. 6, sub-sec. 11), at the time of its making the assignment, and I find from the evidence that the salary of 1914 was continued for 1915, I allow his claim.

The plaintiff will, therefore, be entitled to be paid $900 in priority to the ordinary creditors, and he will rank as an ordinary creditor for the balance of his claim: $2,709.93.

Plaintiff will be entitled to his costs. *Judgment for plaintiff.*

Re SHIRLEYS, LIMITED.

Saskatchewan Supreme Court, Newlands, J. June 6, 1916.

1. CORPORATIONS AND COMPANIES (§ VI F 1—345)—WINDING-UP—PREFERRED CLAIMS—RENT DISTRAINED FOR.

Distress for rent due, levied previous to the commencement of winding-up proceedings, is not a judicial proceeding, and there is nothing in the Winding-up Act (R.S.C. 1906, ch. 144, secs. 22, 23, 84, amended by 7 & 8 Edw. VII. ch. 75, sec. 1) which prevents the landlord from realising on the same.

[*Fuches* v. *Hamilton Tribune Co.*, 10 P.R. (Ont.) 409, distinguished. See also *Re Jasper* (Alta.), 25 D.L.R. 84, affirming 23 D.L.R. 41; *National Trust Co.* v. *Leeson* (Alta.), 26 D.L.R. 422; *Cristall* v. *Loney* (Alta.), 27 D.L.R. 717.]

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2. CORPORATIONS AND COMPANIES (§ VI F 2—357)—WINDING-UP—PREFERRED CLAIMS—WAGES OF "CLERKS"—MANAGER.

The reference to "clerks or other persons" in sec. 70 of the Winding-up Act (R.S.C. 1906, ch. 144), which prefers their claims for three months' wages, applies to persons in the same kind of employment as clerks, and does not include the manager of the company.

[See also *Hives* v. *Imperial Can. Trust Co.* (Sask.), 29 D.L.R. 271.]

Statement. APPLICATION by a landlord to pay out money realized from distress.

A. R. Tingley, for landlord.

F. W. Turnbull, for Young.

H. B. Froste, for liquidator.

Newlands, J. NEWLANDS, J.:—The above-named company is being wound up under the provisions of the Winding-up Act. Before the proceedings were started, Laird, the landlord, distrained on the company for rent due. After the proceedings were commenced, the distress was stayed, but the goods distrained on were sold by order of a Judge—all the rights of the landlord being reserved.

This application was then made to pay out the money realized from the sale of the chattels distrained on—some $600—to the landlord. It is opposed (1) by the liquidator on the ground that, under the Winding-up Act, the landlord has no preference, and (2) by James Young, the manager of the company, who has a claim for wages, on the ground that under said Act he is entitled to his wages as a preferential claim.

1st. As to the claim of the liquidator. Where the rent is due and distress has been levied previous to the commencement of the winding-up proceedings, there is nothing in the Act which prevents the landlord from realising on the same. Secs. 22 and 23 of the Act refer only to proceedings, including distress, commenced after the winding-up proceedings have been started. Sec. 84 applies only to judicial proceedings. Sub-sec. 1 of sec. 84 provides that no lien shall be created upon the real or personal estate of the company for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company. This clearly has reference only to a judgment and execution.

Sub-sec. 2 of this section provides that no lien, etc., shall be created by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or gar-

nishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, etc., the winding-up of the business of the company has commenced. That the use of the words "process" or "proceeding" in this section applies only to judicial proceedings is shewn by the use of the word "plaintiff." By the Judicature Act the word "plaintiff" means a person who commences an action, and the same interpretation is given to this word in all the dictionaries; it, therefore, restricts the process and proceedings to actions, *i.e.*, judicial proceedings.

In *Fuches* v. *Hamilton Tribune Co.*, 10 P. R. (Ont.) 409, Boyd, C., gave this section, which was sec. 69 in the old Act, a wider meaning. He says:—

> As I read the Act, sec. 69 is fatal to this claim, because that provides that no lien or privilege is created by execution or by attachment, garnishee order, or other process or proceeding, if, before the payment over of the moneys made thereunder, the winding up of the business of the company has commenced. This relates back to sec. 12 (now sec. 17), and here the winding up had begun on December 31. No step was taken by the landlords to assert their lien for rent till after the winding up had begun, and the great preponderance of authorities is clear that the Court will not aid the landlord in regard to rent due at that date.

I agree with the Chancellor's conclusions in that case, but not with his interpretation of sec. 69 (now sec. 84). In that case he says:—

> No step was taken by the landlords to assert their lien for rent till after the winding-up had begun.

Sec. 23 (then sec. 17) would, therefore, apply and make all such proceedings void, and sec. 74 (then sec. 69) could not apply.

This decision is, therefore, no authority in this case, where the distress was made before the winding-up proceedings were commenced. Sec. 84 applies to proceedings commenced before the winding-up proceedings have been begun, and, in my opinion, applies only to judicial proceedings, and sec. 23 applies to proceedings—including distress—commenced after the making of the winding-up order.

The decisions are clear that, after a landlord has levied a distress, he has a lien on those chattels for his rent due, and, therefore, the landlord in this case is entitled to be paid the amount for which the goods distrained sold, all his rights having been reserved by the order which stayed the proceedings thereon, as against the liquidator.

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2nd. As to the claim of Young. Young was the manager of the company, and he claims under sec. 70 of the Act:—

Clerks or other persons in, or having been in the employment of the company, etc., shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due or unpaid to them at the time of the making of the winding-up order, not exceeding three months' wages.

Is a manager a clerk or other person? The reference to "other persons" must mean other persons in the same kind of employment as a clerk.

In *Re Hopkinson* v. *Newspaper Proprietary Syndicate Ltd*, [1900] 2 Ch. 349, Cozens-Hardy, J., said, a managing director, is certainly not a "clerk" of the company, and he also held that he was not a "servant" of the company. A manager is no more a "clerk" than a managing director, and if he is not a clerk, neither is he a person whose position is similar to that of a clerk. I would also refer to *Re Ritchie-Hearn Co.*, 6 O.W.R. 474; *Re American Tire Co., Dingman's* case, 2 O.W.R. 29; and *Re Ontario Forge Co., Townsend's* case, 27 O.R. 230.

I am, therefore, of the opinion that Mr. Young is not protected by sec. 70, and that the landlord is entitled to the money realized in preference to him, and the order will go accordingly, with costs against the liquidator and Young in such proportions as may be fixed by the taxing master.

Judgment for landlord.

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Manitoba King's Bench, Mathers, C.J.K.B. February 28, 1916.

1. LANDLORD AND TENANT (§ III D 1—95)—STIPULATION AS TO RENT IN CASE OF ASSIGNMENT FOR CREDITORS.

Under a lease for a term of years containing a provision, that if the lessee make an assignment, three months' future rent should become due and payable and the lessor be at liberty to terminate the lease, does not entitle the lessor to rank as a creditor for the remainder of the term, above three months, if he does not terminate the lease.

2. ASSIGNMENTS FOR CREDITORS (§ VIII A—65)—CLAIMS—UNLIQUIDATED DAMAGES—FUTURE RENT.

A provision in a trust agreement whereby the trustee was authorized to sell the property of the lessee and divide the proceeds among "creditors" does not entitle the lessor to rank for future rent, as he was not a creditor for such rent within the meaning of the agreement at its execution.

[See also *Harwood* v. *Assiniboia Trust Co.* (Sask.), 25 D.L.R. 830; *Cristall* v. *Loney* (Alta.), 27 D.L.R. 717.]

Statement.

ACTION for future rent.

I. Pitblado, K.C., and *C. H. Locke*, for plaintiff.

W. L. McLaws, for defendant.

MATHERS, C.J.K.B.:—On November 5, 1912, the plaintiff by indenture of lease made pursuant to the Short Forms of Indenture Act, "in consideration of the rents, covenants and agreements" therein contained, demised and leased to the Clothes Shop, Ltd., the corner store in the Carleton building on the south-east corner of Portage Ave. and Carlton St. in this city, for a term of 4 years and 10 months to be computed from December 1, 1912, and ending on September 13, 1917. The rent reserved was $73,300, payable in monthly instalments of $1,150 from December 1, 1912, to November 30, 1915, and $1,450 from December 1, 1915, to September 30, 1917, each in advance on the first day of every month of the said term and the lessee was also to pay business tax, electric light, gas and water charges.

The lessee covenanted to pay rent, and to pay business tax, electric light, gas and water charges, and if it made default in payment of such charges they should be construed as rent and the lessor should be at liberty to distrain therefor.

The indenture provides for a number of events, such as default in paying rent or the making of an assignment for the benefit of creditors or in case the premises should be abandoned or should become and remain vacant for a period of 10 days, on the happening of any of which a sum equivalent to 3 months' rent should immediately become due and payable as rent, and the lease should, at the option of the lessor, cease and be void and the term granted expire and be at an end and the lessor should have a right to re-enter and re-lease the premises.

It also contained the usual proviso for re-entry by the lessor for non-payment of rent or non-performance of covenants.

The lessor on his part covenanted for quiet enjoyment and to heat the demised premises when necessary during the term.

The Clothes Shop, Ltd., entered into possession under the lease and continued in possession until April 28, 1915. On April 8, 1915, the lessee transferred by bill of sale bearing that date all its goods and chattels in connection with its store business carried on in the demised premises, and also its book accounts, to the defendant Newton. The bill of sale recited that

> Whereas the bargainor is indebted to certain creditors whose names are set out in the schedule hereto annexed and marked with the letter "A" and has agreed to sell and transfer to the bargainee the goods and chattels and other assets herinafter mentioned for the purpose of selling and disposing of

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the same, and distributing the proceeds thereof *pro rata* among the creditors set out in the said schedule.

The plaintiff was named as one of the creditors in the schedule referred to.

At the same time the Clothes Shop, Ltd., executed under its seal the following document, to which also was attached as schedule "A" the said list of creditors:

This agreement made in duplicate this eighth day of April, A.D. 1915: Between the Clothes Shop, Ltd., hereinafter called "the debtor," of the first part; and Charles Henry Newton, of the City of Winnipeg, in the Province of Manitoba, official assignee, hereinafter called "the trustee," of the second part.

Whereas the debtor is indebted to certain creditors whose names are set out in the schedule hereto annexed and marked with the letter "A;"

And whereas under and by virtue of a certain bill of sale, bearing even date herewith and made between the parties hereto, the said debtor has sold and transferred to the said trustee certain goods and chattels, stock-in-trade, fixtures and fittings and book accounts mentioned in said bill of sale;

And whereas it is agreed that the said bill of sale is executed by the debtor and received by the said trustee on the terms and conditions hereinafter mentioned, viz.:—

1. The said trustee shall be and is hereby declared to be the trustee for and on behalf of the creditors of the said debtor, whose names are set out in the said schedule "A."

2. The said trustee shall have the right to sell and dispose of the said stock-in-trade, fixtures and fittings, book accounts, promissory notes, bills receivable, and other goods and chattels referred to or described in the said bill of sale, or which come otherwise in his possession or power, either by public auction or private sale or for cash or upon terms of credit with or without security as the said trustee shall deem advisable or expedient, and shall pay and distribute the proceeds realized from and out of any such sale or sales, and out of the collection of book accounts, promissory notes, bills receivable in the manner following:—

Firstly: In payment of his costs, charges and expenses for and in connection with the sale and realization of such assets and the distribution hereinafter mentioned together with the solicitors' charges of and in connection with the said bill of sale and this agreement, and,

Secondly: The claims of preferred creditors, if any, and,

Thirdly: In payment *pro rata* among the general creditors mentioned in the said schedule.

3. And it is distinctly understood and agreed between the parties hereto that the said trustee shall not be liable to the said debtor or the said creditors, for any moneys, excepting such as are actually received by him, and shall not be liable for any loss or damage done to or any shrinkage of the said goods and chattels or other assets, or any part thereof, nor for any act or omission on the part of the said trustee, excepting such acts or omissions as shall amount to gross negligence, and that the said trustee shall have power to make any compromise or other settlement in respect of any of the book accounts, promissory notes, bills receivable, or choses in action which he may deem advisable or expedient.

4. It is further distinctly understood and agreed that neither the bill of sale or this agreement shall be deemed to be in any way a satisfaction of or settlement of the existing liability of the said debtor to the said creditors, or any of them, nor shall the same prejudice or affect the present or accruing rights of the said creditors in respect of their claims against the said debtor, nor operate as a merger thereof, nor prejudice or affect any security or securities now or hereafter held by the said creditors, or by any of them, but the said debtor shall remain liable to the said creditors for the amount of his existing indebtedness to them, unaffected by these presents, or by the said bill of sale.

5. It is further agreed between the parties hereto that the said trustee may nominate, constitute or appoint any other person, firm or corporation to act as his attorney or attorneys, to carry out the provisions, terms or trusts contained in this agreement, or to act in any way in his place and stead in connection with this agreement or the said bill of sale as the said trustee shall deem advisable or expedient.

6. In order that the said trustee may know the exact amount of the claims of the various creditors set out in the schedule "A" each creditor as required by the trustee shall forthwith make a statutory declaration verifying his claim against the debtor, and the debtor hereby acknowledges that no creditor holds any security in connection with his claim, other than the landlord of the debtor, W. H. Gardner, who has the right to distrain for three months' rent.

Both bill of sale and trust agreement were delivered to the defendant Newton.

He assumed the burden of the trust and took possession of the goods and book accounts, for which purpose he went upon the demised premises. On April 28, he sold the goods and they were on that day removed from the premises by the purchaser. He has received the proceeds from such sale and now holds same for distribution in accordance with the trust agreement.

The plaintiff received notice of this transfer and agreement, and on May 19, 1915, he sent to the trustee a statutory declaration made by himself proving his claim under the lease. In it he claimed as rent overdue up to and including April, 1915, the sum of $5,800, and of this he claimed that the sum of $4,600 was a preferred claim. He also claimed the further sum of $38,800 being the balance still unpaid of the total rent reserved for the entire term, less the said $5,800 overdue.

On June 22, 1915, the assignee notified the plaintiff that under the advice of his solicitors he would not admit plaintiff's claim for $38,800, and that he proposed to divide the moneys in his hands immediately unless the plaintiff entered an action to establish his right.

This action was then brought by the plaintiff against the assig-

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nee and the Clothes Shop, Ltd., for a declaration that he is entitled to receive his distributive share of the $38,800 as well as upon the portion of the claim admitted by the assignee.

It is admitted that the Clothes Shop, Ltd., vacated the premises on April 28, 1915, in the sense that it no longer carried on business there; but it has since that time authorized other people to go into and use the premises.

The lease is still subsisting and the term demised still remains vested in the lessees, the Clothes Shop, Ltd. It was not contended that there had been any surrender of the lease either by act of the parties or by operation of law. The plaintiff has declined to exercise the option contained in the lease of declaring the same void because of the lessee's assignment for the benefit of creditors and has declined to re-enter or re-lease the premises.

The question to be decided is whether the plaintiff is a "creditor" in respect of rent which has not become due and payable by effluxion of time when the trust for creditors was created within the meaning of the documents creating the trust.

Creditors under the Assignments Acts of Ontario, with which the Manitoba Act is *in pari materia* are those only whose claims are *debitum in presenti*, although they may be *solvendum in futuro*. For this reason a person having a claim for unliquidated damages not reduced to a judgment at the time of the assignment, whether arising out of tort: *Ashley* v. *Brown*, 17 A.R. (Ont.) 500; *Gurofski* v. *Harris*, 27 O.R. 201, or breach of contract: *Grant* v. *West*, 23 A.R. (Ont.) 533; *Magann* v. *Ferguson*, 29 O.R. 235, is not a creditor within the meaning of these Acts. One of the reasons which influenced the Courts in arriving at this conclusion was that the Assignments Acts make no provision whereby a person claiming unliquidated damages may substantiate his claim against the estate.

In *Grant* v. *West*, *supra*, Hagarty, C.J., said, *arguendo*, in answer to the argument that the claim for damages was groundless,

> The objection to the right to rank seems to me to be far deeper. There does not seem to be any provision in the Assignments Act allowing a person claiming damages to substantiate that claim against the estate.

In his judgment he states that in his opinion the word "creditor" is used in the Act as meaning one to whom a debt is owing—correlative to debtor. Osler, J., begins his judgment with the statement that,—

The point taken by the Chief Justice on the argument is, in my opinion, fatal to the appeal.

Farther on he refers to the fact that

A claim for damages is nowhere in terms mentioned in the Act. Wherever the claimant is referred to the language seems to point to a claim against one who is a debtor, a word which does not aptly describe one who is only sought to be made liable for unliquidated damages.

Not only are unliquidated damages excluded from proof under these Acts, but so also are contingent claims, that is, a claim which may or may not ever ripen into a debt, according as some future event does or does not happen.

In *Mail Printing Co.* v. *Clarkson*, 25 A.R. (Ont.) 1, the judgment turned upon the fact that at the date of the assignment the contract was still wholly executory. There was no absolute certainty that the printing company would ever publish any portion of the advertising matter contracted for. It might under the terms of the contract refuse all the matter tendered, or before any space had been used and before the expiration of the year over which the contract extended the newspaper might have suspended publication. In either event, the company would have no claim. Upon these considerations the Court held that the company was not a creditor entitled to rank on the estate.

In *Clapperton* v. *Mutchmor*, 30 O.R. 595, the right to rank was denied to the plaintiff by Boyd, C., because at the date of the assignment his position was that he held the debtor's guarantee for the payment of certain promissory notes still current at the time of the assignment made by a company also in liquidation of which the debtor was president. The Chancellor said (p. 598):—

There was no debt in this case at the time of the assignment. There would be no debt till the notes matured and default arose in their payment by the company. Though this time has now elapsed, and all the notes are overdue and unpaid, still I do not think that the status of creditor obtained after the assignment can entitle the plaintiff to rank with those who were creditors at the date of the assignment.

There the only contingency which might intervene to prevent the plaintiff's claim becoming a debt payable by the assignor was the possibility that the maker of the notes guaranteed a company which went into liquidation three days after the assignment—would pay them when they became due.

In *Carswell* v. *Langley*, 3 O.L.R. 261, it was held that an

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annuitant to whom an annuity of $100 per quarter had been granted during her natural life was not a creditor having a right to rank for future quarterly payments upon the estate of the grantor of the annuity under the Assignments Act. Whether or not there would ever be a debt due from the grantor to the grantee of the annuity depended upon the contingency of the grantee living until the next quarterly payment matured.

Before the amendment of the English Winding-up Act permitting a petition to be presented by a creditor, including any contingent or prospective creditor, it was held that the word "creditor" as then used in the Act did not include a person having a claim for unliquidated damages and that such a person was not entitled to present a petition notwithstanding that under another section of the Act "all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages" were admissible to proof: *Pen-y-Van Colliery Co.*, 6 Ch.D. 477. It was further held that a guarantor of a debt of the company who had not paid the claim was not a creditor: *Re Vron Colliery Co.*, 20 Ch.D. 442, nor was a landlord such a creditor for accruing rent not yet payable: *Re United Club and Hotel Co.*, 60 L.T. 665.

The earlier bankruptcy laws contained no provision admitting contingent debts and those sounding in damages to proof, and the existence of such claims, it was held, did not constitute the claimants creditors entitled to rank on the bankrupt's estate: *Hamond* v. *Toulman*, 7 T.R. 612, (101 E.R. 1159); Robson on Bankruptcy, 273. To remedy this defect in the law Acts were passed, 6 Geo. IV.; 1849, 1861, 1869 and 1883. Now all debts and liabilities present or future, certain or contingent are provable, including unliquidated damages arising out of breach of contract or trust, and provision is made for valuing such claims.

The above cases all deal with the definition of the words "debtor" and "creditor" in particular statutes. They shew that in the absence of anything to indicate that a more comprehensive meaning was intended that which is ascribed to them in everyday usage is to be applied. In its largest sense "creditor" is one who has a right to require the fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable. Stroud, Judicial Dictionary,

2nd ed., 433; *Nicolin* v. *Weiland*, 56 N.W.R. at 588, and all argument from analogy to the Bankruptcy, Assignment and Winding-up Acts is opposed to giving the word a larger meaning than that which ordinary usage attaches to it.

The definition of "creditor" as here used does not depend upon the construction of a statute. I must construe the deeds by which this trust was created according to their express terms in the light of all the circumstances and not to strain them to bring them within the alleged intention of any of these statutes.

The plaintiff by the lease divested himself of the right to the possession of the premises for the whole term subject to the right of re-entry on default of the lessee. The contract was completely executed on his part when he executed the lease. In this respect this case differs from *Mail Printing Co.* v. *Clarkson*, 25 A.R. (Ont.) 1. It is true he covenanted for quiet enjoyment and to heat the premises, but a breach by the landlord of either covenant would not terminate the lease; it would but give the tenant a right of action for the breach. The tenant on its part covenants to pay the whole rent by monthly instalments on the first of each month in advance. The tenant has ceased to carry on business on the premises, but there has been no surrender of the lease, and there is no evidence that the tenant is not able to pay the monthly instalments of rent as they fall due or that the same cannot be collected from it by suit. The premises still belong to the tenant and it may either leave them vacant or resume possession. If there had been no trust for creditors created by the tenant it is clear that the landlord's only right would be to sue for the gales of rent as they came due. He would have no right to sue at once for the whole unpaid portion of the rent reserved, even if the tenant had declared that it had given up the premises and would pay no more rent: *Connolly* v. *Coon*, 23 A.R. (Ont.) 37.

The contention of the plaintiff is that the tenant has, however, conferred upon him the right to prove for, and in that way possibly recover all the unpaid rent at once, without waiting for the expiration of the times fixed for payment by the lease. There was no evidence that the tenant is insolvent or unable to pay its debts in full or that the estate is not sufficient to pay in full all the creditors named, including the disputed claim of the plaintiff. If that be so, the plaintiff, if allowed to rank upon the estate,

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will receive the whole rent reserved long before he would have been entitled to it if there had been no assignment by the tenant. There is no contract or agreement in the lease on which a claim to payment of the whole rent in advance could be based.

Then, is there anything in the deeds to indicate that such was the intention of the tenant? The bill of sale recites that the Clothes Shop, Ltd., is "indebted" to certain "creditors" and has agreed to sell and transfer the goods named to the trustee for the purpose of selling the same and distributing the proceeds *pro rata* amongst the creditors named. In the trust deed the Clothes Shop, Ltd., is designated "the debtor" throughout and Newton is referred to as the trustee for the "creditors." He is empowered to sell the goods and to distribute the proceeds first, in payment of costs and charges; secondly, in payment of preferred claims, and thirdly, "in payment *pro rata* among the general creditors mentioned in the schedule."

By sec. 4 the agreement is not to be deemed a satisfaction of the "existing liability" of the debtor to the creditors nor affect "present or accruing rights" of the creditors in respect of their "claims" against the "debtor," but the "debtor" shall "remain liable to the said creditors for the amount of his existing indebtedness to them." By sec. 6 that the "trustee may know the exact amount of the claims" of the "creditors" each creditor is to make a statutory declaration verifying his "claim" against the "debtor."

Nothing can be inferred from the fact that the plaintiff's name was inserted in the schedule, because there was a large sum due and payable for rent already accrued in respect of which he was properly named as a creditor.

The documents contain no provision such as that found in the Assignments Act for ascertaining the present value of a debt not yet accrued by deducting interest or such as that found in the Bankruptcy Acts and the Winding-up Acts for ascertaining the present value of a contingent claim or one sounding in damages. Hagarty, C.J., and Osler, J., in *Grant* v. *West*, 23 A.R. (Ont.) 533, thought the omission from the Assignments Act of a provision allowing a claim for damages to be substantiated indicated an intention that such a claim should not be allowed to rank. A similar inference might be drawn from the omission of such a provision from these deeds.

I can see nothing to indicate that the word "creditor" in these documents was used other than in its popular sense—correlative to "debtor" but much to indicate that such was the intention of the parties. The trust agreement speaks from the date of its execution. At that time no part of the disputed claim had accrued due nor was there any absolute certainty that any future rent would ever accrue. The lease provides that if the building should burn down or be rendered unfit for the purposes of the lessee, the rent and all remedies for recovering it shall be at once suspended until the premises are rebuilt. Whether or not in the event of injury the premises shall be rebuilt or repaired depends upon the unfettered will of the plaintiff. The plaintiff relies upon the company's covenant to pay the rent, but the covenant would at once cease to be enforceable if the premises were destroyed by fire. In view of the possibility of that event happening it would, it seems to me, be highly unjust and contrary to the contract of the parties that the plaintiff should be admitted to prove now for the full rent. The very most he would be entitled to do would be to prove for the present value of his claim. But how is that value to be arrived at even if the trust instruments made provision for assessing it? The premises might have been destroyed the next day or they may remain intact until the expiration of the lease. No tribunal, however wide its powers, could possibly name a sum which will certainly accrue to the plaintiff. It seems to me quite impossible to say that a man is a "creditor" even using the word in its largest sense, in respect of a sum of money not one penny of which may ever become payable.

I have found no authority directly in point, but *King* v. *Malcott*, 9 Hare, 691, is somewhat analogous. In that case premises were leased for 99 years at a rent of £450 per annum. The lease contained a covenant on the part of the lessee himself, his heirs and executors to pay the rent. The lessee died when only a small fraction of the term had elapsed, having previously assigned the demised premises to another, leaving a will charging his debts upon his real and personal estate. The lessor brought an action against the executors for administration and to have a sufficient part of the proceeds of the estate set apart and invested as a due provision for the payment of the rent then due or thereafter to accrue due on the lease. It was not claimed as here that

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there was an immediate right to rank as a creditor upon the estate; all that was asked was that a sufficient portion of the estate be impounded to provide for future rent accruing and being unpaid by the assignee of the lease. In that case, as the Vice-Chancellor pointed out, not only was there no rent due, but there was no certainty that anything ever would be due on the covenant, for, if the rent was paid when due, no action would ever lie, and the action was dismissed.

King v. *Malcott, supra*, was applied in *Re Haytor Granite Co.*, 1 L.R. Eq. 11, where a very similar application was made under the Winding-up Act. There a company which had become the lessee of a granite quarry for a term of years at an annual rent which it had covenanted to pay was ordered to be wound up, while several years of the term still remained. The landlord took out a summons to be admitted to prove for the future rent. As in the previous case the company had assigned the lease but its liability upon its covenant to pay still remained. The application was based upon sec. 158 of the Winding-up Act 1862, under which all claims present or future, certain or contingent, ascertained or sounding only in damages were admissible to proof, a just estimate being made as far as possible of the value of all claims, subject to a contingency or sounding only in damages. The Master of the Rolls held that it was impossible to estimate the chance of the present or some future owner of the lease not paying the rent, the result of which would only be that the landlord would get back the property in the state it then was and refused the application. On appeal, L.R. 1 Ch. 77, the order of the Master of the Rolls was varied but only to this extent that the landlord was permitted to enter a claim for the whole rent but only to prove for rent actually accrued due.

The next case in which the question is discussed, *Re London and Colonial Co.* (*Hersey's Claim*), L.R. 5 Eq. 561, is distinguished from the *Haytor* case by the fact that the lease had not been assigned but remained with the liquidator. The landlord on the authority of the *Haytor* case had been permitted to enter a claim for the entire future rent, but as there was then nothing in arrears, he could prove for nothing. The liquidator declared several dividends and the landlord applied for an order directing the liquidator to pay into Court a sum representing the dividends which would have been payable to him upon his total estimated

rent for the unexpired portion of the term to secure his dividends as his claim matured. The Vice-Chancellor held that such a claim for future rent was not within sec. 158 of the Winding-up Act, and refused the application. He said, at p. 566:—

> From the terms of this section it follows either that the claimant has a right to immediate proof and payment or . . . that he has no present right at all. I am of opinion that he is entitled to no present right at all; or in other words, that the section does not apply to the case of a lessor who has the lease always as an absolute security—a continual remedy by distress—a remedy by re-entry if he desires it—who has been paid all the arrears of rent which have accrued due since the winding up—and with respect to whom it must be said that the chances of any future breaches of covenant or of there being or not being a sufficient distress cannot be the subject of calculation.
>
> It would be strange, too, if his proof should be admitted and that such a proof and payment in competition with the other creditors should not be taken as a satisfaction of his remedies by covenant, distress or re-entry—no matter what the amount of the dividend might be; and yet there is no provision in the Act providing for his giving up those rights, nor am I aware as at present advised that the Court could impose any such terms on him.

The reasoning of that case is distinctly against the plaintiff's right to prove in this case. If a claim for future rent cannot be admitted to proof in a winding-up proceeding, notwithstanding the very wide terms of section 158 of the Winding-up Act, it follows that it cannot be admitted to proof under the terms of an agreement which contains nothing equivalent to that section.

The Judicature Act, 1875, sec. 10, made the Bankruptcy rules "as to debts and liabilities provable" applicable to winding-up proceedings. In two cases afterwards decided, viz., *Hardy* v. *Fothergill*, 13 App. Cas. 351, and *Craig's Claim*, [1895] 1 Ch. 267, it was intimated but not decided that this change altered the law and that therefore a landlord's right to prove for future rent must be conceded. A few months after the decision in *Craig's Claim*, *supra*, the point arose again *Re New Oriental Corporation*, [1895], 1 Ch. 753, and Vaughan Williams, L.J., held that these two cases had no application to a case where the lease is still subsisting and adopting the principle of *Haytor's Granite Co.*, *supra*, and *Horsey's Claim*, he allowed a claim to be entered for the whole future rent, but only to prove for what was overdue, although the company was insolvent. This case was followed in *Re Panther Lead Co.*, [1896] 1 Ch. 978, the facts of which were practically identical with the *Oriental Corp.* case, with this exception, that in the latter case the lease was still subsisting and the lessor refused to accept a surrender, whereas in the *Panther Lead* case

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the lessor offered to do so on terms of his being allowed to prove for the loss thereby sustained, and Romer, J., intimated his opinion that the liquidator should accept the offer and left it to the parties to carry out an arrangement to that effect. The Judge said if the lessor had as in the *Oriental Corp.* case refused to accept a surrender he would have found great difficulty in doing more than was done by Vaughan Williams, J., in that case.

While these cases were decided under the Winding-up Act, they are of assistance in determining the plaintiff's rights in so far as they enunciate general principles of justice. They lay down this guiding principle that a lessor cannot "have both the rent and possession," that is, cannot prove for future rent and retain his reversion with the rights of distress, action on the covenant and re-entry incident to it: Emden on Winding-up of Companies, 7th ed. 168.

I have, therefore, come to the conclusion, notwithstanding the very able argument of Mr. Pitblado, that upon the proper construction of the documents creating this trust, as well as upon principle and authority, that the plaintiff's claim cannot be maintained. *Action dismissed with costs.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. February 21, 1916.

MECHANICS' LIENS (§ III—10)—PRIORITIES—PURCHASER OF UNFINISHED BUILDING WITHOUT NOTICE OF LIENS—"OWNER."

A purchaser of an unfinished building whose deed is registered prior to the registration of any mechanics' liens without actual notice thereof thereby acquires a priority by virtue of the Registry Act (R.S.O. 1914, ch. 124), and takes the property free of the liens. Mere knowledge that building was going on upon the land does not amount to actual notice; nor can the purchaser be deemed an owner within the meaning of that part of sec. 2 (c) of the Mechanics and Wage-Earners Lien Act (R.S.O. 1914, ch. 140), which depends upon privity, consent or benefit, in order to charge the land with the liens.

[*Cook* v. *Koldoffsky*, 28 D.L.R. 346, 35 O.L.R. 555; *Marshall Brick Co.* v. *Irving*, 28 D.L.R. 464, 35 O.L.R. 542; *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D.L.R. 533, 34 O.L.R. 604; *Orr* v. *Robertson*, 23 D.L.R. 17, 34 O.L.R. 147, applied.]

Statement.

APPEAL by the plaintiffs from the judgment of R. S. Neville, Esquire, K.C., an Official Referee, upon the trial of an action to enforce a mechanics' lien.

Reasons for judgment of the learned Referee, in which the facts are stated, were given as follows:—

This is an action brought by the plaintiffs to enforce a mechanics' lien for the sum of $243.31 against the lands mentioned

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in the statement of claim. At the trial, the Monarch Brass Manufacturing Company Limited appeared with a claim for $190.96, one Rodaro with another for $145.65, and the Vokes Hardware Company with a further claim for $124.23.

The claims were all established in the usual way, and judgment will go for each of the claimants for their respective claims against the defendant Jones; the plaintiffs would be entitled also to liens upon the lands, but for the fact that the lands were sold by the defendant Jones to the late James Oliver, before any liens were registered.

The real contest between the parties is as to whether Oliver's purchase from Jones has freed the property from the liens. The facts were diligently inquired into by counsel at the trial, and afterwards the case was argued at considerable length, all counsel citing authorities.

The facts may be briefly set out. The defendant Jones was the owner, and he employed the various lien-holders in the construction of his house, or bought material from them. All the claims rest upon contracts or orders given by Jones. As the house was approaching completion, one Coates, who was finishing the painting work, interested himself to sell the property, and he brought Jones and Oliver together, and they made a contract by which Oliver agreed to purchase the property.

At this time, or immediately after, Oliver was ill and was unable to go about, but he placed the matter in his regular solicitor's hands for the purpose of carrying out the purchase. Mr. Oliver knew that the building was only just being completed; and in fact, when the contract was signed, there were still some little things to do to make the construction complete. Mr. Oliver, being confined to his house, left the matter entirely in his solicitor's hands, except for the one incident, namely, that he told his solicitor that Coates would report to him when the house was complete. He told Mr. Mitchell, his solicitor, that when Coates reported that the house was complete that would be satisfactory, and that is all that he ever employed Coates to do, so far as carrying through the purchase is concerned. Mitchell knew that the house was being completed, and he knew that contractors, material-men and labourers, if not paid, would be entitled to liens, and in carrying through the sale he had this in mind all the time.

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There were no liens registered, however; and Mr. Mitchell endeavoured to see that all claims were paid. Mr. J. A. Campbell, another solicitor, was acting for the mortgagee of the property, and was said to be familiar with the progress of the work. Mr. Mitchell handed to Mr. Campbell $500 for the purpose of paying off any claims there might be on the part of possible lien-holders, and I understand that the money was paid out to settle claims just as it was intended that it should be. Then it was represented to Mr. Mitchell that all claims were paid, and that there were no liens or possible liens that might be registered. Mr. Mitchell on the 3rd July, 1914, took a statutory declaration from the defendant Jones, which stated that he (Jones) was a builder and owner of the premises in question, that the said premises were complete except the varnishing and painting of verandah floors, and he added that that work was being completed on the day he made the declaration. The declaration also said that all work and material were paid for, and that there were no liens and no one entitled to file a lien. The man Coates, before mentioned, is the one whose work it was said was being completed on the day the statutory declaration was made, and his was one of the claims paid off. I think, however, it was paid not out of the $500 above mentioned, but out of an item of $200 which Oliver had paid over as a deposit when the contract of sale was entered into. Mr. Mitchell knew that Coates was paid; and then, if the statutory declaration could be relied on, it was clear that there were no possible claims against the property.

Mr. Mitchell registered the conveyance to Oliver on the 9th July, 1914, and at the time he did so he believed that all claims had been paid upon which liens might be claimed or founded, and he believed the statements made in Jones's statutory declaration, and acted upon this belief. No liens were registered till the following month.

It is clear that Mr. Oliver himself knew of no liens. It is also clear that Mr. Mitchell knew of no liens, and did not think there were any. Coates swears that he did not know of any other liens or claims except his own, and thought everything was paid for. I mention this because it was argued that Coates was Oliver's agent, and that his knowledge affected Oliver. I do not think that he was Oliver's agent in any respect except as I have mentiontioned before.

The conclusion that I have come to is, that Oliver was an innocent and *bonâ fide* purchaser for value of the lands in question without having either knowledge or notice of any liens then existing, and that he paid over his purchase-money and took his conveyance and registered it, through his solicitor, in the full belief that there were no liens against the property, his solicitor having the same belief and acting in the manner I have already set forth. I think that Oliver is entitled to hold the property freed of all liens, and that his executors, who are defendants, must succeed in this action.

The plaintiffs' appeal was on the following grounds:—

(1) That the judgment was contrary to law and the weight of evidence.

(2) That the Referee should have found that the plaintiffs were entitled to a lien upon the lands in question, having fulfilled all the requirements of the statute in that behalf to entitle them to such lien, in respect of the materials furnished; and that the plaintiffs' said lien could not be destroyed by a sale or conveyance of the said lands.

(3) That the said James Oliver was fixed with notice of the existence of the said lien and must be held to have taken subject thereto.

(4) That the learned Referee erred in holding that the plaintiffs were not entitled to a lien against the interest of the said James Oliver, when they had registered, within the thirty days immediately following the last delivery of materials, their lien in respect of the same.

(5) That the said James Oliver could not relieve himself from liability by accepting a declaration, as to the absence of liens, made by the defendant Jones.

D. Inglis Grant, for appellants.

R. G. Agnew, for defendants the owners, the respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—The Official Referee finds that neither the purchaser, Oliver, nor his solicitor, nor his so-called agent, Coates, had any actual notice of any liens or claims for liens when the purchase by Oliver was completed. This opinion is justified by the evidence, which satisfies me that every reasonable and proper precaution was taken to avoid, if diligence could accomplish it, Hodgins, J.A.

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the very position in which the appellants seek now to put the buyer's personal representatives.

The purchase by Oliver was of an unfinished building to be taken over by him from Jones, the building owner, "as soon as house is completed to inspector's satisfaction." This was done, the deed registered and the money paid, about two weeks before the liens were recorded. Counsel for the appellants did not dispute the good faith of Oliver, nor of his solicitor, but relied on the provisions of the statute as preserving the priority of their lien, and those of the other lien-holders, over the deed. The ground urged was that, the lien having attached by the doing of the work and the supplying of materials, the language of sec. 21 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, "Except as herein otherwise provided those Acts" (*i.e.*, the Registry Act and the Land Titles Act) "shall not apply to any lien arising under this Act," took the lien out of the provisions of those Acts so far as they enacted that registration was necessary to preserve priority.

This view is not new, but the current of authority has steadily set against it, and, in addition to the cases referred to on the argument, I may mention *In re Craig* (1883), 3 C.L.T. 501, a decision of Proudfoot, J., contrary to his dissenting view in *Hynes* v. *Smith* (1879), 27 Gr. 150, and *McNamara* v. *Kirkland* (1891), 18 A.R. (Ont.) 270, where the meaning of the exception is specially discussed. Recently the decisions in the Appellate Division have adhered to the view that priority of registration, in the absence of actual notice, must prevail. See *Cook* v. *Koldoffsky* 28 D.L.R. 346, 35 O.L.R. 555, and *Marshall Brick Co.* v. *Irving*, 28 D.L.R. 464, 35 O.L.R. 542.

There is not in this case any actual notice of the liens brought home. Knowledge that building is going on upon the lands is not enough. This is established by decisions beginning in 1878: *Richards* v. *Chamberlain* (1878), 25 Gr. 402. Nor can it be successfully contended that Oliver comes within that part of the definition of an owner which depends upon privity, consent, or benefit, so as to render the land in the hands of his representatives subject to the liens.

The cases of *Gearing* v. *Robinson* (1900), 27 A.R. 364, and *Slattery* v. *Lillis* (1905), 10 O.L.R. 697, have definitely determined

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that, in the language of the present Chief Justice of Ontario (10 O.L.R. at p. 703) "there must be the request, the furnishing of the materials in pursuance of that request either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. If, in addition to the request, one or other of these alternative conditions exist . . the lien is created in favour of the material-man."

This has been in effect followed in *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D.L.R. 533, 34 O.L.R. 604, *Orr* v. *Robertson*, 23 D.L.R. 17, 34 O.L.R., 147, and in the case of *Marshall Brick Co.* v. *Irving*, already referred to. It is quite possible to give a reasonable interpretation to the words in the definition (sec. 2 (c)) "all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished," without infringing this principle. See *Reggin* v. *Manes*, 22 O.R. 443, and *Blight* v. *Ray* (1893), 23 O.R. 415. But, if Oliver comes within this definition by virtue of his deed from Jones, as he seems to do, his protection is found, as already indicated, in the Registry Act.

The appeal should be dismissed with costs.

Appeal dismissed.

HOWARTH v. ELECTRIC STEEL AND METALS CO. YOUNG v. ELECTRIC STEEL AND METALS CO.

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Ontario Supreme Court, Sutherland, J. February 8, 1916.

ELECTRICITY (§ III A—16)—LIABILITY OF POWER COMMISSION—DEFECTIVE WIRING—INJURIES TO EMPLOYEES.

For injuries sustained by an employee of a steel company, through an explosion in a transformer station, the Hydro-Electric Power Commission of Ontario was liable, the explosion having occurred through the negligence of those employees of the Commission who made the installations in the station. The consent of the Attorney-General to the bringing of an action against the Hydro-Electric Power Commission of Ontario entitles the Supreme Court to pronounce judgment against the Commission.

[*Graham* v. *Commissioners*, 28 O.R. 1, *Roper* v. *Public Works Commissioners*, [1915] 1 K.B. 45, distinguished.]

Statement.

THE first action was brought by Minnie Howarth, mother and administratrix of the estate of Ambrose Howarth, deceased, against the above-named company and the Hydro-Electric Power Commission of Ontario, to recover damages for the death of her son, from injuries sustained in the transformer station of the employers of the deceased, the defendants the Electric Steel

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and Metals Company Limited, at the town of Welland, by the explosion of an oil-switch.

The second action was brought against the same defendants by one Young, also employed by the defendant company, who was injured by the same explosion.

A. C. Kingstone, for plaintiffs.

G. Lynch-Staunton, K.C., and *G. B. Burson*, for defendants the Electric Steel and Metals Company Limited.

M. H. Ludwig, K.C., for the defendants the Hydro-Electric Power Commission of Ontario.

Sutherland, J.

SUTHERLAND, J.:—These two cases were, by consent of counsel, tried together, the evidence in the main being applicable to both.

The actions arise out of an explosion, on the 17th October, 1914, of the oil-switch in the transformer station of the defendants the Electric Steel and Metals Company Limited at the town of Welland, as a result of which Ambrose Howarth, one of their employees, was so injured that he soon afterwards died, and the plaintiff Young, another employee, was also injured.

The Howarth action was commenced by writ dated the 14th January, 1915, the plaintiff being Minnie Howarth, the mother of the deceased man, Ambrose Howarth, and suing originally as his parent. At the trial, an application was made to amend so that she should sue as administratrix of the estate of her deceased son, instead of as parent, which application was granted.

The other action is brought by the injured man, Young.

In the Howarth action, the plaintiff says that the facts are "that the explosion was caused by the negligence, carelessness, and incompetence of the persons employed by the said defendants the Electric Steel and Metal Company Limited, in making the connection of high tension wires heavily charged with electric current to the furnace transformer on the said defendants' premises; and that the defendants the Hydro-Electric Power Commission of Ontario, their officers, agents, and workmen employed by the defendants the Electric Steel and Metals Company Limited, wrongfully and negligently connected the high tension wires in such an unskilful manner as to cause a very high and excessive current of electricity to flow into the said oil-switch, thereby causing the explosion above referred to. The plaintiff further says that in any event the electrical appliances at the said defen-

dant company's transformer house were defective for the purposes for which they were used, and no proper inspection had been made of the said electrical appliances before the electric current which caused the explosion had been turned on; and that, had a careful, thorough, and proper inspection been made of the said appliances in use at the said plant at the time, the said current would not have been permitted to escape, and the said explosion would not have occurred."

The defendants the Electric Steel and Metals Company Limited, on their part, deny that the explosion was caused by any negligence, carelessness, or incompetence on their part, or that the electrical appliances owned by them were defective. They also say that the deceased man was not acting within the scope of his employment at the time he was injured, and was not in the transformer house at the time by reason of the order or directions of the company's superintendent or any other person in their service to whose orders the deceased was bound to and did conform. They also say that, if the electrical appliances owned and installed by the defendants the Hydro-Electric Power Commission of Ontario were defective, or if no proper inspection was made, it was the fault of their co-defendants, the Hydro-Electric Power Commission of Ontario, who, under their contract with the Welland Power Commission, were to supply and install all appliances, wiring, etc., up to the transformer on the high tension side, and provide such inspection as was necessary. They also deny that the Hydro-Electric Power Commission of Ontario were employed by them for the installation of the high tension wiring, oil-switches, etc., these appliances being the property of the Hydro-Electric Power Commission of Ontario, under a contract signed between them and the Welland Power Commission, whereby they were owned and installed by that Commission—the defendants the Electric Steel and Metals Company Limited having an option to purchase them, should they desire to do so.

The defendants the Hydro-Electric Power Commission of Ontario deny that the explosion of the oil-switch was caused in consequence of their negligently connecting the high tension wires with it. They also deny that the electrical appliances at the transformer house were defective for the purposes for which they were intended to be used, or that proper inspection was not made thereof before the electric energy was turned into the oil-

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switch. They also plead that the injuries sustained by the deceased man were the result of his own negligence, and not of any negligence on their part, and that he was not acting within the scope of his employment when injured, and was not present in the station at the time of the explosion by their order or direction or that of any person in their service to whose orders he was bound to and did conform.

In the Young action, the plaintiff says that the defendants the Hydro-Electric Power Commission of Ontario were engaged, on behalf of the defendants the Electric Steel and Metals Company Limited, in installing a new electrical system with high tension wires at their transformer station in Welland, and that, on the date named, while doing so, and before carefully and prudently completing the installation, the defendants the Hydro-Electric Power Commission of Ontario, wrongfully and negligently and without due inspection, turned on the electric current, thereby causing an excessive current to go into the oil-switch, and causing an explosion therein. He also says that the premises of the defendants were thereby rendered dangerous and unsafe for the officers and employees of the defendants the Electric Steel and Metals Company Limited, and in particular himself.

The defendants the Electric Steel and Metals Company Limited, in answer to the plaintiff Young's claim, say that, under a contract between the defendants the Hydro-Electric Power Commission of Ontario and the Welland Power Commission, the former own the electrical system complained of by the plaintiff—the Electric Steel and Metals Company Limited having only an option to purchase it. They also say that if, therefore, the said installation was not carefully completed, or if no proper inspection thereof was made, or if the current was negligently turned on, or if the premises were rendered unsafe, it was the fault of the defendants the Hydro-Electric Power Commission of Ontario.

The defendants the Hydro-Electric Power Commission of Ontario deny that the injuries of the plaintiff were caused by their negligence or that of their employees. They also say that the electrical system was carefully installed and inspected before the current was turned on, and that the plaintiff was not injured by reason of an excessive current having entered the oil-switch. They also say that the plaintiff was not present

at the transformer station at the time of the explosion by the invitation, direction, or order of these defendants, or of any person in their service to whose orders he was bound to conform and did conform. They plead that his injuries were sustained through his own negligence.

The work on the transformer station in question came to be done in the following way. The steel company, desiring to be supplied with power, entered into negotiations early in 1914 with the Hydro-Electric Power Commission of Ontario. It then being necessary for them to purchase a transformer, they obtained a written proposal, dated the 20th January, 1914, from the Canadian Crocker-Wheeler Company Limited, which they accepted on the 27th January, 1914, and under which the Crocker-Wheeler company agreed to furnish them with: "*Alternate 'C'*. One (1) —900 K.V.A. 45700 (Star), 26400 (delta) volts to 90–100–110 volts, three phase, 25 cycles, oil insulated, water cooled transformers." And part of the data as to the transformers incorporated in such proposal is as follows: "900 K.V.A. 25 cycles, 3 phase, 45700 star connected high tension 26400 delta connected low tension 100 volts. Taps to give 90,110 volts on low tension. This transformer is wound to operate with the high tension terminals star connected for a line voltage of 45,700 volts and with a low tension terminals delta connected for a line voltage of 100 volts."

Correspondence followed between the steel company and the Hydro-Electric Commission of Ontario about the plan of their transformer station and the location therein of the transformer. A transformer is an apparatus which, by the utilisation of the phenomena of magnetic induction, is used for the changing of the ratio of electric potential from a higher to a lower value, or *vice versâ*. This is done by allowing the electric current to pass through an insulated coil of wire of a different number of turns, the coil being wound so as that it partly surrounds an iron core. The secondary or low tension current, which is entirely separate and distinct from the primary or high tension current, passing through the above coil, is generated in a second coil on the same iron core, and frequently in close mechanical relationship to the primary current.

While it is the Hydro-Electric Power Commission of Ontario

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who build the extension line necessary to supply the power, and supply and erect the apparatus to carry it to the customer, the actual contract for the sale and purchase of the power is made with local power commissions, of which there was one at the town of Welland.

The Hydro-Electric Power Commission of Ontario got in touch with this local commission, and on the 12th April, 1914, the local commission passed the following resolution: "That the Hydro-Electric Power Commission of Welland request the Hydro-Electric Power Commission of Ontario to build an extension line to the plant of the Electric Steel and Metals Company Limited, also to install the necessary equipment to be used in supplying power to the above-named concern. The said line and equipment to be subject to be taken over by the Welland Hydro-Electric Power Commission at any future date that they may be desired to do so."

In consequence, on the 16th April, the Hydro-Electric Power Commission of Ontario wrote to the steel company as follows: "The Hydro-Electric Power Commission of Welland have passed a resolution requesting the Hydro-Electric Power Commission of Ontario to build the extension of lines necessary to supply power to the plant of the Electric Steel and Metals Company Limited, and also to install the necessary switches and equipment to supply this power up to the transformers which are to be installed by your company. That part of the apparatus which under ordinary conditions would be installed by your company and is to be installed by the Hydro-Electric Power Commission of Ontario, will have to be charged for in the monthly power bills of the Welland Commission, *i.e.*, interest and sinking fund on the necessary investment, the understanding being that your company have the privilege of purchasing this equipment at any future time that they may decide to do so."

To this the steel company replied on the 20th April as follows: "We beg to acknowledge receipt of your favour of the 16th inst. notifying us of the resolution of the Hydro-Electric Power Commission of Welland requesting the Hydro-Electric Power Commission of Ontario to build an extension to the necessary lines to supply power to our plant, also to install the necessary switches and equipment to supply power up to the transformers. We are

quite agreeable to the arrangement you mention, that the part of the apparatus which is usually installed by the company will in this instance be supplied by the Ontario Hydro-Electric people," etc.

These letters indicate what appears to be the practice, namely, that, while local hydro-electric commissions enter into contracts for the sale of power, they look to the Hydro-Electric Power Commission of Ontario to undertake and perform such part of the work as they are obliged under the contract to do, and so in the present case the Welland Power Commission arranged with and looked to the Hydro-Electric Power Commission of Ontario to do the work mentioned. The construction of the line was thereupon commenced by the Hydro-Electric Power Commission of Ontario; the actual work of constructing the apparatus outside and inside of the transformer station and up to the transformer being placed by them in the charge of one Miller, said to have been a competent electrical construction expert. He was apparently given no written instructions, and it is said that his instructions were that he should do the high tension construction work.

The duty of inspecting the high tension construction work was placed in the hands of an electrical engineer named Johnston, employed by the Hydro-Electric Power Commission of Ontario.

The transformer was delivered by the Crocker-Wheeler company at the premises of the steel company, and was set up in the transformer room, in its designated place. It appears that the steel company was desirous of having the Hydro-Electric Power Commission of Ontario do the secondary wiring for the service transformer. Accordingly, on the 23rd July, 1914, they wrote to the Chief Engineer as follows: "We hope you are not overlooking the wiring of our transformer room. We are not sure whether this will be done by the local Hydro-Electric Commission or by your men, but we think this work should be proceeded with immediately, so there will be no risk of a delay from this end when the power is on the spot." And again, on the 1st September, the steel company wrote to the Hydro-Electric Power Commission of Ontario as follows: "Your Mr. Miller, who is working in our transformer house, appears to have had no instructions to put in the secondaries for the service transformer; and, as we should like you to arrange to do this work, we shall be glad

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if you will give him instructions." On the 3rd September, the Hydro-Electric Power Commission of Ontario wrote to the steel company as follows: "In reply to your favour of the 1st inst., in which you state that you would like us to arrange to do the work in connection with the secondary wiring for the service transformers, our instructions from the Welland Hydro-Electric Commission were to do the 46,000 volt work only, and our work has been arranged accordingly. In fact, we pointed out to you in one of our letters some time ago that it was our understanding that you were to do all the secondary wiring. If it were not for the fact that we have work mapped out for Mr. Miller which is urgent, we would only be too pleased to undertake this work for you on a cost basis."

The steel company thereupon proceeded to do the secondary wiring. The work of setting up the transformer and of doing this wiring was under the charge of the plaintiff Young, an electrical engineer employed by the steel company, and the actual work was in part done by the deceased man Howarth, an electrical mechanic.

The transformer is about eight feet high, oval in shape, and about seven feet across. The object of the transformer is to secure safety by the separation of the high potential primary circuit and the low potential circuit, any contact between the two in the converter being a source of danger. This transformer is what is known as the oil insulated one, and care is required that it shall be filled with the proper kind of oil. For the purpose of leading the high tension wires into the transformer so as to connect therein with the high tension coils, there are what are known as "bushings," or what may be termed insulated pipes through which the high tension wires are brought down to the top of and introduced into the transformer. Below the top of the transformer and inside thereof is a board called the terminal board. The bushings are carried through holes in the top of the transformer, and in the terminal board and through them the high tension wires are brought into the transformer, where they are "connected up," as it is termed, with the high tension coils, by tying the ends with nuts or other appliances. The holes in the terminal board are numbered, and it is said that the difficulty arose and the explosion resulted from the fact that the high tension leads

had been connected to points "three" on the terminal board instead of to points "one."

The evidence of an electrical engineer, named William Gordon McGhie, who examined the transformer shortly after the explosion, puts the matter in this way:—

"Q. 40. What is underneath the boards? A. Immediately underneath the boards are the leads that lead down to the windings of the transformer; the points 'three' are connected underneath the board by solid copper, which does not go through the windings, and which caused in this case a dead short circuit, or, in electrical terms, a high tension neutral.

"Q. 41. The high tension wires are brought how into the transformer? A. Through the high tension bushings.

"Q. 42. They go first through the oil-switch? A. The oil-switch is there to allow the circuit to be broken safely and to prevent arking. The switch will trip out in case of overload. In order to break a switch of that high tension you have to have it immersed in oil; there would be too much arking if you broke it in the air.

"Q. 43. These high tension wires were connected at points 'three'? A. Yes.

"Q. 44. And thereby caused a short circuit by reason of the copper underneath? A. Yes.

"Q. 45. Where should they have been connected? A. The high tension should have been connected to 'one' as shewn on the diagram.

"Q. 46. What kind of a transformer do you call this? A. Oil immersed, water cooled, three face, furnace transformer.

"Q. 47. Were any defects found in the transformer? A. The transformer was practically as good as when it was shipped from the shop.

"Q. 48. As far as the transformer was concerned, was it in safe condition? A. Yes, sir.

"Q. 49. Nothing defective about it? A. No, sir.

"Q. 50. What was the result of the short circuit? A. The oil-switch would be so heavily overloaded it would not be able to break the circuit safely. It would cause such a large ark inside the switch, it would cause an explosion; in this case it was the bottom of the oil-tank that was blown out.

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"Q. 51. Was that evident from the examination you made? A. Yes. I was more interested in the transformer, but I saw that the oil-switch was blown out. There were three oil-switches, and they were all blown out.

"Q. 52. That would be dangerous? A. Yes, sir.

"Q. 53. Why were the oil-switches not serving their purpose? A. They are only supposed to be put to a certain capacity. Due to the short circuit, they were so overloaded, they could not be expected to serve their purpose.

"Q. 54. What caused the overload? A. The overload was caused by the current which flowed through the short circuit."

Upon all the expert evidence, it appears plain, and indeed it was practically admitted, that the cause of the explosion was this wrong connection. If the transformer fails to perform its functions, and the high potential current passes into the interior wiring, an explosion in the oil-switch is a natural result. It was the duty of either the steel company or the Hydro-Electric Power Commission of Ontario, through its officials, to exercise a high degree of care in making this connection and to inspect this particular part of the work before the power was turned on. The steel company had bought the bushings with the transformer, but it appears from the evidence that Miller put them up.

On the 23rd July, the steel company wrote to Mr. Gaby, the Chief Engineer of the Hydro-Electric Power Commission of Ontario, and said: "We hope you are not overlooking the wiring of our transformer room; we are not sure whether this will be done by the local Hydro-Electric Commission or by your own men, but we think this work should be proceeded with immediately so there will be no risk of a delay from this end when the power is on the spot."

On the 27th July, the Hydro-Electric Power Commission of Ontario wrote to the steel company, and among other things said: "We understand that you have the transformers and oil-switches on the job complete with bushings assembled."

On the 1st September, the steel company acknowledged a letter from the Hydro-Electric Power Commission of Ontario, in part as follows: "We beg to acknowledge receipt of your favour of the 21st Aug., in which you asked us to supply you with copies of all correspondence which passed between the Canadian West-

inghouse Company Limited and ourselves, on the subject of the oil-breakers."

On the 24th September, the Hydro-Electric Power Commission of Ontario wrote to the steel company: "We have instructed our Mr. G. H. Miller to forward to you from the Electric Steel and Metals station at Welland samples of several lots of transformer oil."

On the same day, they wrote to Miller as follows: "Confirming 'phone message of the 23rd by W. Amos, we ask you to forward to our Mr. Dobson, Toronto Laboratory, Strachan avenue, by express, quart samples of oil carefully taken from the 900 K.V.A. transformer, each of the 100 K.V.A. transformers, and from the oil for the current and potential transformers. It will be satisfactory for you to fill with oil and to place in service the current and potential transformers without first drying them out, since you state that you have closely inspected the transformer windings and can detect no moisture on them."

On the 14th October, Johnston made a written report to the Hydro-Electric Power Commission of Ontario, in which he said: "I have instructed Mr. Miller to be in Welland on Friday the 16th to complete erection, so that the station can be made alive for service on Saturday morning. Mr. Turnbull says expects power on Saturday morning the 17th. I expect to be in Welland some time Friday to see that station is O.K." Turnbull is the president of the steel company.

On the 17th October, Johnston seems to have considered that the work which the Hydro-Electric Power Commission of Ontario had to do in connection with the high tension wiring and installation had been completed. His evidence is that he had inspected all the high tension work done by the Hydro-Electric Power Commission of Ontario up to the transformer. In the transformer room on that day, and at the time of the accident, were Miller, Howarth, Young, a man named Lefevre, and Johnston. The latter says he did not inspect the furnace transformer, as he did not consider it was part of his duty to do so.

Mr. Gaby, the Chief Engineer of the Hydro-Electric Power Commission of Ontario, gave evidence at the trial and said that all of the high tension work should be inspected before the power was turned on, and that, if this were not done, the inspector would

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not be doing his duty or carrying out the Commission's instructions; also, that it is the usual custom to turn on the power after inspection. He said, also, that a man who was near the apparatus when the power was about to be turned on should know it, as there was apt to be danger, and the closer he was the greater the danger. He said that he would let those know who had business to know and might be near when the power was about to be turned on.

Johnston says that Young asked him when he was going to turn the current on, and he replied, "Some time to-night," and as soon as he could get sufficient oil for the service transformer switch. This was a switch that had to do with the service transformer, but not with the furnace transformer. He said he asked Young if his furnace transformers were all right, and Young replied "Yes," and that thereupon he said, "We can turn on the current in five minutes," and went over to the transformer house, Young following him. Young says that Johnston said to him, "Are you ready?" and he replied "Yes," meaning as to his part of the work, namely, the low tension wiring of the transformer. He says that Young did not say he was going to make a test. He also says that he knew the power was going to be turned on, but expected to have some further warning. Johnston further says that he then did what was necessary to prepare to turn on the current, all the men mentioned being present and able to see what he was doing. While he thinks that the men knew that he was about to turn on the power, he cannot say that he gave them a definite warning or notice to that effect. He says that he then went to the lever for opening the oil-switch, which was on the outside of the wall in the furnace-room, and that, when he pulled the remote control-switch and the current came on, there was an explosion, the oil in the switches was ignited and scattered around, and the men were burned and injured thereby.

It appears that Miller and Lefevre also died as a result of their injuries.

The work had been practically all done before the actual written agreement between the Welland Power Commission and the steel company was executed. It is dated the 15th October, 1914, and provides for the steel company taking power exclusively from that Commission from the date thereof to the 19th December, 1929. It contains, among other terms, the following:—

"2. (j) The customer shall erect a sub-station approved of by the Commission, and shall supply, install, and operate the electrical equipment in the same manner as instructed by the Commission. The customer shall be responsible for the proper inspection and maintenance of all this station equipment, except such as has been installed by the Commission."

"3. (e) The customer shall select and use transformers and apparatus suitable to receive the electric power produced by the apparatus of the Commission . . . all apparatus, machinery, and wiring to be approved of by the Commission."

The first important question for me to determine is, who actually took the high tension wires through the bushings in the top of the transformer and through the holes in the terminal board, and connected them with the high tension wires underneath?

Two men at the trial testified that they saw Miller doing work inside the top of the furnace transformer, which would seem to point plainly to his having made the connection. One of these is the plaintiff Young, and the other is a labourer named Thompson.

At the inquest, which was held soon after the accident, and when he was still suffering severely from his injuries, Young was asked whether Miller had made the connections inside the transformer and through the terminal board, and his evidence then appears to have been as follows: "I presume he did the connecting . . . I could not say." At the trial before me he said: "I saw Miller with his hands through the holes. It was a work of feeling more than seeing. He made the connections. . . . This was a month or six weeks before the accident." He endeavoured to explain the apparent discrepancy in his evidence by stating that at the inquest he was still suffering so badly that his mind was in a state of confusion, and he could not recollect clearly what had occurred.

Thompson, at the inquest, in reply to a question, "Had Miller anything to do with the putting in of the transformers?" gave the answer, "I don't know, I never saw him do anything like that." At the trial he said that he saw Miller fixing wires in the transformer room. He also said: "He fetched the big wires from above and connected them with the small wires in the hole; he was working with the wires in there, the thick wires outside and small ones

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inside, about an hour with his hands in the hole, on one day about a month before the accident." He was also asked certain questions and gave the following answers at the trial:—

"Q. Did you tell about the bushings and the wiring in connection with it at the inquest? You mentioned that at the inquest didn't you? A. I think so, I am not sure.

"Q. You were examined all about this at the inquest? A. Yes.

"Q. You told it all at the inquest? A. Yes.

"Q. Explained what you are telling now? A. Yes, just the same."

The contention on behalf of the Hydro-Electric Power Commission of Ontario is, that the expression "up to the transformer" is to be construed to mean that it was no part of their duty to take the high tension wires into the transformer at all. While the word "to" has various meanings, such as "in a direction toward" or "toward and ending at," it seems to me that in the present case it must mean more than this. The power was to be supplied by the Hydro-Electric Power Commission of Ontario. The work of the Commission was not effective for the purpose of introducing the power until their high tension wires were brought into contact with the high tension wires inside the transformer and these were tied together. The introduction of the high tension wires into the transformer, and bringing them in contact with the high tension wires therein, and tying these together, was an important mechanical work and one which might be the occasion of great danger unless properly done. It was the Hydro-Electric Power Commission of Ontario which was furnishing the high tension current and erecting the apparatus for that purpose. They seem to require and are given extensive powers under the Act. They are equipped with skilled and competent men to construct, install, and inspect. It seems to me that—the contract not being clear as to who was to make the connection within the transformer of the high and low tension wires, and it having been found by me that Miller, having erected the bushings, carried them through the top of the transformer, thereby bringing the high tension wires into it, and made the connection therein between the high tension wires—the principle enunciated by Lord Blackburn in *Mackay v. Dick* (1881), 6 App. Cas. 251, at p. 263, can well be applied. This is what he says: "I think I may safely say,

as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

While the evidence of Young and Thompson is perhaps not as satisfactory as it might be, I am unable to discredit them where they say in definite terms that they saw Miller making the connections or doing the work which must obviously have been for that purpose. I find, therefore, as a fact, that he made the connections, and did so in the course of the work of which he was in charge, as construction foreman for the Hydro-Electric Power Commission of Ontario. I am unable to see from the evidence that, before turning on the power, Johnston made that careful inspection of the transformer, and the connection between the high and low tension wires therein, that, in the circumstances, it was proper for him to make. Young and Howarth had been engaged in setting up the transformer and in doing work upon it, and I am unable to see that there was any negligence on their part in being present in the transformer room of their employers, the steel company, at the time the accident occurred. It was, I think, the duty of Johnston to warn them specifically, before turning on the power, to keep a reasonably safe distance from the furnace transformer and switches.

Upon these findings, I come to the conclusion that the explosion occurred through the negligence of the employees of the defendants the Hydro-Electric Power Commission of Ontario, and that these defendants are liable in damages, unless a defence set up by them is available as an answer. This defence is that, as the Commission is an "emanation from the Crown or an agent of the Crown," discharging duties in the interest of the public and without profit, it cannot be made liable for an act of negligence such as that in question herein. The Power Commission Act is R. S. O. 1914, ch. 39. Counsel for the plaintiff referred to the Interpretation Act, R. S. O. 1914, ch. 1, sec. 27: "In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall (*a*) vest in such corporation power to sue and be

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sued, to contract and be contracted with by their corporate name, to have a common seal," etc. In both the original Act creating the Hydro-Electric Power Commission of Ontario, namely, 1907, 7 Edw. VII. ch. 19, and in the present Act, a Commission is created. Nowhere, however, are they expressly made a corporation or body politic and corporate. But under the present Power Commission Act, there is a section (16) in the same terms as sec. 23 of the original Act, and to the following effect: "Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office." It is said that in the present cases application was made to the Attorney-General, some time after the actions were commenced against the steel company, for his consent to the actions being brought against the Hydro-Electric Power Commission of Ontario also; and, such consent being given, the defendants the Hydro-Electric Power Commission of Ontario were accordingly added.

It seems to me that it is implied in this consent that, if the Commission should be held to be liable in the actions, judgment may be pronounced against them. I think this differentiates these cases from such cases as *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O. R. 1, and *Roper v. Public Works Commissioners*, [1915] 1 K. B. 45, and cases therein referred to. Reference also to *Re City of Ottawa and Provincial Board of Health* (1914), 20 D.L.R. 531, 33 O. L. R. 1.

The deceased man Howarth was a young man and unmarried, and was at the time of the accident earning regularly about $50 or $60 per month. He lived part of the time at home, and assisted his parents with money before the father died, and, according to the plaintiff's evidence, gave her more money thereafter. There were other three children. In the circumstances, and having regard to future contingencies, I think a fair sum for me to allow as damages would be $1,000.

The plaintiff Young was at the time of the accident 33 years of age and earning $160 a month. He was badly burned and obliged to remain in the hospital for five weeks. He left it for a time, but went back again to have some "skin grafting done." He was burned on the face, neck, hand, left arm, and down the back. He testifies that he was in perfect health before the accident, but

that his nervous system has been badly affected. He says, further, that his left arm is still "tied" in consequence of a skin formation resulting from the burn and that he cannot lift it above the shoulder. The medical testimony is to the effect that this may be remedied in good part by a further operation. Hospital, medical, and drug bills, and bills for supplies and appliances, were put in, amounting to $1,100. When examined for discovery, this plaintiff said that he did not expect to pay some of these bills. His explanation at the trial about this was that he expected the defendants to do so. He was paid his wages by the steel company up to the 15th February, 1915. He has for some time past been associated with Mr. Turnbull in another company, where, upon the evidence, he is probably earning as much money as before the accident.

While on the whole he has made a good recovery and may still improve, it is difficult to say to what extent the nervous condition in which the accident has left him may affect him in future. He has, no doubt, also suffered considerable pain. I have concluded to fix his damages at $2,500.

Each of the plaintiffs will therefore have judgment for the sums mentioned, with costs, as against the defendants the Hydro-Electric Power Commission of Ontario.

The actions will be dismissed as against the steel company, but, under the circumstances, without costs.

HUNT v. BECK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. March 21, 1916.

WATERS (§ II C—87)—DAM—INTERFERENCE WITH LOGGING—ONUS.

In an action for deprivation of freshet-water, by placing stop-logs in a dam, the burden is upon the plaintiff to prove the water was lessened to an extent sufficient to interfere with the floating of his logs down stream.

[*Hunt* v. *Beck*, 27 D.L.R. 777, 34 O.L.R. 609, affirmed.]

APPEAL by the plaintiffs from the judgment of BOYD, C., 27 D.L.R. 777, 34 O.L.R. 609. Affirmed. Statement.

T. P. Galt, K.C., and *U. McFadden*, for appellants.

G. H. Watson, K.C., and *T. E. Williams*, K.C., for defendants, respondents.

GARROW, J.A.:—A great many reasons are given in the notice of appeal why the judgment should be set aside, but it is evident from the course of the proceedings and from the argument before us that the one supreme point Garrow, J.A.

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in the case raises a pure question of fact and not of law, and that point is, did the act of the defendants in putting in the stop-logs in the dam at Carpenter Lake retain from the plaintiffs the freshet-water to the use of which they were entitled, to an extent sufficient to interfere with the process then under way of floating the plaintiffs' logs down stream? If that fact has not been established, no question of law can possibly arise, and the plaintiffs' case must fail.

The burden of proof, of course, rested upon the plaintiffs. This they undertook to satisfy by calling a very large number of witnesses, much of whose evidence, describing experiences in other seasons and other more or less irrelevant matter, is really of very little use. The real matter is confined within narrow compass. The defendants admit putting in the stop-logs. The only dispute is whether they were put in on the 9th May or the 11th. The learned Referee held, upon the evidence, that the weight of evidence upon this point was with the plaintiffs. The learned Chancellor evidently considered it a matter of minor importance whether it was the 9th or the 11th.

My own impression, after reading the evidence, is that the learned Referee's conclusion as to the fact, that they were put in on the 9th, is probably correct, and that the circumstance, bearing as it does directly on the issue, is certainly one of sufficient importance to require it to be seriously considered, of course in conjunction with the other facts in evidence. The learned Referee, however, evidently treated it as crucial, which I think, carries its importance much too far. The real question is as to the probable condition of the spring freshet at the time the logs were placed in the dam by the defendants' servant—was it practically over then, or was it still in sufficient vigour to have accomplished the plaintiffs' purpose if left alone? If it was not, then the act was harmless. And it was, of course, harmless unless it can be said that not only was some freshet-water impounded, but that enough was so impounded as injuriously to interfere with the plaintiffs' operations. It is, of course, a circumstance of importance that the fall of the water and the placing of the logs in the dam synchronise, as it is said by the learned Referee, but not a conclusive, and it may even be a misleading, circumstance, unless the surrounding circumstances are examined with some care.

The circumstance of chief moment is, what was the actual condition of the water in the river for a few days before and immediately after the day when the logs were replaced in the dam, which I will assume was on the 9th? John McKay, the plaintiffs' foreman, was in charge. He says they were into the Thessalon river out of Wood's creek on the 6th May. There was fair water for driving for the first two days. After that it commenced to fall; "we were down to almost nothing at all . . . About the 9th or 10th May, along there." And the plaintiffs' case in this respect, upon the evidence, cannot be put any higher than it is placed by Mr. McKay's evidence.

On the 9th, Mr. Hunt says, he went upstream, leaving camp about 2.30 p.m., according to the evidence of Mr. McKay, the foreman, hunting for water. On the way he met the defendants' witness Tavell, the man who closed the dam. Tavell in his cross-examination says that Hunt told him when they met "that the water was all gone." And Hunt did not, when examined, so far as I can see, deny that he had made that statement. Tavell also said that he closed the dam between one and two o'clock p.m., and at that time very little water was flowing over the sill, not more than an inch, he considered; so little, in fact, as to make it quite impossible that it could have had any appreciable effect on the drive before Mr. Hunt left.

Mr. Hunt's statement apparently agrees in a general way with McKay's statement when he speaks of the water as sufficient only for the first two days, while by the 9th or 10th "along there, they were down to almost nothing at all"—a statement which seems to me to go a long way towards supporting the defendants' contention that the real trouble was not the closing of the dam, but that the spring freshet had practically ceased when the dam was closed.

Carpenter's creek is only one branch of the river Thessalon, and not even, on the evidence, the main branch. In addition, other streams empty into the river below the dam and above where the plaintiffs' logs were, such as Wood's creek and Cassidy's creek, the former slightly larger and the latter somewhat smaller than Carpenter's creek; and, in addition, there is the so-called main or northerly branch, about the volume or strength of which there still seems to be some mystery.

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It would, of course, be nonsense to suggest that only Carpenter's creek carried freshet-water. If there was freshet-water in it, which is the plaintiffs' theory, there must have also been freshet-water in the other branches, all of which would reach the plaintiffs' logs unimpeded, together with the not inconsiderable leakage which, the evidence shews, existed in the Carpenter's creek dam. So that, if something over one-half at least of the alleged freshet was still reaching the plaintiffs' logs, notwithstanding the closing of the dam, the language of both Mr. McKay and of Mr. Hunt, before referred to, would be at least inaccurate.

On the other hand, if the freshet for all useful purposes was then over, as I think, upon the evidence, it was, and the closing of the dam therefore practically harmless, what they deposed to would be quite in line with the other apparent facts.

Meredith, C.J.O. Maclaren, J.A. Hodgins, J.A.

I think the appeal fails and should be dismissed with costs.

MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., concurred.

Magee, J.A.

MAGEE, J.A.:—On the assumption that the plaintiffs in the spring of 1914 had only been able to float what logs they did by the aid of water stored by the defendants in their storage-dams, I would fully concur in the dismissal of the appeal. The evidence as to that would lead me to the opposite conclusion, as it did the trial Judge.

But, in the absence of direct evidence as to the closing of the defendants' dams being the cause of the stoppage of the water, and not the sudden failure of the spring freshets, I do not feel warranted in differing from the result arrived at by my colleagues, though I would have drawn the same inference as the trial Judge in the plaintiffs' favour.

I therefore agree, with considerable hesitation, in the result.

Appeal dismissed.

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BÉDARD v. CORP. OF LOCHABER WEST.

Quebec Court of Review, Archibald, A.C.J., Charbonneau and Demers, JJ. February 12, 1916.

HIGHWAYS (§ V A 2—250) — CLOSING BRIDGE — DAMAGES — LIABILITY OF MUNICIPALITY TO ABUTTING OWNER.

A municipality having the power to close a bridge forming part of a highway is responsible for the immediate damage caused thereby to an abutting owner. The latter is entitled to be indemnified for the loss of access and the losses directly resulting therefrom in connection with the working of his farm.

[Arts. 356, 1053 C.C Que.; Art. 527 Mun. Code, referred to.]

Statement.

REVIEW of the judgment of Chauvin, J., Superior Court of the District of Ottawa, rendered June 16, 1914, which is confirmed.

The plaintiff was the owner of a farm in the township of Lochaber. For more than 28 years his farm was, on the north, connected with the public road by a bridge over a creek, built by the defendant, and this bridge was his only access and exit. On June 27, 1912, the defendant destroyed this bridge. The plaintiff sued the defendant, complaining that he was thus deprived of all communication with the public road, and was suffering damages for an amount of $1,850.

The defendant denied the damage, and alleged that this bridge was of use to the plaintiff only and was in a dangerous state; that, on the petition of many ratepayers, the defendant had adopted a by-law to close that part of the road and the bridge, and open another road to the north-west of the farm; that the plaintiff had access to the new public road, and that the change had been done in the interest of the public.

The plaintiff answered that the procedure for the opening of the new road was illegal and a flagrant injustice to the plaintiff; that it was an abuse of power on the part of the defendant, which had exceeded its jurisdiction; that it was opposed to the interest of the public; that this change in the road had only been made by the defendant to avoid conforming to a judgment of the Superior Court in a case between the same parties, in which the defendant had been condemned to a fine for not keeping that road in a proper condition, and that the defendant had acted by vengeance in suppressing that road.

The Superior Court maintained the action by the following judgment:—

Considering that the defendant, in closing the bridge and that part of road of division No. 1 in virtue of by-law No. 7, dated February 5, 1912, to open another public road at the north-western extremity of the property of the plaintiff, has deprived the latter of the exit which he had on the public road, causing him damages for which he is well entitled to sue;

Considering that this by-law No. 7, closing the road and bridge built 28 years ago, has been adopted without any reason of public interest and to please people hostile to the plaintiff and who had

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no interest in the old or new road, and that the act of the defendant is an unjust abuse of power and injurious to the plaintiff;

Considering that a municipal corporation is responsible for the damages that it caused to riparian owners in the closing of a public road, and more particularly in the circumstances as those in the present case;

Considering that the damages suffered by the plaintiff are the following:—Cost of a bridge and part of a road leading to it on the property of the plaintiff, to obviate the inconvenience arising from the lack of access to the public road, $250; loss on the crop of 1912 of 120 bushels of barley at 48 cents, $57.60; damages accruing from loss of profits on milk and difficulty of transporting milk to the cheese factory, $75.00; making a total of damages amounting to $382.60.

The Court condemns the defendant to pay to the plaintiff the sum of $382.60, with interest from the date the action was instituted, and costs.

Arthur Desjardins, K.C., for plaintiff.

T. P. Foran, K.C., for defendant.

The judgment of the Court was delivered by

Demers, J.

DEMERS, J.:—I cannot admit the principle that from the moment that a corporation is authorized to do something, even when it injures the rights of others, it is not held to any compensation. All the French authors agree on this point. In the exercise of a right, we must not injure the rights of others. In the state of society the right of everyone is necessarily limited by the rights of others. The corporations have no privileges in this respect. They are subject to the civil law in respect to their contracts, quasi-contracts, délits and quasi-délits. Art. 1053, therefore, applies to them, and that is the meaning of the first paragraph of art. 356 C.C. A private Act applies to them in their relation to individuals.

The question to decide is, therefore, this: Is Bedard injured in his rights? He had a right to this road because it was a public road; we must thus treat: "a road which is used as a common place to reach a highway" (3 Proud'hon, Property, No. 820).

It was the only road of the plaintiff. Could the council suppress it purely and simply. No, notwithstanding art. 527 of the Municipal Code. It would have been necessary to expropriate

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the property of the plaintiff. Art. 527 of the Municipal Code must, therefore, be interpreted according to common law. The plaintiff possessed in this road more rights than the public in general. Had Bedard the right to ask that the municipality continue to supply him with a road to give him exit from his farm as before? Undoubtedly. The corporation could remove this road, but it had to make it reach the farm of Bedard without causing him any additional expenses in the operation of his farm. Is this what it has done? Theoretically we must answer yes. Practically it is no, since:—(1) No part of the farm which is cultivated and can be cultivated is on that side. The defendant should have gone up to this latter part of the farm of the plaintiff and leave him the same exit as before. (2) Moreover, this change necessitates, on the part of the plaintiff, the building of a new road on his farm. It is the same as if, instead of leaving a street in front of a house, the town closed it and made it pass on the side, thus obliging the proprietor to change the access to his house. Therefore, front road or way of exit, it is all the same; it affects the enjoyment of the proprietor.

The diversion or change of a road always affects private owners, as well as all changes in streets, but the damages thus suffered are generally not direct nor immediate. Thus a road going up a grade and leading to a village is diverted; what produces a longer route is a remote damage. But I think if we examine the jurisprudence, if we analyze the different cases where it has granted an indemnity, we arrive at this conclusion: the damage must be direct or immediate, or, if we prefer, special, to give a right to an indemnity. If the injury which is complained of is neither direct nor immediate, there is no recourse.

For these reasons, I am of opinion to confirm the judgment *a quo* with costs. *Judgment affirmed.*

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Quebec Court of Review, Charbonneau, Demers and Guerin, JJ. February 12, 1916.

MECHANICS' LIENS (§ III—10)—PRIVILEGE OF MATERIALMAN—PRIORITY OVER PURCHASER.

Under arts. 2013-2013*l*, C.C. Que., no delay is fixed for registration of the privilege of a supplier of materials, and the latter has no priority in respect of his hypothecary privilege over a purchaser of the land who registered his title prior to the registration of the privilege.

[*Brunswick* v. *Courval*, 49 Que. S.C. 50, distinguished; *Carriere* v. *Sigouin*, 33 Que. S.C. 423, 18 Que. K.B. 176; *Lalonde* v. *Labelle*, 16 Que. S.C. 573, referred to.]

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Statement.

REVIEW of the judgment of Chauvin, J., Superior Court, rendered December 24, 1913, which is affirmed.

The action is one with regard to the validity of privilege for supplying materials.

The plaintiff alleges that he delivered to the defendant materials worth $193.63 for a building he was erecting for himself at Montreal. Subsequently, on March 26, 1913, the defendant having sold this immoveable to the *mis-en-cause*, the plaintiff notified the latter of the account due him by his vendor. On April 11 following, the plaintiff registered a privilege as supplier of materials on the increased value brought to the building by his materials, and on the next day he gave a notice accordingly to the defendant and the *mis-en-cause*. On April 14 he took an action against the defendant bringing into the suit the purchaser, and asked for a judgment against the defendant and the acknowledgment of his privilege on the said immoveable.

The new owner, *mis-en-cause*, contested this privilege, alleging that it had been registered 13 days after his own contract of sale had been registered; and that being so the plaintiff could have acquired no privilege.

The plaintiff replied generally as to matters of fact; and also by an *inscription en droit* which was reserved.

On his own behalf, the *mis-en-cause* took an action against the plaintiff in radiation of the privilege above mentioned.

On a motion of the *mis-en-cause* and on consent of both parties, the two cases were consolidated by order of Court to make but one case.

The Superior Court maintained the action of the plaintiff against the defendant for $193.63, but it rejected it towards the *mis-en-cause*; it admitted the defence and the action in radiation of the *mis-en-cause*, and declared that the privilege in question was illegal and null, with all costs against the plaintiff, except those of an action by default against the defendant Gauthier.

Here are the "considérants" of the Superior Court:

Considering that although there is a delay fixed by art. 2013*b* for the registration of the privilege of the workman and others, there is none for the supplier of materials, and that the delay of 3 months granted to the said supplier by art. 2013*i* applies only in the case of materials supplied to a contractor, when the notice

given to the proprietor before the delivery of these materials has the effect of a *saisie-arrêt* by a third party, and that the application of this exceptional provision in matters of privilege cannot be extended to any other case than that provided by the said article;

Considering in consequence, that there is no delay fixed for the registration of privilege of a supplier of materials;

Considering that the nature of this privilege granted by art. 2013*l* to the supplier of materials, differs from the other privileges mentioned in the said article, being styled "a right of hypothec" not having priority over other hypothecary debts registered previously (art. 2013*b*) and no delay being specified for this right of registration of hypothec, the same as for ordinary hypothecs;

Considering that this privilege ranks only according to its date of registration;

Considering that on May 26, 1913, when the *mis-en-cause* Vallée has acquired the property of the defendant Gauthier and has had his title registered, the right of hypothec of the plaintiff Emard was not registered; and that the latter had not conformed himself to the provisions of art. 2013*f* and to art. 2103, and this sale thus affecting the debt of the supplier of the said plaintiff, as enacted by art. 2013*f*;

The Court condemns the defendant, Jean Gauthier, to pay to the plaintiff, Raymond Emard, the sum of $193.63 with interest and the costs of an action not contested;

Rejects the *inscriptions en droit* of the plaintiff, Raymond Emard, and his action as to the *mis-en-cause* Vallée, and

Maintains the action in radiation of the said Adrien Vallée;

Declares the registration of inscription taken by the said Raymond Emard, under No. 241,559, of the Registry Office of the Counties of Hochelaga and Jacques-Cartier, illegal and void;

Orders the registrar of the registry divisions for the counties of Hochelaga and Jacques Cartier to strike off the said inscription for registration, the whole with costs against the plaintiff, Raymond Emard, except the costs of an action by default against Jean Gauthier, as above adjudged.

Monty & Duranleau, for plaintiff.

Sénécal & Gélinas, for *mis-en-cause*.

CHARBONNEAU, J.:—In his factum the plaintiff Vallée complains of the fact that the *mis-en-cause* has taken this second action, Charbonneau, J.

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when, in his defence, he could have obtained the radiation of this registration at the same time as the setting aside of his action. It is possible that in sound procedure the appellant is right and that demand of radiation might be considered as an accessory conclusion of the defence produced against the action to have declared the privilege valid, but this means which could have been the object of a defence against the action in radiation, and which was not invoked in time to obviate the multiplication of costs complained of, cannot be invoked now that the parties, by consent, have joined the cases in order that they be decided by one judgment.

On the merits of the question we have to ascertain if the privilege or hypothec of the supplier of materials must be registered before the sale of the immoveable to a third party in order to keep its value and in opposition to a third person acquiring it.

It results from the law as it is now laid down in the Code after it had been amended, that the privilege or hypothec (it matters not as to the name) of the supplier of materials, must be registered. It is true that art. 2013*a* gives to the supplier of materials a privilege on the increased value of the immoveable. It is true also that art. 2013*a* gives the 5th rank to this privilege, but in the following articles, 2013*b* to 2013*l*, it is stated how this right of preference exists. It is well stated in 2013*b* that the day labourer, the workman, the builder, will have a privilege without registration during the completion of the works, and with registration after the work is done, provided that this registration be made within 30 days, also on certain similar conditions in 2013*c*; 2013*f* indicates specifically that the sale to a third party will not affect his privilege provided the formalities of *a*, *b*, *c*, have been followed, which indicates very clearly that this article only relates to day labourers, workmen and builders. 2013*g* to 2013*l* indicate in what manner the privilege of the supplier of materials exists and must be exercised, as well in regard to *saisie-arrêt* put in the hands of the owner as in regard to the affectation of the immoveable and it results from those articles that this privilege which now bears the name of hypothec, will rank, after its registration, after the hypothecs previously registered.

According to articles 2015 and 2085, privileges take effect with regard to immoveables only if they are registered, save the

exceptions specifically mentioned in the Code by art. 2084 and other special provisions. We have been told that the amendment made to arts. 2013 and 2013*a* had for effect, in adding the claims of the supplier to the other privileges, to assimilate it to the claims of the day labourer, the workman and of the builder, and to give it consequently a privilege without registration during all the time of the construction. But what well demonstrates that this was not the intention of the legislator, is that 2013*b* and *c* were amended and 2013*l* was left intact. It is necessary not to lose sight of the beginning of art. 2013*b*, which is the key of all this additional disposition introduced by 57 Vict. All the rights of preference or of privilege exist in the manner provided; in the articles which were introduced up to 2013*b* inclusively, the privileges are only established in principle. Their existence and the exercise of the privileges which flow from them depend absolutely upon arts. 2013 to 2013*l*.

I would myself be much at sea to tell why the legislature has made this amendment thus, but it would be unimportant to find the solution of this question. From the law as it is laid down now, the privilege of the supplier introduced in 2013 and 2013*a* can only exist by the registration of 2013*l*. As this registration had no determined duration and the law does not attribute to it any retroactive effect, it cannot be opposed to the purchaser who has acquired for value under a title duly registered before. The case of *Brunswick Balke Collender* v. *Courval*, 49 Que. S.C. 50, related to a case altogether different since it is there a question of the privilege of an architect, which was already mentioned in art. 2009, whilst the claim of the supplier is not. It must also be observed that there is not, relatively to the architect, any specific provision as the one found in art. 2013*l* relative to suppliers of materials. We cannot, under the pretext of defining the intentions of the legislature and to better the law, suppress a formal provision which remains on the statute even if it was evident that it was by mere forgetfulness that this provision was not made to disappear. Even in the case of the architect, who would not have under the law as it is, any specified delays for registering, I think he should follow the same rule which has been laid down in the present case, especially in regard to art. 2085, C.C. For these reasons I suggest the confirmation of the judgment in the first instance.

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DEMERS, J.:—Arts. 2013 and 2013*a* say that the supplier of materials has a privilege. Art. 2013*l* says he has an hypothec. Some people have concluded from this that he has two rights, a privilege and an hypothec. This interpretation was rejected in the case of *Carrière* v. *Sigouin*, 33 Que. S.C. 423 and 18 Que. K.B. 176.

Others have maintained that the supplier of materials had but a mere hypothec, an interpretation which some vainly tried to make prevail in the case of *Lalonde* v. *Labelle*, 16 Que. S.C. 573.

The interpretation which conciliates these two articles ought to be adopted. It is a real right of the nature of the privilege and of the hypothec. It is of the nature of the privilege and art. 2094 would be applicable to it; it even prevails against the vendor. It resembles the hypothec in that it does not take priority over hypothecs previously registered. The reason is that it is submitted to the formality of registration (art. 2083, 2013*f*, see Form A of 2103) and that no delay is given to it for this registration. (2083-2130 C.C.).

And since it is so for hypothecs which are a kind of alienation, it is logical to apply the same principle to the case of alienation, art. 2013*f*. In order to protect himself, the supplier should then register immediately.

We have been referred to the case of *Brunswick Balke Collender* v. *Courval*, 49 Que. S.C. 50, in which it seems to have been decided that the architect has a privilege against his creditors as long as he registers in the 30 days provided by art. 2013, although it is not formally mentioned in that article. It is to be noted that the claim of the architect as well as that of the builder only exists when his mandate is accomplished: namely, that the house is completed. We could, perhaps, give this extension to the privilege of the supplier of materials were it not for art. 2013*l*, which is formal.

The case of the supplier of materials is different; the latter's right runs from the time of the supply, and it is probably on account of this that the law makes a distinction. However, it may be the case is settled in the case of the supplier of materials in conflict with the hypothecary creditor, and the decision re *Brunswick* v. *Courval*, *supra*, cannot be followed.

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Quebec Court of Review, Charbonneau, Demers and Guerin, JJ.
February 29, 1916.

TRIAL (§ II C 8—110)—QUESTIONS FOR JURY—NEGLIGENCE.

Negligence is a mixed question of law and fact, and is therefore a proper subject to be determined by a jury under the Court's instructions; their findings, if in accordance with the pleadings and evidence, are final, and cannot be disturbed.

[See also *Security Life Ins. Co.* v. *Power*, 24 Que. K.B. 181; *Montreal* v. *Gamache*, 25 D.L.R. 303, 24 Que. K.B. 312; *McPhee* v. *Esquimalt, etc., R. Co.*, 23 D.L.R. 561; *Porter* v. *O'Connell*, 43 N.B.R. 458.]

Statement.

REVIEW of the judgment of Saint Pierre, J., Superior Court, rendered on the verdict of a jury, April 23, 1913, which is confirmed by the majority of the Court of Review.

Brodeur, Bérard & Calder, for plaintiff.

Laurendeau & Archambault, for defendant.

Charbonneau, J.

CHARBONNEAU, J. (dissenting):—Every time that a Court of Review or a Court of Appeal is asked to adjudge in a case tried by a jury we are referred to art. 501 of the Code of Procedure and we are told: "Do not touch that verdict, the jury is sovereign, absolute, and must be held to be infallible, unless its verdict be completely foolish." It is absolutely what this article says in a little more judicial terms. The law says in effect: unless this verdict be of such a nature that the jury in examining all the evidence, could not have reasonably rendered it. Arts. 498, 501, C.C.P.

It would be an insult thrown at the face of twelve citizens, well selected and who, on simple questions of fact, not being embarrassed by quibbling doctrine, are in a perfect state to judge. But it happens that the law is often mixed with the facts, and the answers of the jury are most of the time not only an ascertainment of fact but an affirmation of law. This is due to the practical impossibility of discerning the facts from the law so as to be able to present questions purely of fact to the jury. Many have worked at this task, as well on the part of the Bar as of the Judges and finally it was found that the results were not satisfactory. We have then adopted stereotyped questions which all essentially comprise matters of fact and law. It is exactly so in the present case. Two accidents happened to the plaintiff, the first one on February 12, 1912, in which accident he broke a bone of his left leg in falling on the sidewalk at the corner of St. Denis and St. Catherine Sts., the second in tripping, his leg still weak, against

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one of the stones of the sidewalk at the corner of St. James and St. Catherine Sts. The jury was asked if those two accidents had in fact happened, which was a simple question of fact. Afterwards, the jury was asked who was to be held responsible, the plaintiff or the defendant, and for what reason and in what proportion. All these questions are essentially mixed and the answers the same. In effect, to arrive at a solution the jury had to find the cause of the accident, which again was a question of fact, but to hold the plaintiff or the defendant responsible, or both in common, it was necessary to declare what were the duties of the defendant with regard to the sidewalk in question and what could have been the duties of the plaintiff in circulating over this sidewalk. This is absolutely and exclusively of law. For my part, I feel perfectly at ease to examine this verdict, the same as an ordinary judgment, without taking into account the injunctions of art. 501. This is, moreover, what has often been done, especially in the case of *Dumphy* v. *M.L.H. & P. Co.* (16 Que. K.B. 527), affirmed by the Privy Council, [1907] A.C. 454. And this is what has been recently done by the same Privy Council in the case of *C.P.R. Co.* v. *Fréchette* (22 D.L.R. 356, 24 Que. K.B. 459), reversing the judgment of the Court of Appeal which had seemed to have abandoned its old doctrine on this subject.

The jury has found that the original accident ought to be placed under the exclusive responsibility of the plaintiff, and as to the second accident which, apparently, could have occurred only from the fact that the leg of the plaintiff was not yet completely cured, it attributes the responsibility, by contribution, to the defendant and to the plaintiff, imputing the two-thirds of the damages to the defendant and the judgment was in consequence rendered for $200. The amount is not considerable, but as was pointed out by the solicitors of the defendant, it is a question here of a serious principle which, laid against the municipal administration would lead to considerable consequences. It is in effect admitted that if the jury has held the city responsible it is because one of the squares of stone of which the sidewalk is built, projected ¾ of an inch above the maximum.

To decide that the city is responsible for this accident is to decide that it is obliged to build and maintain its sidewalks, be they of wood, cement or flat stones and its street crossings without

any projection, not even of ¾ of an inch. It is not a considerable unevenness, especially when we consider that in our public buildings and even in our private houses, the door sills project above the floor at least this difference. And taking into account our climate, the necessities of the roads and street crossings, and the different materials used for the construction of sidewalks and street crossings, the disturbances caused by the wear and traffic, it seems to me impossible to submit the city to such a strict duty, and it is certainly not the duty that is imposed upon it by the law which says that it must keep it sidewalks and roads in a proper condition, with all the care of a good father of a family. A sidewalk is neither a piano cover nor a draughtsman's table. It seems to me that a sidewalk in flag-stones or in wood or even in cement which would have unevennesses of ¾ of an inch, fulfils sufficiently the duties of the municipality with regard to the way it is put down and its maintenance. If we were thinking for a moment that the defendant is a corporation, that it is the whole community, it seems to me that the case would not arise. If, at a friend's place, I give myself a sprain in tripping over the sill of an inside or outside door or on any unevenness on the walking surface of his house, and this, on account of not having sufficiently looked where I was walking, it would be ridiculous for me to sue him for damages and the fate of this action would soon be settled by a jury. The appellant corporation has cited cases where projections even more considerable than the one in question here have not rendered the corporations responsible. The Supreme Court in the case of *Messenger* v. *Bridgetown* (31 Can. S.C.R. 379), has given what I think to be the right principle of the law in saying that the obstruction in question "was not serious or unusual." In the present case this obstruction of ¾ of an inch is neither "serious" nor "unusual." It is a well known fact, that obstructions of this kind, even in summer, and obstructions much more serious in winter are found on all the sidewalks of the City of Montreal and of all other municipalities; and to hold a municipality responsible for these obstructions, either in the maintenance or in the building of the same is to ask an impossible thing, and, in my opinion, purely absurd. It is certainly asking more than the law imposes and we cannot interpret in this sense the obligation of the good father of a family.

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I therefore suggest to dismiss the action with costs notwithstanding the verdict.

DEMERS, J.:—It is a question in this case of a trial by jury. The City of Montreal was held responsible for an accident which happened to the plaintiff on account of the difference in level of ¾ of an inch in one of its sidewalks, at one of the most frequented spots of the city.

We are asked to reverse the verdict of the jury for two reasons:—(1) Because the Judges misdirected the jurymen. (2) Because it is a verdict that a jury could not properly render.

The first objection was not insisted upon. There remains the second. The law states that the presiding Judge at the trial must decide if there is any proof, and that he must state the law to the jury and that the jurymen are alone judges of the facts.

It is unquestionable that there was proof in favour of the plaintiff, but it is said, the question of negligence and fault contains a question of law, and the jury in declaring that there is fault is therefore pronouncing on a question of law, which is of the attribute of the Judges only. If this argument was well founded, it would be necessary to admit that our practice is defective, since in those actions we always ask if there is fault and in what it consists.

Our practice seems to have been approved by the Supreme Court in the case of *Montreal Light, Heat & Power* v. *Regan* (40 Can. S.C.R. 580).

If I understand well our system, it can be summarized as follows: The Judge is the organ of the law, he is bound to decide if the action is well founded in law. In this case, the Judge was bound to tell to the jury (and he has done so) that the City of Montreal was responsible if it neglected to bring to the maintenance of its sidewalks the care of a good father of a family.

In trials by jury, the Judge, in my opinion, is the theorist. He gives the principles of the law; the jury alone applies those principles. The law does not say what facts constitute negligence. The jury are practical men; they alone must say if the defendant has acted with all the care of a good father of a family. This is a question of fact left entirely to the decision of the jury. If the jury says there is fault, it is because it finds that the defendant has not given to its sidewalk, at a spot so much frequented, all

the care that it should have given. This evidently is not a question of law, but a mere question of fact; and it is for this reason that in our questions we do not content ourselves by asking the jury if there is fault, but we oblige them to say in what consists this fault.

If the Judge who presided at the trial had taken upon himself to declare that this difference of ¾ of an inch should not have been taken into consideration by the jury he would have, in my opinion, pronounced on a question of fact.

This point remains: Is it absolutely clear that no jury could reasonably render a verdict against the defendant? In my opinion I cannot arrive at this conclusion. It results from the remarks of the regretted late Judge St. Pierre that there was a great doubt in his mind, but that he believed that it was a case where the jury could pronounce in favour of one or the other of the parties. And in the circumstances, I am not ready for my part to declare that it is absolutely clear that the jury could not render this verdict, and, in consequence, I am of opinion to confirm the judgment *a quo* with costs.

Guerin, J.

GUERIN, J.:—Inscriptions in Review from judgments based upon a jury's verdict for damages are almost invariably urged by the defendant for one or the other or both of the following reasons: (1) Misdirection by the Judge; (2) Excessive damages awarded by the jury.

It is true that in this case on the day of the verdict and the judgment, the defendant, besides its formal objection, put in a special objection,

à tous les deux résumés du juge, en entier, tels que faits en français et en anglais, pour le motif que le juge a mal avisé les jurés.

This objection, however, was not urged at the argument in Review, and quite properly so. The address was from the lips of the late St. Pierre, J., whose recent loss we all deplore; it was a simple and clear explanation of the law which should guide the jury in arriving at a decision, as well as a fair summing up of the evidence: C.P., arts. 472, 474, 475.

As to the amount of the damages awarded, the defendant states that the plaintiff being a miner who was not working on a salary, has not proved any definite damage for loss of time. On the excess of the award for damages, however, the defendant

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is not too insistent. Of the $2,000 claimed, $200 only were awarded to include loss of time, physical pain present and future, etc. The modesty of the amount awarded as damages is no argument against the verdict. In fact it is not so much the excessive damages of which the defendant complains as the costs which include the costs of the jury. The defendant's objection as to the costs would be more cogent, if before the trial began, or during the 5 days it lasted, a reasonable tender had been made to the plaintiff.

In choosing to have his case decided by a jury, the plaintiff exercised a legal right: C.P., art. 422. The option for a jury having been thus made, the decision was by law left to the jury alone as to whether the plaintiff suffered damages through the fault of the defendant and to what extent. The jury were an essential part of the tribunal, and there is nothing unusual in that part of the judgment which condemns the defendant to pay the costs of the jury trial, which do not vary according to the amount of the award: C.P., art. 549; *Dessaulles* v. *Taché*, 8 L.C.J. 342; *Clough* v. *Fabre*, 9 Que. P.R. 276.

It is, moreover, a well recognized rule that our Courts of Appeal will not disturb a judgment as to costs alone. Unless therefore the defendant is entitled to a reversal or a modification of the award itself of which the costs are but incidental, the judgment as regards the costs should stand.

Whether the judgment for $200 should be maintained, regardless of the costs, is the proposition this Court must decide. The main, if not the only difficulty in the case arises from question No. 9 and the jury's answers, they are as follows:

Q. 9: Was the said fall the result of the fault of the defendant, and if so, in what did the said fault consist? A.: Yes, in allowing a flag-stone protruding three-quarters of an inch higher than the others. (Unanimous.)

It has been strenuously argued in the past by some of the brightest minds of this Court, that such a finding cannot be made by the jury, that the jury may determine that certain facts are proved, but that the Court alone may decide that such facts whether of omission or commission constitute fault or negligence. In 1906, Taschereau, later C.J., in the K.B. spoke *dissentiens* as follows in the Court of Review: *Regan* v. *M.L.H. and P. Co.*, 30 Que. S.C. 104, 115:

Il est élémentaire, dans la doctrine, que ce qui constitue en loi la faute,

la négligence ou l'imprudence, n'est pas du tout du domaine du jury. Le jury n'a pas mission de dire, et on ne doit pas lui demander s'il y a faute. . . . Lorsqu'un accident s'est produit, on ne doit pas laisser au jury la détermination de la faute; on doit simplement lui soumettre un état de faits, on doit lui demander s'il est vrai ou non que tel fait est établi, que tel acte d'omission ou de commission a été prouvé, et la Cour, sur ces réponses du jury dira, comme tribunal, s'il y a quelque part faute, négligence ou imprudence. Le tribunal n'est pas lié par la déclaration d'un jury à l'effet qu'il y a faute, négligence ou imprudence dans tel ou tel acte; le jury ne doit et ne peut que constater l'acte ou le fait, et la Cour décide s'il y a là faute. En droit donc, tout ce que l'on peut légalement demander aux jurés, c'est de dire si, dans leur opinion, tel accident est dû à tel fait ou à telle omission, laissant à la Cour de décider si tel fait ou telle omission constitue faute, négligence ou imprudence.

This question No. 9 as well as the other questions submitted to the jury are, however, in exact conformity with the questions as to negligence in *Bell* v. *Montreal Lithographing Co.* which were fixed by Davidson, our late Chief Justice, of S.C. and confirmed unanimously by the King's Bench in 1909, 15 R. de J. 190, *coram* Trenholme, Lavergne, Cross, Archambeault, and Carroll, JJ. The report of this judgment is rather short, and I therefore give it more fully, as found in the *Montreal Gazette* report and preserved with the records of the Court of Appeals:

This appeal is from an interlocutory judgment of the Superior Court, rendered on December 9, 1907, by Davidson, J., fixing the facts to be submitted to the jury in an action in damages brought by the plaintiff as a result of damages suffered by his minor daughter.

The appellant contended that the questions should not be as to whether the accident occurred through the fault or negligence of the defendant, seeing that fault or negligence involves a question of law not to be determined by the jury, but that the questions should be as to whether the accident occurred through the acts or omissions of the defendant, this being purely a question of fact. Only in this way can the provinces of law and of fact be kept distinct. The appellant claimed that the questions as drafted prejudiced the position of the defendant.

Considering that the forms of the questions fixed for the jury in this cause, and complained of by the appellant are forms sanctioned by long usage in the Courts of this Province, and are also sanctioned by the Supreme Court of Canada and the Privy Council, and operate no injustice to the appellants,

Not only the questions submitted to the jury are unobjectionable and operate no injustice to the defendant, but negligence may now be only academically discussed as a mixed question of fact and of law. In the light of our highest jurisprudence, negligence is a fact for the jury. In *Montreal Light, Heat & Power Co.* v. *Regan*, 40 Can. S.C.R. 580, Idington, J., with a majority of the Court affirming the verdict, states:

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It was urged upon us that legal negligence is a mixed question of law and fact and that the jury ought not to be allowed to pass upon it, but merely find the facts upon which the Court should pass. This sort of objection has been in a former case ineffectually brought before this Court.

On the same occasion Duff, J., expressed himself as follows:

More than once the Judicial Committee of the Privy Council has said that the question of negligence under the law of Quebec is a question of fact for the jury.

He then cites *Lambkin* v. *South Eastern R. Co.*, 5 App. Cas. 352, and *Tobin* v. *Murison*, 5 Moo. P.C. 110, 126.

But the defendant urges that the flag-stone complained of only protruded three-quarters of an inch over the others, and that the city should not be condemned for such a trifle.

In the defendant's factum, it is stated that in spite of all the care and attention of the city's employees, it was impossible to discover this small unevenness, but Gagné, one of the defendant's employees, states in his deposition, quoted in the defendant's factum, that these small inequalities of level exist almost everywhere on these kind of sidewalks. However trifling it may have been, the city had it cemented over after the accident. It is evident that if the city had not omitted to perform this trifling act of pasting a little cement, the accident would not have happened. At best the sidewalk was not in a state of order; this unevenness was an imperfection against good workmanship. By allowing the sidewalk to remain so, the city omitted to do something and the jury found this omission of sufficient gravity to constitute negligence. The length of the case vouches for the fact that the verdict was not arrived at unconsiderately; unanimity prevailed in the award.

The members of the Court are not called upon to determine what they or each one would have decided had the case been submitted in the ordinary course without a jury. The jury having found on the facts, shall the verdict stand? It is to be observed that a verdict is not considered against the weight of the evidence, unless it is one which the jury, viewing the whole of the evidence could not reasonably find: C.P., art. 501. The record does not shew that the jurors were influenced by improper motives, nor does the Judge's charge shew that they were led into error: C.P., arts. 502, 508.

A judgment different from that of the trial Judge could only be rendered in favour of the defendant: (1) If the facts found by

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the jury require a judgment in the defendant's favour, or if the trial Judge erred as to the real effect of the verdict; (2) If the allegations of the plaintiff were not sufficient in law to maintain his pretentions; (3) If it were absolutely clear from all the evidence that no jury could be justified in finding any verdict other than one in favour of the defendant: C.P., art. 508.

The record does not shew that any one of these eventualities has happened, and I am therefore of opinion to confirm the judgment of the first Court with costs against the appellant. *Vide* also *Metropolitan Railway* v. *Wright*, 11 App. Cas. 152; *Solomon* v. *Bitton*, 8 Q.B.D. 176; *Fraser* v. *Drew*, 30 Can. S.C.R. 241. *Judgment affirmed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 14, 1916.

CONTRACTS (§ II C—140)—TO DELIVER SHARES—TIME—COMPANY NOT FORMED.

From the nature of the contract and the surrounding circumstances, an agreement to give cash and shares in a company to be afterwards formed in payment for mining areas, is not broken by a failure to deliver the shares if the formation of the company does not take place; it was an implied condition of the contract that the shares should come into existence. (Idington, and Anglin, JJ., dissenting.)

[*Johnson* v. *Roche*, 24 D.L.R. 305, 49 N.S.R. 12, reversed.]

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia (24 D.L.R. 305, 49 N.S.R. 12), varying the judgment in favour of the plaintiff at the trial by awarding substantial in lieu of nominal damages.

Rogers, K.C., and *Ralston*, K.C., for the appellant.

Mellish, K.C., and *Allison*, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The plaintiff in the action claimed $16,000 damages for failure to deliver $17,000 of common stock of the Margaree Coal and Railway Co., Ltd., pursuant to an agreement dated November 5, 1909. To the knowledge of the parties there was no such stock in existence. It may be supposed that they expected the company would shortly be in a position to issue it; difficulties, however, arose in raising the necessary capital and the company has never been organized.

A careful examination of the record has convinced me that it must be assumed the parties to the agreement declared upon only intended to bind themselves on the condition that the company would be completely organized and the defendant placed

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in a position to deliver the stock. I am satisfied that Roche never intended to bind himself personally and that Johnson never expected or intended that he should.

It is well known that there can be no sale of goods which have not at least a potential existence at the time of the contract of sale. Shares in a company are not goods, but rather in the nature of choses in action. I do not think, however, this can make any difference.

Can the respondent claim damages for breach of a contract to deliver such non-existent shares which it is obviously impossible for the appellant to do?

The case is different from that of a contract to deliver so many goods of a particular kind where no specific goods are to be sold, for then the contractor may be made liable in damages for breach of his contract. But in *Taylor* v. *Caldwell*, 3 B. & S. 826, it was held that:—

> Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

If, in cases where the particular specified thing is in existence at the time when the contract is made, a condition is to be implied that it must continue to exist at the date for fulfilment, much more must such a condition be implied where the thing is not in existence at the date of the contract and both parties know that, unless and until it does come into existence, the contract will be impossible of performance.

Taylor v. *Caldwell*, 3 B. & S. 826, has been followed in later cases and notably in that of *Howell* v. *Coupland*, 1 Q.B.D. 258, where the specific thing contracted for was not in existence at the date of the contract and it was pointed out by Mellish, L.J., that this could make no difference in the application of the principle that if the thing perishes before the time for performance the vendor is excused from performance by the delivery of the thing contracted for.

If a party to a contract is relieved of his obligation to deliver

where the goods, though existing at the time of the contract, have been subsequently destroyed or where, though non-existent at the time of the contract, they have subsequently come into existence and been destroyed, much more it would seem is he entitled to relief if the goods never come into existence at all. It seems indeed almost necessary in such case to imply a condition in the contract that the goods must come into existence, for no man could be supposed to bind himself to such an impossibility as the delivery of a non-existent thing.

The trafficking in shares of a company which has no existence seems a highly undesirable practice and one which I think may well be limited as far as possible, certainly to the extent of not holding the contractor liable in damages for failure to deliver a particular specified thing which to the knowledge of both parties must be impossible at least until the thing comes into existence. I think this disposes of the only point raised in the action, though it may leave open certain questions between the parties arising out of the transaction to which it relates; these cannot be properly disposed of here.

The appeal should be allowed and the action dismissed with costs.

Davies, J.

DAVIES J.—This appeal is from a judgment of the Supreme Court of Nova Scotia varying the judgment of the trial Judge, who had awarded plaintiff nominal damages and remitting the case back to a referee for the assessment of such damages as the plaintiff might by further evidence be shewn to have sustained by reason of the breach of the defendants' obligation under the contract to deliver the plaintiff certain shares in a coal company to be organized.

Drysdale and Longley, JJ., dissented on the ground that no evidence had been given as to the value of the stock for failure to deliver which the action was brought and no attempt was made to put a value upon it and that the trial Judge was right under these circumstances in awarding nominal damages only, but at the same time yielded their opinion to that of the majority and agreed to the reference.

The contract upon which the action was brought reads as follows: (see 24 D.L.R. 306).

The right of the plaintiff to maintain the action depends upon

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the true construction of this agreement. If it was an absolute and unconditional contract to deliver the stock as the learned trial Judge held and the Court *en banc* confirmed and there was a breach of it on defendant's part, the only question remaining would be whether the Court *en banc* was right in remitting the case back to a referee to take further evidence and assess the damages.

In the view I take of the whole case and the proper construction to be put upon the contract, it is not necessary to discuss the reference back for assessment upon further evidence to be taken on the question of damages.

I am of the opinion that the contract is not an absolute and unqualified one and that the defendant's obligation to deliver the stock was one dependent upon the coming into existence of a fact anticipated and hoped for by both parties, namely, the success of the Margaree Company in organizing and financing its undertaking in England or elsewhere and in floating its bonds for £40,000 on the market.

The trial Judge said:—

> I have before me a contract absolutely clean cut, plain and simple on its face and without any ambiguity or room for conjecture or doubt as to its meaning. I must be guided by the plain, literal meaning of the words used, and I cannot go counter to them, even though I may think it very likely that both parties at the time contemplated the delivery of the stock when the company was on its feet.

But with the greatest possible respect, I think the Judge had before him much more than that. He had matter and facts which made it essentially necessary to be considered in determining what was the real contractual obligation of the defendant, what it was the parties were contracting about, and what they each had full knowledge of and what under such considerations was the real intention of the parties as expressed. The substance and reality of the matter being dealt with and the real nature of the transaction have to be considered before the meaning of the defendant's obligation can be fairly determined.

The evidence shewed conclusively that the promoters of the Margaree Coal and R. Co., Ltd., had been negotiating for months in England for the financing of their undertaking; and the sale of their bonds to the extent of £40,000, sterling, was to enable them to operate their mines and to construct a railway from their coal lands to tide water, and the necessary terminals and that

the floating of these bonds was known by both parties to the contract to be a vital and essential necessity for the success of the undertaking.

Johnson, the plaintiff, it is true, says substantially that when he signed the contract both defendant and Morrison, the active promoter of the company, told him that the stock had been actually underwritten.

The defendant and Morrison positively denied that anything of the sort had been told Johnson and the trial Judge accepted their testimony.

That testimony was to the effect that negotiations for the financing of the company were proceeding satisfactorily in London, and that it was hoped they would be successful.

Under the facts as found by the trial Judge I cannot believe that any such absolute contract as was contended for ever was intended or that the contract entered into was such.

Such a construction really amounted to a guarantee on Roche's part that the £40,000 required would be forthcoming within the 6 months and the evidence satisfies me that no such intention ever existed or was thought to exist between the parties.

I agree with the trial Judge and the Court *en banc* that the shares which it was proposed at one time to issue to Johnson were not the shares the contract called for and that both parties intended. In the literal construction, however, which is sought to be put upon the contract, but which I do not accept, there is much to be said in favour of the view that these shares offered to Johnson were a fulfilment of Roche's contractual obligation.

Johnson, however, from the first objected and refused to accept any shares other than those in a fully organized company which had been financed so as effectively to carry out its undertaking.

If he had an unqualified contractual right to such shares then I think he had a right to substantial and not nominal damages and that the judgment below was right.

Holding the view, however, of the proper construction of the contract I have above expressed I do not think the plaintiff has succeeded in proving any cause of action.

The conditions which he himself says governed and controlled the issue of the shares he was to receive never came into exist-

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ence. No fault was or could be imputed to the defendant for this and Roche's contractual obligation was not, therefore, broken.

Any remedy the plaintiff may have under the contract (on a return of the $11,000 cash paid to him) to have his interest in the coal areas restored him are not affected by this judgment.

The appeal should be allowed and the action dismissed with costs.

Idington, J.

IDINGTON, J. (dissenting):—The appellant agreed with the respondent's husband to buy 4 square miles of coal lands for the price of $11,000 in cash and $17,000 of common stock of the Margaree Coal and R. Co., Ltd., to be delivered within 6 months from the date of the agreement.

This agreement was so far fulfilled that the lands were transferred to appellant and the cash paid, but the stock has never been delivered. The respondent later on acquired the title to this agreement and right to sue for its breach.

I shall not enter upon the wide field of what is the correct measure of damages the appellant should pay. I am quite clear the Court below is right in holding that the damages are more than nominal and entitled to refer the assessment thereof to a referee.

Notwithstanding a most elaborate argument well presented, there is really nothing more in this appeal.

I may be permitted respectfully to say, however, that, after paying the closest attention to the argument, it seemed to me a setting up men of straw to knock them down.

The fact that the respondent's husband may have seemed to imagine he was entitled to have the common shares of a company which had not only got organized, but also been so far successful in its operations as to float an issue of bonds, seems beside what we have to deal with.

The referee may have to consider all that, in order to determine whether or not in light of the surrounding circumstances the contract, so far as relative to the kind of common stock to be given, by implication reached so far and whether, in assessing damages for its breach, he can hold them, if assessable at all, properly based on such implications, and thus to have been within the contemplation of the contracting parties. So far as we are concerned, that is not the question before us. All we have to deal,

with involves only the question of whether or not such stock as offered, being that of an unorganized company issuing so much paper of doubtful legality and no value, can reasonably be said to have been an offering of what was within the contemplation of the contracting parties.

I have no hesitation in answering it was not. If it had been, there was no possible meaning in providing 6 months for the issuing and delivery thereof.

Between that extreme and the other which appellant may claim, there is a wide field for the referee to deal with.

The Court below might well, if it had seen fit, have defined the proper measure of damages, but how can we say, in face of the judgment of this Court in the recent case of *Wood* v. *The Grand Valley R. Co.*, 22 D.L.R. 614, 51 Can. S.C.R. 283, that an imperative duty in law rested upon that Court to have laid down the limits within which the referee should proceed?

That case presents an entirely different state of facts from this, but the principles of law applicable thereto are closely analogous to, if not absolutely identical with, those which must govern the referee in proceeding herein.

In that case, I felt that the Divisional Appellate Court for Ontario, in order to save needless expenses and avoid the possibility of a miscarriage in the conduct of the reference, might have been well advised in more accurately defining the legal grounds upon which the referee should proceed and the limits of the damages to be allowed.

Unfortunately, I stood alone and must now bow to the decision of the Court and say that so long as there is a case of damages to be considered by a referee there is no error in the judgment now appealed from.

There is something which might be said relative to the attitude of Johnson in the demands he made upon appellant in its bearing upon this respondent's right to recover. If it had appeared that he, so clearly in his own right or in right of what he was authorized by respondent as assignee, had presented his or her demands, in such clear-cut shape as to absolve appellant from proffering anything but what he did in discharge of his obligation, then he was thereby released from further attempts to satisfy the claim.

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The whole evidence bearing upon such an issue, when fairly read, does not justify such a contention.

Indeed, such contention is not pleaded, yet it was only, if resting thereon, that the evidence referred to on the subject could be made to serve the defendant in law.

The appeal should be dismissed with costs.

DUFF, J.:—The litigation which led to this appeal was instituted by the respondent for the purpose of enforcing a certain agreement, dated November 5, 1909, between her husband and the appellant, under which certain coal areas in the county of Inverness, N.S., were to be transferred to the appellant in consideration of a present payment of $11,000 and

$17,000 of the common stock of the Margaree Coal & Railway Company, Limited, said stock to be delivered within six months from the date hereof.

The Margaree Company was incorporated in the year 1903-1904, with a nominal capital of £500,000 and with power to incur indebtedness to the extent of £600,000. The plan of the promoters was that the company should acquire certain coal areas in Inverness, 48 in number, to develop and work these areas, and for that purpose to construct a railway about 50 miles in length connected with the Intercolonial Railway and with shipping points. It was intended that in the usual way the property should be paid for partly in cash and partly by the transfer of fully paid-up shares, the necessary capital being procured for the purchase of the areas and for construction and development by sales of bonds and shares.

The appellant, who appears to have been the moving spirit in the enterprise, obtained an option from Johnson on his four areas in 1907. Shortly after that the persons interested in the areas, the promoters, pooled their interests, a trustee being appointed and options and transfers in escrow of the leases being given to the trustee. The option on Johnson's areas was extended from time to time until, in 1909, Johnson, being pressed for money, urged the respondent to take over his areas at a cash price, and eventually the agreement above mentioned was arrived at. In 1910, before the expiration of the six months within which the shares were to be delivered, under the literal terms of the agreement, Johnson made an assignment for the general benefit of creditors, and some months afterwards the assignee, with the assent of Johnson's principal creditors, transferred Johnson's

rights under the agreement to Mrs. Johnson, the respondent, for the consideration of $100. Johnson's estate appears to have been hopelessly involved, and it is quite evident, I think, that his rights under the agreement were not regarded by the competent businessmen, who at that time considered the matter, as having any present realizable value. The efforts of the promoters to obtain capital in England and France from time to time appeared to them to be on the point of succeeding and in the summer of 1911 Mr. Morrison, one of the promoters, went to England in the full expectation of succeeding in obtaining the necessary capital; he did not succeed, and at the time of the trial the efforts of the appellant and his associates to obtain adequate capital had produced no result.

In the meantime Johnson, on behalf of his wife, had called upon the respondent to perform his agreement by delivering shares, the first demand having been made in the beginning of 1911, about eight months after Johnson's assignment to the trustee for creditors. There were several interviews between Johnson and the respondent and between Johnson and Mr. Morrison on the subject, at which Johnson appears to have been informed that shares would be allotted and transferred to him if he insisted upon it. Johnson always, however, assumed the attitude that under the agreement he was entitled to shares in a company furnished with capital for carrying on its operations. There is considerable variety in the form of expression used, but I think, according to the fair reading of Johnson's own evidence, that is the view of his rights under the agreement which he was putting forward and insisting upon at that time. He says explicitly he would not have accepted shares without being satisfied that the company was properly organized and financed. A correspondence ensued between the appellant and Mr. Allison, the respondent's solicitor, in which a demand was made, on behalf of the respondent, for payment in money of the amount of the face value of the shares, and the action followed.

The controversy reduces itself to two questions or rather falls into two divisions. First, it is necessary to consider the legal effect of the agreement of November 5, 1909. Several views have been put forward. On the part of the respondent it is contended, and the contention seems to have been accepted by the Chief Justice in the Court below, that the appellant's undertaking was

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something more than an undertaking that could be satisfied by the delivery of the paid-up shares in the Margaree Company validly allotted and issued. The parties, it is said, did not contemplate the allotment of the shares in the payment of the purchase price of any of the 48 areas, the titles to which had been pooled, until the company had procured the necessary capital to enable it to purchase the areas under the terms of the pooling agreements and to enable it to develop the properties and put the whole undertaking into operation. That is, no doubt, the view, though he somewhat crudely expressed it, which Johnson had in his mind when he refused to accept the shares offered by the appellant, and that is, no doubt, the view intended to be expressed in the letter of July 31, 1911, written on behalf of the respondent by the gentleman who was then acting as her solicitor.

On behalf of the appellant alternative constructions are advanced. First, that, if the view just outlined correctly interprets the agreement, that can only be upon the theory that the real nature of the arrangement between Johnson and the appellant was that Johnson, in addition to the sum of $11,000 cash, was to share in the fruits of the promotion of the company in the ratio of $17,000 to the par value of the aggregate of shares allotted to the proprietors according to the terms of the pooling arrangements. And one result of this is said to be that the obligation to deliver must be subject to a condition that the promotion of the company should be brought to a successful issue. The alternative construction is that the "$17,000 of the common stock" of the Margaree Company is a description which is fully answered by shares of the par value of $17,000 validly allotted and fully paid up; but that the agreement, being an agreement for the sale of the land, the stipulation as to time is not of its essence, and that a term should be implied to the effect that delivery of the shares should be exigible only after the lapse of a reasonable time for completing the contemplated purchase by the company of the property of the promoters.

There are arguments in favour of every one of these rival constructions of considerable plausibility; but, having weighed them all, I have not had much difficulty in concluding that, on the whole, the balance is definitely against the first.

There are three circumstances to consider in testing these con-

structions. First, there was no legal obstacle in the way of allotting fully paid up shares in exchange for the payment in cash of their full value at the time the agreement was entered into or at any time down to the trial; and, consequently, whether capital was obtained or not, sufficient for the purchase of the properties and the working of the company's enterprise, the agreement was at all times capable of being performed according to its literal terms.

Secondly, the appellant, no doubt, as well as Johnson, fully expected that the efforts of the promoters to obtain capital would be successful within the period named in the agreement, six months from the date; and this delay, it may be assumed, was intended for the protection of the appellant in order to avoid the embarrassment certain to arise in connection with the issue of the shares and the transfer of them in payment for one of the properties while the promotion of the enterprise remained incomplete.

Thirdly, the sale was brought about by the appellant's desire to accommodate Johnson, who was pressed for money.

In these circumstances is there any justification for implying a term, as in the respondent's proposed construction, by which the appellant warranted that sufficient capital would be obtained within the time mentioned or indeed at any time? The principles upon which, in transactions of this kind, the Courts act, in implying a term not found expressed in a contract, have been stated in various ways. It has been said, for example, that the law will imply a term obviously intended by the parties and necessary to make the contract effectual, that is to say, where the written contract, as expressed in writing, would otherwise be futile: *per* Bowen, L.J., in *Oriental Steamship Co.* v. *Tylor*, [1893] 2 K.B. 518, at 527. Lord Watson has put the matter thus (and it is perhaps the most practical way of stating it) in *Dahl* v. *Nelson, Donkin & Co.*, 6 App. Cas. 38, at 59:—

> I have always understood, that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and when one or other

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of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

It is necessary to add, however, a reference to the warning of Lord Esher, in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at 491, the effect of which is that it is not sufficient that the suggested stipulation should appear to be reasonable or that it should appear to be reasonable to imply such a stipulation; the Court must be satisfied that the implication is a necessary one, that is to say, that it must be presumed that both parties, if the matter had been brought to their attention would, as reasonable men, have insisted upon it.

I am by no means convinced that if the point had been raised, Johnson would have insisted upon any warranty; indeed, I think it highly improbable, in view of the fact that the appellant was buying Johnson's property at Johnson's solicitation and mainly for Johnson's accommodation, that Johnson would have thought of exacting such a stipulation. He knew that the appellant's interest in the promotion was much greater than his and that no effort would be wanting on the appellant's part; and I see not the slightest ground for inferring that he would have called upon the appellant to warrant by contract the success of his efforts. As to the appellant, there was nothing in the circumstances likely to suggest to any reasonable man in his position (inconveniencing himself to do Johnson a favour) that he ought to undertake the burden of such a stipulation.

There is, I think, more plausibility in the contention that both parties to the agreement in question contemplated a transfer to Johnson of shares allotted to the appellant by the company in payment of the purchase price of Johnson's areas in accordance with the terms of the pooling arrangement; a transfer which could only take place when the property, as a whole, had been taken over by the company. That is what the parties unquestionably had in view. And if the contention on behalf of the respondent, that I have just been examining, were to be accepted, it would seem to follow almost as a corollary that the appellant's undertaking to transfer should not be exigible until the property had been taken over by the company. On that footing the case

would be well within the settled principle that where, from the nature of the contract and surrounding circumstances, it is clear that the contract is based upon the assumption by both parties that some condition or state of things going to the root of the contract and essential to its performance should be in existence, the non-existence of such condition or state of things when the time for fulfilment has arrived affords in general an answer to a action upon the contract. (*Taylor* v. *Caldwell*, 3 B. & S. 826, 32 L.J.Q.B. 164; *Krell* v. *Henry*, [1903] 2 K.B. 740, 72 L.J.K.B. 794; *Chandler* v. *Webster*, [1904] 1 K.B. 493, at 499, 501, 73 L.J.K.B. 401; *Re Hull and Lady Meux*, [1905] 1 K.B. 588, 74 L.J.K.B. 252; and *cf. Herne Bay Steamboat Co.* v. *Hutton*, [1903] 2 K.B. 683, 72 L.J.K.B. 879.)

I do not find it necessary to decide definitely whether or not this is the right view of the agreement before us. I have come to the conclusion that, whether this view of the agreement or the second of the alternative constructions presented on part of the appellant be accepted, the respondent must fail in her action.

The stipulation as to delivery within 6 months is obviously not of the essence of this contract. Both sides have pressed the contention that the contract contemplates a transfer of shares allotted in payment of coal properties to be taken over by the company. Having regard to the circumstances already adverted to and to the subsequent conduct of the parties, which may, I think, be looked to for assistance in interpreting the contract, the proper conclusion is that both parties must have intended that the appellant was to have a reasonable time with reference to the nature of the business he was engaged in before being called upon to deliver the shares, and that the parties were contracting upon that footing.

Accepting this construction of the agreement, then, has there been any breach of which the respondent is entitled to complain? The facts I am about to state are, I think, sufficient to shew that down to the time when, some months prior to the commencement of the action, the respondent, through her solicitor, demanded money in lieu of shares, there had been no breach on the part of the appellant and nothing entitling the respondent to declare that by reason of the appellant's conduct the contract was rescinded.

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The primary facts are really not in dispute, but it is necessary to notice them at some length in order to consider the legal consequence of them. I have already mentioned that the respondent, through her husband, had again and again declared that she would not accept shares in the coal company, even although fully paid up, until it appeared that sufficient capital had been raised to set the company in operation. That position was reiterated by the respondent's husband in his evidence given at the trial, in which he explicitly declared more than once, with slight variations of phraseology, that he would not have accepted shares until that condition had been satisfied. It is necessary, however, to refer to some communications which passed between Mr. Allison, the respondent's solicitor, and the appellant. In August, 1911, Mr. Allison called upon the appellant and Mr. Morrison, and made then, as he says, an unconditional demand upon the appellant for the delivery of the shares which, by a letter of July 27, 1911, addressed to the gentleman who was then acting as her solicitor, the appellant had offered her. This demand was not pressed, Mr. Allison being informed by the appellant and Mr. Morrison of Mr. Morrison's contemplated visit to Europe, and the expectation of both of them that a successful flotation would result. Mr. Allison was informed that the shares would be delivered if he insisted upon it, but that this would be a source of embarrassment; and for this reason the demand was not pressed, the respondent agreeing to await the event of Mr. Morrison's efforts.

One is entitled here, I think, to infer (it is not in the least inconsistent with the general effect of Mr. Allison's evidence) that the respondent acted in consenting to wait, with a view to her own rather obvious interest that the prospects of a successful flotation should not be impaired as the result of her importunities. The respondent did not move again until February 19, 1912, when a letter was written by Mr. Allison demanding not the shares, but the face value of the shares in money. This letter was followed by a letter of February 29, in which the respondent explicitly refused to accept shares and reiterated her demand to be paid the face value of the shares as damages. The conclusion to which I have come is that, after the interview of August, 1911, considering all the circumstances, the respondent was not entitled without some further intimation to the appellant to treat a failure

to deliver upon some particular date as a breach of contract on the part of the appellant entitling her to treat the contract as rescinded; and, in any view, the attitude assumed by the respondent in the letters of February 19, 29, March 2, and June 8, and at the trial absolves the appellant from anything like a formal tender of the shares or the production of the shares in Court.

The appeal should be allowed and the action dismissed with costs.

Anglin, J.

ANGLIN, J. (dissenting):—The coal areas covered by this agreement were, immediately upon its execution, conveyed by W. H. Johnson to the defendant, and the $11,000 cash was thereupon paid to Johnson. The shares have not been delivered. The flotation of the Margaree Coal Co. has not yet been effected, difficulties hitherto insurmountable having been encountered in making the financial arrangements deemed necessary, and at the present time there appears to be no prospect of a successful flotation of the company. The plaintiff, who is the wife of W. H. Johnson, purchased from his assignee for creditors his interests under the agreement with the defendant.

After several extensions of the time for delivery of the shares had been assented to, the plaintiff finally called upon the defendant to carry out his agreement; and she brings this action for damages for his failure to make delivery of the $17,000 of shares.

In order to determine the rights of the parties it is essential to ascertain what their bargain was. Two questions arise as to the meaning and effect of the writing to which they committed it. The first question is: What kind of shares did W. H. Johnson stipulate for and William Roche undertake to deliver—shares in a company merely chartered, without capital or property, and with no prospect of being in a position to commence operations within any reasonable time, or shares in an organized company with sufficient capital provided for the development and prosecution of its undertaking and having its operations already begun, or being in a position immediately, or practically so, to commence operations? The second question is: When was delivery of the shares made exigible—at, or within a reasonable time after, the expiry of the 6 months named in the writing, or only if and when the defendant and his associates should succeed in financing the

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company and putting it in a position to commence active operations?

By the judgment at the trial it was determined that the shares contracted for were shares in a company "on its feet"—adequately financed and ready to prosecute its undertaking—that the defendant had contracted to deliver such shares not if and when flotation should take place, but within six months or a reasonable time thereafter, and that there had been a breach of this contract by the defendant entitling the plaintiff to damages. But because he deemed the evidence insufficient to enable him to assess such damages, the learned trial Judge held that the plaintiff could recover only nominal damages. On appeal by the plaintiff, the full Court held him entitled to substantial damages, indicated the basis on which they should be assessed, and directed a reference to fix the amount. From that judgment the defendant appeals.

In order to know what the parties intended respectively to stipulate for and to undertake, all the terms of the writing, the circumstances under which they contracted, and the interpretation which their conduct shews that they themselves put upon their agreement must be taken into account.

The plaintiff alleges that the intention of the parties was that her husband should receive shares in a company sufficiently financed to be ready to begin active operations, and that the defendant undertook to deliver such shares to him within 6 months. By his plea the defendant asserts that delivery of the shares was to be made only upon completion of the financial arrangements of the company and when it should be ready to begin operations, and, alternatively, that if the plaintiff was entitled to the delivery of any shares before the completion of financial arrangements and before the company was ready to commence operations, her only right was to receive shares issued under sec. 10 of the incorporating statute, that she refused to take such shares when offered to her, but that he is still ready and willing to bring them into Court; and he submits to such order as the Court may see fit to make in respect to them.

The evidence seems to establish that the plaintiff and her husband were more than once informed that they could have shares of the kind last mentioned. They always took the position that they would not accept such shares as they were not

what they were entitled to. If shares in a company possessed neither of the money nor of the property requisite for its enterprise were what the plaintiff's husband had agreed to take, the defendant might properly ask that this action should be dismissed upon his carrying out the offer of delivery made in his statement of defence. When the plaintiff and her husband refused to accept such shares, however, the defendant did not take the stand that they were not entitled to anything else. On the contrary, he urged that they should allow further time for the financing, in order that shares in a company ready to operate might be available. There was more than one extension of the time for delivery agreed to under these circumstances.

But the terms of the contract themselves perhaps furnish an argument even more cogent in support of the view that the parties were bargaining for shares in a company adequately financed and ready to prosecute its undertaking. Else why the stipulation for 6 months within which to make delivery? Shares such as had been offered to the plaintiff and her husband more than once before action, and of which the offer is repeated in the defendant's plea, were immediately available when the agreement was made. There would be no reason for providing that their delivery should be withheld for 6 months. Shares answering the other description were not immediately available, but it was understood that the financial arrangements of the company were about complete and that it would undoubtedly be in operation well within the 6 months stipulated for. Indeed, so great was the expectation of an almost immediate flotation of the company's bonds and stocks, that the plaintiff's husband understood (as the trial Judge has found), though erroneously, that the stock of the company had been actually underwritten. The Judge says:—

> There is an issue of fact between Mr. Johnson on the one side, and the defendant and Mr. Morrison on the other side. Mr. Johnson says that Mr. Morrison and the defendant, both being present at the same time, told him that the stock in the company had been actually underwritten, this is denied by the defendant and Mr. Morrison, and I accept their testimony. I do not impute intentional untruthfulness to Mr. Johnson, and I have no doubt that words of strong expectation were used, which after the lapse of time Mr. Johnson may now think were representations of an actual existing state of affairs.

To quote another passage from the opinion of the Judge:—

> At the time when the contract was made, the defendant, I have no doubt,

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expected that before the 6 months elapsed, money would be raised in England to float the company, in which event the company would have been organized and the stock issued and delivered. This, I have no doubt was what the defendant thought and intended to do.

There is abundant evidence to support these findings, and I can see no reason why they should be disturbed.

As already stated, the first position taken by the defendant himself is that his obligation was to deliver the shares only after the flotation of the company—that, as it is put in his factum,

> the period of six months mentioned in the agreement . . . had reference merely to the probable time necessary to finance the company and were words of expectation only.

As to the soundness of this interpretation of the agreement, I shall have something to say presently. I refer to it now because it makes it practically certain that it was shares in a company completely floated and ready to prosecute its undertaking—a fact otherwise tolerably well established—that the parties had in view. The suggestion that the defendant's obligation could be satisfied by the delivery of shares in a company without indispensable capital paid, or even subscribed, and with no prospect of attaining a position in which it would be ready to commence operations, issued under such a provision as sec. 10 of the incorporating Act, was the veriest afterthought.

But what as to the obligation to deliver within 6 months, which I regard as the really crucial question in the case? In the first place, without distortion of plain language, an unqualified undertaking to deliver shares within 6 months cannot be read as providing for delivery only when the company should be floated and as relieving from all obligation to deliver if flotation should be found impossible. An analysis of the exhaustive argument for the appellant on this branch of the case discloses that it rests wholly and solely upon the unlikelihood of the appellant having bound himself absolutely to make delivery. But if he meant that his obligation should be contingent on flotation, how easy it would have been to express that idea! Why stipulate for 6 months? No doubt, in the light of subsequent events, it may seem astonishing that the defendant should not have anticipated the possibility of difficulties in the financing of his company. But the evidence makes it abundantly clear that at the time the agreement was made the expectation of everybody—of the defendant and his friends and advisers, as well as of the

plaintiff's husband—was that the flotation was already, for all practical purposes, an accomplished fact, and that in undertaking to make delivery within 6 months the defendant was in reality not assuming any risk. It was in this frame of mind that he made his bargain. Why should we now import into it an element of contingency for which he did not provide and against which, had it been suggested to him at that time, he would probably have deemed it an excess of caution to guard? Moreover, having regard to Johnson's attitude—his refusal to renew options, his insistence on an out-and-out purchase of his areas, his determination to secure in some satisfactory form his price of $28,000—what justification is there for assuming that he was prepared to take, and did in fact take, the risk of failure of a flotation which was wholly in the hands of the defendant and his associates? No doubt, under pressure of straitened circumstances, he reduced his cash payment from $14,000 to $11,000, increasing the stock payment from $14,000 to $17,000—but, on doing so, he obtained from a man known to be in a financial position which made him capable of implementing it, an unconditional promise for the delivery of $17,000 of shares in a company which, I think, it has been conclusively shewn was to be a company financed and floated upon the basis which all parties then had in mind and regarded as practically an accomplished fact. With great respect for those who hold the contrary view, I cannot, because of any supposed hardship on the defendant—which I cannot but think is more apparent than real (for, after all, he obtained the coal areas, which we must assume he thought worth $28,000, or he would not, as a promoter of the Margaree Coal Co., have made the bargain he did)—introduce into that bargain a condition to which the parties did not make it subject and to which upon the whole evidence I see no reason to think they intended that it should be subject: *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at 491, 494-5.

I agree with the trial Judge and the Judges of the Appellate Court that the arrangement made with Mr. Thorn was not, and was not intended to be, a discharge of the defendant's contractual obligation.

The defendant further complains of the judgment in appeal, because it allows the plaintiff, on a reference, to supplement evi-

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dence as to damages which the trial Judge found to be insufficient to warrant a recovery of more than nominal damages. It is only upon this point, as I understand their judgment, that there was any difference of opinion amongst the Judges of the provincial Courts. There was, in my opinion, evidence which shewed that the plaintiff was entitled to recover substantial damages, though probably not all that might be furnished to enable the Court to satisfactorily fix the amount which should be awarded. The attainment of precision or certainty in the ascertainment of the amount of actual loss is not essential to the assessment of damages in cases such as this: *Chaplin* v. *Hicks*, [1911] 2 K.B. 786. I am fully alive to the danger of allowing a plaintiff to supplement his proof either upon a new trial or on a reference such as the Court *en banc* has directed. But there can be no doubt of the power of the Court in a proper case to make such an order. The exercise of that power is necessarily from its very nature largely discretionary and should not be lightly interfered with on a further appeal. The question to be determined in the present action is: What would have been the probable value of shares in the common stock of the defendant company had it been successfully floated within 6 months of the making of the agreement or within any extension of that time assented to by the plaintiff? On such a question there is perhaps not the same danger in allowing further investigation, as ordinarily attends the ordering of re-hearings on questions of fact. Moreover, I am not satisfied that all the aspects in which the question of damages should be considered in a case such as this were present to the mind of the trial Judge. Many elements which must be considered in estimating what would have been the probable value of the shares have been suggested in the judgment of the present Chief Justice of Nova Scotia. For the view that, in a case in which the damages are difficult of ascertainment and largely of a contingent character and the evidence adduced at the trial, where the question of damages was gone into, shews that substantial damages have been sustained, but is insufficient to enable the Court to determine the amount which should be awarded, it is not an improper exercise of discretion to direct a reference such as has been ordered in the present case, there is the authority of the recent decision of the Ontario Appellate Division in *Wood* v. *Grand Valley R.*

Co., 16 D.L.R. 361, 30 O.L.R. 44, affirmed on appeal by this Court (22 D.L.R. 614, 51 Can. S.C.R. 283). CAN. S. C.

I am for these reasons of the opinion that this appeal should be dismissed. Anglin, J.

Appeal allowed.

Re REID: ex parte IMPERIAL CANADIAN TRUST CO. ALTA. S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, and McCarthy, JJ. June 30, 1916.

EXECUTION (§ I—2)—AGAINST INTEREST IN PARTNERSHIP—PROCEDURE.

The only method by which an execution creditor can reach a partnership interest upon a judgment against one of the partners only, is, not by virtue of his execution, but by a charging order founded on his judgment under the Partnership Ordinance 1899 ch. 7 sec. 25 (see Con. Ord. N.W.T. 1911 ch. 94), without the necessity for an execution being issued thereon.

APPEAL from an order of Simmons, J., in an execution proceedings. Reversed. Statement.

Peacock & Skene, for appellant.

W. D. Gow, for respondent.

The judgment of the Court was delivered by

BECK, J.:—The Trust Co., as guardian, applied to Simmons, J., for an order for directions, there being represented on the application certain execution creditors and certain ordinary creditors of the lunatic. Beck, J.

Simmons, J.'s, order authorized the Trust Co. to borrow $2,000; and directed that the proceeds should be distributed in a certain order of priority; first in payment of the execution debts.

The appeal is from this order. The day following the argument we were informed that the lunatic had just died. Under those circumstances—the reasons for making the loan having gone—nothing was left for us to decide except, perhaps, the question of the costs of the appeal.

Counsel however asked us to decide the question as to the priority of the execution creditors for the guidance of the administrator of the estate, that question having been fully argued before us.

It is stated that the Trust Co. propose to apply for letters of administration, and in the meantime they file a consent to be appointed administrator *ad litem*. Under these circumstances we think it proper to decide the question of priority.

Stuart, J., made an order on Oct. 9, 1915, declaring John P.

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Reid a lunatic and appointing the Trust Co. guardian of his estate.

Three executions against Reid were in the sheriff's hands on or before September 13, 1915.

Reid and one Roe were carrying on farming operations as partners.

On September 13 the sheriff purported to seize under these executions which were not against the firm, but against Reid individually, certain live stock of the firm—apparently not as being the property of Reid individually, but for the purpose of realising on Reid's interest as a partner therein.

The Partnership Ordinance 1899 (ch. 7) sec. 25 enacts that a writ of execution shall not issue against any partnership property except on a judgment against the firm, but that the Court or a Judge may make an order charging a partner's interest in the partnership property or the profits with the payment of the amount of the judgment debt and interest and may appoint a receiver of the partner's share of the profits, etc., and direct accounts, etc., and that the other partner may redeem his interest or purchase it.

The old practice is stated in Archbold's Q.B. Practice (1885) 14th ed., pp. 853 *et seq.*

In making the seizure the sheriff followed the old practice. That practice was, however, abolished by the provision of the Partnership Ordinance which I have quoted, (Lindley on Partnership, 8th ed., 418), and the only method by which an execution creditor or a partner can now reach a partnership interest is, not by virtue of his execution, but by a charging order founded on his judgment without the necessity for an execution being issued thereon.

It was contended in effect that rule 614 authorizing the sheriff to seize and sell any equitable or other right, property, interest or equity of redemption re-introduced the old practice, but although the Lieutenant-Governor-in-Council is by the Supreme Court (ch. 3 of 1907) given authority to make rules governing the practice and procedure of the Court, and in doing so to alter or amend the then existing statutory rules appended to the Judicature Act and may possibly have been given thereby authority to alter in some respects at least practice and procedure embodied

in other statutory provisions, I should think that this authority would not extend to a case where, as here, the practice and procedure is embodied in and forms an integral part of a Code dealing with substantive rights and with practice and procedure as arising out of such rights and consequently affecting them. But whether or not the authority of the Lieutenant-Governor is so restricted, it is quite clear, I think, that a general provision such as r. 614 cannot be taken as intended to repeal a special provision directed to a particular case and dealing with it in an exceptional way.

The solicitor for the execution creditors seems to have at least doubted the effectiveness of the seizure; for they did in fact afterwards, and before attempting to sell apply for a receiver order; but the motion was adjourned from time to time and finally *sine die;* and no receiver order or charging order was ever made.

There being, therefore, no effective seizure under the executions of Reid's partnership interest and no charging order or receiver order against it, the execution creditors had not up to the time of Reid's death, acquired any higher standing than that of ordinary unsecured creditors and must in the administration of the estate rank *pro rata* with them, in accordance with the provisions of the Trustee Ordinance (ch. 11 of 1903, 2nd sess.)

The whole of Reid's partnership interest was in fact sold to his partner by the guardian with the approval of a Judge. The guardian received the proceeds no doubt under the condition that they should, so far as the creditors are concerned, stand in the place of the partnership interest sold.

For the reason I have given, these proceeds must be distributed among all the unsecured creditors (including the execution creditors) *pro rata*, subject to any priorities not taken away by the section of the Trustee Ordinance to which I have referred, and to any priorities which the Trust Co. may have for advances, or which they or any of the parties may have as to the costs, by law or by virtue of any order that may have been made in the lunacy proceedings.

It must be understood that I have dealt only with the debtor's partnership interest. If there were at the date of his death any other goods or lands, such property would be bound by writs of

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execution in the sheriff's hands without seizure (except in the case of certain kinds of personal property) and with respect to any such property, if there be any, the execution creditors would have a priority. Rule 609 *et seq.*

If there is any other property some questions of marshalling or subrogation may arise in the administration of the estate; but these questions can be dealt with, if necessary, by a single Judge.

As to the costs of this appeal: The appellants are the ordinary creditors. They have succeeded in establishing that the order appealed from was wrong. They should have their costs. If the Trust Co. have incurred any costs in relation to the appeal they also should have their costs. With regard to the execution creditors they have failed in the appeal, but in view of the fact that they applied for a receiver order and, had they obtained it, would have secured priority and thus were vigilant, and seem to have failed only because for some unexplained reason the Master refused to deal with the question and adjourned the matter *sine die*, and the question raised on appeal was raised in the interests of a class of creditors. I think they, under these special circumstances, should not only be relieved of paying the costs of the appeal but, with the other parties, have their costs out of the estate. *Appeal allowed.*

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GRAND TRUNK R. CO. v. JAMES.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

1. CARRIERS (§ II O 1—325)—INCIDENTAL POWERS OF RAILWAY COMPANY—CARRIAGE OF BAGGAGE.

The carriage of baggage to and from its own stations is a power fairly "incidental" to the statutory powers of a railway company.

2. TRADE NAME (§ I—9)—CARRIAGE OF BAGGAGE BY RAILWAY COMPANY—INFRINGEMENT—INJUNCTION.

A railway company is entitled to the exclusive use of the trade name they adopt in carrying on a baggage transfer business, and any infringement thereupon by a third party subsequently attempting to carry on a similar business under a similar trade name will be restrained by injunction.

[*Grand Trunk R. Co.* v. *James*, 22 D.L.R. 915, affirmed.]

Statement.

APPEAL from the judgment of Stuart, J., 22 D.L.R. 915. Affirmed.

J. Shaw, for plaintiff, respondent.

A. A. McGillivray, for defendant, appellant.

Stuart, J.

STUART, J.:—The facts of this case are fully set forth in the judgment appealed from and need not here be repeated.

I think there is fairly good ground for the criticism which the trial Judge made of the interpretation placed upon sec. 17 of the special Act incorporating the Grand Trunk Pacific R. Co. in the judgment I delivered on the first application for an interim injunction, although the case would have been stronger if the words "in connection therewith" had been inserted also after the word "facilities."

However, it is, in my view, unnecessary to trouble ourselves with this question because it is clear that a corporation has the right to do whatever can fairly be called incidental to its main purposes, objects and powers. Indeed, this is expressly enacted in sec. 79 of the Railway Act and is well settled by the decisions referred to in the judgment of Walsh, J. The one question is whether the right to carry the baggage of its passengers to and from its own stations is properly incidental to the operation of a railway. As Lord Loreburn said in *Att.-Gen.* v. *Mersey R. Co.*, [1907] A.C. 415:

> It must be shown that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so.

And Lord James of Hereford said, at p. 418:

> No doubt there are certain things incidental to the carriage of passengers which can be done. Of these perhaps that which is most attractive would be the giving of refreshments on the line. That is not, I presume, authorized in express terms by the statutes, but that is incidental to the carriage of passengers. In the same way the meeting of passengers or delivering them at their places of abode, where they wish to go, by an omnibus may well be carried on without exceeding the statutory powers.

The case from which I make these quotations was an application for an injunction by the Attorney-General, on the relation of a municipality which conducted a tramway system, to restrain the railway company from carrying on an omnibus business, and the injunction was granted but merely because it appeared that the railway's omnibuses were picking up and carrying passengers generally and not merely to and from its own stations and it was held impossible to attempt, by the imposition of an undertaking, to restrict the company to what Lord James would apparently have held to be legitimately incidental—as the Court of Appeal had attempted to do.

But even if the words of Lord James were merely *obiter*, in the circumstances I think one must have great respect for an opinion so definitely expressed by him. Besides, it must surely be evident

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to anyone that it is, in fact, a great convenience to the public travelling on a railway line to find that the company which has carried them and their baggage to its stations is ready to furnish them with facilities for getting that baggage quickly and safely to their places of abode near those stations. It is just at the moment when the passenger alights, often in a strange place, that he needs the attention of the railway company most. I think the carriage of baggage to and from its own stations is clearly a power fairly incidental to the statutory powers of the company. The case of the *London County Council* v. *Attorney-General*, [1902] A.C. 165, merely decided that the business of an omnibus company was not incidental to that of a tramway (i.e., a street railway) company which, of course, is a different matter altogether.

In my opinion the plaintiffs, the G.T.P.R. Co., were in fact engaged in the baggage transfer business but, of course, only as incidental to their general business. I think the nature of the arrangement with Riddick was such that he was in effect their agent—an agent for whose acts within the scope of his employment the company would clearly have been responsible. With regard to baggage transferred from one railway to another he was paid by the company. With regard to the baggage taken to and from their station to private places it is true he was allowed to take from the passengers what he earned, and it was also true that he was permitted to and did do other work not connected with the railway on his own account. But I cannot understand how this can lead one to say that the railway company was not engaged in transferring baggage. They were clearly responsible for Riddick's acts. His connection with them could be terminated at any time. He was acting ostensibly as their agent. They chose a particular method of getting their transfer business done and it was done under their name. The fact that Riddick was not remunerated by a salary but by the fees he could get from individuals whom he served on their behalf did not make his work any the less really the work of the railway company. Their remuneration came not in money but in the appreciation by their customers of the services rendered them.

The railway company is not, it is to be noted, carrying on a *general* transfer business. They do not pretend to transfer

baggage from one place in the city to another irrespective of their own line of railway. If they did, they could no doubt be restrained at the suit perhaps of the Solicitor-General of Canada, they being a federal company, on the ground that they were exceeding their corporate powers just as was done in most of the English cases cited to us. Such actions are not as common in Canada as in England, but they are possible. The railway is merely carrying on its own railway business, and as part of it, and as an incident to it, the company is looking after the baggage of its customers only. It is just like the case of a hotel or restaurant which looks after the coats, hats, canes, and umbrellas of its customers in a checking room as an incident of its business. If the proprietor of the hotel were to put someone in charge of the room and let him get his remuneration by tips or by a regular fee that person would none the less be carrying on part of the business of the proprietor. In the same way I think the railway company was engaged in looking after the baggage transfer of its customers, even though this was done through Riddick in the way described in the evidence.

But it was not, as I have said, engaged in a regular or *general* transfer business, and this circumstance lessens the importance to be attached to the idea of competition in this case. In my opinion, it is not so much on the ground of what is generally called unfair competition and damage resulting therefrom that the plaintiffs have a right to complain, because after all the company apparently makes no money out of the transfer business or its customers any way. The true ground on which the plaintiffs' case can be rested is that the defendant adopted a name which had long been associated in the public mind with the business of the plaintiff companies and adopted it in application to a business which the plaintiff companies had a right to carry on as incidental to their main business and thus falsely represented to the public that he was connected in some way with the plaintiff companies. Even though the plaintiffs might not be held liable for his acts if they did not interfere to stop him, and for myself I have much doubt on that point, particularly if he never came upon their premises, they would still be liable to be held responsible not in a Court legally, but in the minds and opinions of the travelling public whose good opinion they were anxious to retain, and whose

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bad opinion might and probably would injure them for any misconduct or inattention on the part of the defendant.

If a plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms. 38 Cyc. 770.

As was said in a Massachusetts case:—

In establishing a new business the defendant had no occasion to adopt a name which would be likely to mislead the public and induce them to believe that the business which he was establishing was conducted by the plaintiffs. It was easy to choose a satisfactory name unlike the plaintiffs' and to conduct the business in such a way as to leave the plaintiffs the whole benefit of such reputation as they had gained in the community. *Samuels* v. *Spitzer*, 177 Mass. 226-7.

I think it is clear from the evidence that the defendant's predecessor in title deliberately adopted the plaintiff's name in view of the anticipated entry of their railway line into Calgary and not as an independent discovery, thought or invention of his own.

The deceptive use of a trade name can be enjoined where there is a clear probability of damage, not only or necessarily by way of direct pecuniary loss in the way of immediate loss of the trade taken away, but also indirectly by loss of reputation and consequent general loss of trade. Any probable injury to the plaintiff's business is sufficient, and it is easy to see in the present case that injury is not only quite possible but probable on account of the confusion which would inevitably ensue if the defendant were not restrained.

With regard to the amendment of the statement of claim, I think it was unnecessary in any case in view particularly of par. 12 of the claim as it stood. Moreover, the plaintiffs offered, when asking for the amendment, to permit new evidence to be given and apparently the offer was not considered for a moment perhaps because there was really no more light to be thrown on the case. With regard to the form of the judgment, I think it is quite unnecessary to be troubled about the declaratory part of it because the injunction contained in the second clause is really the operative part, and could stand even if the declaratory clause were not there at all.

For these reasons and for the reasons given by the trial Judge, I think the plaintiffs were entitled to succeed and that the appeal should be dismissed with costs.

SCOTT and MCCARTHY, JJ., concurred.

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BECK, J.:—The trial Judge, Walsh, J., has set out the facts. I concur with his reasons for holding the plaintiff entitled to succeed.

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The following proposition is laid down in 10 Cyc. tit. "Corporations," pp. 151, *et seq.*:

Beck, J.

> While the name of a corporation is not in strictness a franchise yet the exclusive right to its use will be protected in equity by a writ of injunction by analogy to the protection of trade marks, just as the name of an individual, a partnership, or a voluntary association may be so protected.

This proposition is supported by the following English authorities: *Tussaud* v. *Tussaud*, 44 Ch.D. 678; *Hendriks* v. *Montagu*, 17 Ch.D. 638; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch.D. 748; *Merchant Banking Co.* v. *Merchants' J. S. Bank*, 9 Ch.D. 560. The principles upon which the foregoing proposition is founded are very clearly expressed in the cases cited. The appeal should be dismissed with costs. *Appeal dismissed.*

CANADIAN PACIFIC R. CO. v. AITKEN.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. June 30, 1916.

PRINCIPAL AND AGENT (§ II A—8)—SALE OF LAND—AGENT'S REPRESENTATIONS NOT WITHIN SCOPE OF AGENCY.

Representations by the authorized agent of a company employed to sell their lands, made to a friend in the course of social intercourse, not in the company's interest, but for the purpose of giving his friend a "tip" whereby both he and his friend might make a profit, are not binding upon the company.

APPEAL by the defendant from the judgment of McCarthy, J. Affirmed. Statement.

George A. Walker, for plaintiff, respondent.

R. T. D. Aitken, for defendant, appellant.

The judgment of the Court was delivered by

SCOTT, J.:—The action is for the balance of purchase money and interest payable under agreement entered into by the defendant for the purchase of certain town lots in the townsite of Tilley, Alberta. Scott, J.

The defence relied upon by the defendant is that he was induced to enter into the agreement by the misrepresentation of the plaintiff company or its agents that the company would make and erect certain improvements in that townsite which would cause it to be a distribution point for the merchandise of the farming community around there, and that the company would

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establish there the offices of the Can. Pac. Irrigation and Colonization Co. Ltd. and that said offices would be the centre of the eastern irrigation system for Alberta and that all parties purchasing land in said eastern irrigation system would be referred to those offices. In the particulars furnished by him he alleges that the misrepresentations complained of were made by one Cardell, who, while employed by plaintiff company, effected the sale, and that they were made by him at the offices of the plaintiff company in Calgary.

The negotiations for the purchase of the property were carried on by the defendant with Cardell, who at that time was a clerk in the land department of plaintiff company. He was also secretary of the Can. Pac. R. Irrigation Co. with charge of their agencies which had charge of all the land in what was known as the irrigation block in which the lands in question are situated. The defendant's version of what took place between him and Cardell is as follows:

Q. With whom did you have conversation in regard to the purchase of the lots in question? A. Mr. Cardell. Q. How did the conversation take place, what led up to it? A. The first conversation took place, if I remember rightly, in the Calgary Club. I think it was over a game of billiards that we were playing together. He spoke about this being a good thing. Q. Tell us what led up to the contract and the application? A. Well, I used to see Mr. Cardell a good deal. We had a lot of conversation. I think perhaps it was scattered over two or three different conversations, but I am not sure. He was putting me next to a good thing that the C.P.R. was putting on the market, or about to put on the market, that there was certain lots in this townsite of Tilley. He suggested that I should make an application for the purchase of them. He told me that the town of Tilley was to be the headquarters for the eastern section of the irrigation project. That the C.P.R. would erect buildings there to take care of the settlers. They would have some offices there and that the town was to be laid out as a model town, and was to be one of the biggest things the C.P.R. were going to do in the shape of townsites. By getting in early I could get in cheap because the land would be much more valuable on account of this project. If the land was worth much more on account of the C.P.R. irrigation project of which it was to be the headquarters.

Q. What did he say had already been done to carry out the representations which he had made to you? A. My recollection is that he said plans had been made and the scheme had all been mapped out and decided on by the C.P.R. and that contracts were let or being let for the building. According to what he said I gathered that the whole plan was cut and dried and ready to go into operation. Q. What followed up the representations which he says he made to you? On how many occasions were these representations made to you? A. I told him I would buy these lots and an application was either sent to me through the mail or Mr. Cardell brought it to me. Q. How many

times had he spoken to you of the representations which you have already stated? A. Oh, possibly there was only the one conversation, possibly there may have been one or two. I think it was in the evening the first time he spoke about it and we may have had another conversation the next morning. It was very soon afterwards that I signed the application. Probably the next day. Q. How did you get the application for these lots? A. I rather think Mr. Cardell brought them in, but they may have come through the mail.

Cardell, who was called as a witness for the defendant, gives the following version:—

Q. Do you remember what representations were made by you to Mr. Aitken in regard to it? What was said? A. You mean in which way? Q. At the time he purchased the property can you tell us what took place, what was said between you and Mr. Aitken, how did he come to buy it? A. On representation from me as far as I can remember. Q. What were those? A. That there was to be certain work done in the townsite of Tilley by the C.P.R. Q. What was that work? A. It was the intention to make it the headquarters for the sale of land in the eastern section of the irrigation building, engineering building and sale headquarters. Q. What else? Anything else? A. No. Q. Any other statements made by you? Do you know what, if anything, had been done by the C.P.R. to warrant those representations? A. I can say up to a year and a half ago when I was there then, there was nothing of that nature being done.

Cardell also states that it was the intention of the company at that time to make the improvements he referred to, that plans had been prepared for the work and that the matter of the proposed improvements had been discussed in the office. He admits that he was interested with the defendant in the purchase and it is shewn that he advanced a portion of the down payment made by the defendant. It is also shewn that the sale of lots in the Tilley townsite was never advertised by the company. The following statements of Cardell referring to that sale are important:

Q. So far as the Tilley townsite is concerned this sale was the only transaction? A. The only one that went through. Q. You thought it was a good thing? A. Yes. Q. Along with the idea of enabling people who were friends of yours in making a little money? A. Absolutely. Q. Knowing that your duty to the company required you to do so? A. It was a duty to the company in selling their land. Q. It was a duty to the company that you should personally make money out of the company? A. The company had nothing to do with my personal affairs.

It was shewn that Cardell was authorized by the company to make sales of the company's lands in the irrigation block and if the representations made by him to the defendant had been made by him in the ordinary course of his duties as such agent, for instance, if they had been made by him in the company's offices to applicants for purchase or otherwise for the purpose of advancing the company's interests by disposing of their lands it

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might reasonably be contended that the company should be held to be bound by them, but it would, in my view, be unreasonable to hold that they should be bound by them where, as in this case, they were made to a friend in the course of social intercourse, not for the purpose of advancing the company's interests or of assisting it in the disposal of its property but merely for the purpose of giving that friend what is known as a "tip" whereby both he and his friend might make a profit. The conclusion is, to my mind, irresistible that the defendant must have known that it was for the latter purpose and that purpose alone that the representations were made. I would dismiss the appeal with costs.

Appeal dismissed.

MAN.

K. B.

BURGE v. FINES.

Manitoba King's Bench, Galt, J. February 18, 1916.

MORTGAGE (§ VI B—75)—APPLICATION OF PAYMENTS—INTEREST BEFORE PRINCIPAL—MORATORIUM.

Where a mortgagor makes a payment on the mortgage and does not direct whether the funds are to be appropriated in payment of the principal or interest, a duty arises on the part of the mortgagee to apply it towards the payment of the interest, otherwise the interest would be added to capital, and so become itself liable to interest, or the interest would be in default for more than one year, and the mortgage thereby become liable to foreclosure under the Moratorium Act.

[*Cockburn* v. *Edwards*, 18 Ch.D. 449; *Wrigley* v. *Gill*, [1906] 1 Ch. 165, followed.]

Statement.

ACTION for foreclosure of mortgage.

J. E. Robertson and *H. S. Rutherford*, for plaintiff.

A. C. Campbell, for defendant.

Galt, J.

GALT, J.:—The plaintiff claims judgment for the sum of $999.80, and interest thereon at 7 per cent. from July 24, 1915. The claim is contested by the defendants mainly upon the ground that the Moratorium Act is an answer to the action.

The claim is based on a mortgage dated August 4, 1913, whereby the defendants mortgaged to the plaintiffs certain lands in the Province of Manitoba to secure the sum of $10,191, payable in instalments together with interest at 7 per cent. per annum and compound interest, as follows:—

$2,000 on August 4, 1913; $500 on August 19, 1913; $150 on December 1, 1913; $1,000 on July 24, 1914, etc., together with interest at the rate aforesaid, to be paid with each instalment of principal after the date hereof and upon so much principal money hereby secured as shall from time to time remain unpaid until the whole of the principal money and interest is paid, whether before or after the same becomes due; but after default interest at the rate aforesaid shall accrue and be payable from day to day, the first payment of

interest to be made on August 4, 1913; and it is further agreed that on default in payment of any instalment of interest, such interest shall at once become principal and bear interest at the rate aforesaid, which interest shall be payable from day to day, and shall itself bear interest at the rate aforesaid, if not paid prior to the next gale day, it being agreed that all interest, as well that upon principal as upon interest, is to be compounded at each day mentioned for payment of interest. Provided that on default of payment of any portion of the moneys hereby secured, the whole of the moneys hereby secured shall become payable and that all subsequent interest shall fall due and be payable from day to day.

The mortgage furthermore contained a covenant whereby the mortgagor became tenant from year to year to the mortgagees at a yearly rental equivalent to and payable at the same times as the interest upon the principal above provided to be paid. There was also a provision that the mortgagees might distrain for arrears of interest.

Default was made by the defendants in payment of the principal and interest which fell due on July 24, 1914, but on August 6, 1914, the defendant, Thomas Fines, paid the plaintiff, Stephen Larkin, the sum of $800 on the mortgage. That payment was more than sufficient to cover all interest due to that date.

Counsel for both parties laid great stress upon the actual application of the moneys paid by the defendant in August, 1914; but the evidence was conflicting. The defendant, Thomas Fines, said that in July, 1914, prior to the date of the payment, he saw Stephen Larkin in the hotel at Teulon and told him that he would not be able to pay all that was due that month, but would pay him the interest anyway and all he could of the principal. Larkin, on the other hand, denies that he had any conversation with said defendant in reference to appropriating any moneys which might be paid to the interest.

The law in this respect is that when a man is indebted to a creditor in respect of two or more debts he is entitled, when making his payment, to direct how his money shall be applied by the creditor, and it is the duty of the creditor to appropriate such payment accordingly, but if the debtor fail to give such a direction, the creditor has a right at any time thereafter to appropriate the payment to any particular debt he chooses.

In this present case it is necessary to decide how the payment of the $800 should be applied, because, if it were applied on the instalment of principal which fell due on July 24, 1914, the interest

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would be more than a year overdue before this action was commenced, and the plaintiff would be entitled to judgment. If, on the other hand, the payment should be held to cover the interest due in July, 1914, the Moratorium Act bars the plaintiff's right of action.

I have quoted from the mortgage the material portions which bear upon the question at issue, and in interpreting the meaning to be given to the clauses relating to interest it is necessary to consider also other provisions in the instrument.

Owing to the conflict of evidence between Thomas Fines and Stephen Larkin, both of whom appear to be respectable and trustworthy witnesses to the extent of their recollection, it is a difficult matter to decide which of their accounts should be accepted as correct. Fines swears definitely that he saw Larkin in the hotel at Teulon and told him that he would pay him sufficient to at least cover the interest. Larkin has no recollection of any such statement. Even if this evidence stood alone I should have to accept Fines' affirmative statement rather than Larkin's lack of recollection. But there are other considerations which strongly support the defendant's case.

The provision in the mortgage that on default in payment of any instalment of interest, such interest should at once become principal, would, at first sight, be a complete answer to the action, because default was made in payment of the interest on July 24, 1914, and no further instalment of interest fell due until July 24, 1915, which would be within a year prior to the commencement of the action. If that were the proper construction to be given to the clause in question a mortgagee who had included (as is very commonly done) the above-mentioned provision, would never be able to recover his interest so long as the Moratorium Act survives.

But the provisions as to tenancy, and a right of distress for arrears of interest are wholly inconsistent with such construction, and lead to the conclusion that the parties were simply providing for payment of interest upon interest.

As a matter of fact, when the $800 was paid by the defendant in August, 1914, no appropriation whatever was made by either party. There are cases, however, in which when money is paid, a duty arises on the part of the creditor to apply the money in a

certain way, apart altogether from the ordinary doctrines of appropriation of payments. For instance, in *Cockburn* v. *Edwards*, 18 Ch.D. 449, Cotton, L.J., says, at p. 463:—

If, however, a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would shew that there was in his hands at every time a balance applicable to reduction of the principal, I am not prepared to decide that he can, merely because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale.

A similar question arose in *Wrigley* v. *Gill*, [1906] 1 Ch. 165. That was an action by a mortgagor for the redemption of certain mortgaged leasehold property. The mortgage contained a clause similar in effect to the clause of the mortgage in the present case. It read as follows:—

Provided also, and it is hereby agreed, that, if and so often as any interest due under the covenant hereinbefore contained, or this present provision, shall be in arrear for twenty-one days after the day hereby appointed for payment thereof, such interest shall be treated as an accession to the capital moneys hereby secured, as on the day on which the same ought to have been paid, and shall thenceforth bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects.

The mortgagee had entered into possession of the property and received the rents and profits to an extent, at least during some of the years in question, to cover all interest charges. The question to be decided was whether, under such circumstances, the interest could be said to be in arrear within the meaning of the above proviso. In delivering judgment, Vaughan Williams, L.J., says, at p. 170:—

The effect of the order made by Warrington, J., is that the mortgagor is relieved from the burden of capitalization of interest, except in certain cases. . . . It has not been suggested that the mortgagor, in fact, made any payment of the interest as such, but it is said that, although he did not in fact make any payment of interest as such, yet that if the mortgagee had in her hands rents which, after deducting the ground rent and other proper outgoings, left in her hands a sum sufficient for the payment of the interest then it cannot be said that, within the meaning of the above proviso, the interest was in arrear.

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In the present case, as in *Cockburn* v. *Edwards*, the question is not one of payment, but whether the interest was in arrear within the meaning of the proviso. In this conflict of opinion between Judges of great authority we have to consider what is the proper conclusion in a case like the present, in which *primâ facie* one's mind revolts somewhat against a construction which will give the mortgagee a right to interest upon interest—for that is

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the meaning of capitalization—when he has had in his pocket money of the mortgagor available for payment of the interest and which the mortgagee could use for that purpose if he thought fit to do so. We ought not to put such a construction upon such a proviso unless we arrive at the conclusion that this must have been the intention of the parties.

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In such circumstances I do not think, but it is not necessary to decide it in this case, that the mortgagee, having in his hands rents available to pay the interest, would be able to relieve himself of the obligation so to apply the money by giving notice to the mortgagor that he had appropriated it to some other purpose, or that he did not appropriate it to the payment of the interest.

It would appear from the above authorities that, even assuming that no appropriation whatever had been mentioned by the defendant Thomas Fines to the plaintiff Stephen Larkin at Teulon, a duty arose on the part of Larkin when he received the $800 in August, 1914, to apply it to the payment of interest.

For these reasons, I am of opinion that the interest which fell due on July 24, 1914, must be taken to have been paid, and this action, having been brought prematurely, must be dismissed. The defendants are entitled to their costs. *Action dismissed.*

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FERGUSON v. FERGUSON.

Manitoba King's Bench, Curran, J. March 3, 1916.

INJUNCTION (§ II — 130) — TO RESTRAIN DISPOSITION OF PROPERTY TO PROTECT ALIMONY—COSTS—REFUSAL.

The power of the Court under sec. 26 (o) of the King's Bench Act (R.S.M. 1913, ch. 46) to grant an injunction in alimony cases restraining the husband from disposing of his property, "whenever it appears just and convenient," in protection of the wife's interests, does not extend to enable such injunction being granted before judgment is obtained. Such injunctions having been granted, wrongfully, a motion by the wife that she be allowed costs in connection with such injunctions improperly granted cannot be allowed.

[*Burdett* v. *Fader*, 6 O.L.R. 532, affirmed in 7 O.L.R. 72; *Walker* v. *Walker*, 10 P.R. (Ont.) 633; *Bashford* v. *Bott*, 2 S.L.R. 461, considered.]

Statement.

APPLICATION for costs in alimony action.

W. H. Trueman, for plaintiff.

Defendant in person.

Curran, J.

CURRAN, J.:—This is an action for alimony brought by Etta May Ferguson against her husband, Thomas R. Ferguson. The statement of claim was issued on April 1, 1915, and an order for interim alimony was made on May 14, 1915, and subsequently registered. The statement of claim contains an allegation that the defendant is the registered owner in fee simple of a house and piece of land situate at No. 4 Ruskin Row, in the City of Winnipeg,

being lot 12 as shewn upon a plan of survey of part of lot 43 of the Parish of St. Boniface registered in the Winnipeg Land Titles Office as plan No. 700, said to be of the value of $20,000 and upwards, subject to an encumbrance of $4,000. No *lis pendens* appears to have been issued and registered.

Sec. 19 of The King's Bench Act (ch. 46 R.S.M. 1913) providing for the registration of orders for alimony, is as follows:—

> 19. An order or judgment for alimony may be registered in any registry office or land titles office in Manitoba, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the registration division or land titles district where the registration is made, and operate thereon in the same manner, and with the same effect, as the registration of a charge by the defendant of a life annuity on his lands.

The trial of the action began before me on July 12, 1915, and was continued for some days in that month and in the month of October following, and completed on or about November 6 following. Judgment was reserved and subsequently delivered on February 3, 1916, awarding the plaintiff permanent alimony in the sum of $30 per week. Minutes of this judgment were settled and issued on February 7, 1916. On September 1, 1915, the plaintiff obtained an interim injunction order restraining the defendant until September 15 following from mortgaging, charging, encumbering, selling, alienating or otherwise disposing of the land before described. The material upon which this order was obtained disclosed, amongst other things, that the defendant was in arrear in the payment of interim alimony due the plaintiff up to August 26, 1915, in the sum of $250; that an execution issued against the defendant's goods to enforce payment of these arrears had proved unavailing, as the sheriff was unable to find any goods of the defendant upon which to levy; that certain goods of the defendant, consisting of household furniture and law books, of the estimated value of between $3,000 and $4,000, stored by the defendant with the Security Storage and Warehouse Co. in the City of Winnipeg, had been removed by the defendant and stored in some place unknown to the plaintiff; that the plaintiff had been informed by the manager of the said storage company that he had been instructed by the defendant to give no information as to where the same had been taken or where the same were; that the defendant had stated upon examination for discovery in this action that he had no money or property other than household

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furniture and law books and his equity in the lands described in the statement of claim and in certain lots at Halsted Park, St. James, and Elmwood, Winnipeg; that the value of the defendant's equity in the Ruskin Row property was in her belief from $10,000 to $12,000, and that the equity in the other properties was of little or no value at the present time; that the defendant had leased the Ruskin Row property with an option of purchase to the tenant at between $18,000 and $20,000, and lastly, that the plaintiff feared if the defendant is not restrained by injunction from alienating, encumbering or otherwise disposing of said house and property on Ruskin Row, he will dispose of, encumber or alienate said land with the effect of defeating, delaying or hindering the plaintiff in the recovery of said arrears of interim alimony or in the recovery of any judgment that she may obtain in this action. Successive injunction orders were issued from time to time covering the whole period of the trial and judgment, the last order, dated January 19, 1916, being effective until February 9, 1916, thus carrying the period of restraint some six days beyond the date of delivery of judgment and affording time to the plaintiff to protect her rights under the judgment by registration of a certificate of same in the proper registration office. Some seven of these injunction orders were obtained in all, and the plaintiff is now seeking to tax the costs of same against the defendant as part of the costs taxable under the judgment. The taxing officer refused to tax these costs without an order from a Judge, and this order the plaintiff now applies for.

The defendant opposes the application, alleging that there were no grounds to justify the injunction order in the first instance, and that it ought never to have been made. His contention is that the injunction procedure was in effect a design to tie up his landed property by injunction until the plaintiff could obtain a judgment against him; that it was an abuse of the process of the Court in the light of decided cases.

It seems to me that the defendant's contention is in the main correct and that the injunction order ought not to have been made: (*Burdett* v. *Fader*, 6 O.L.R. 532, affirmed by Divisional Court in appeal, 7 O.L.R. 72). This was an action for libel and the plaintiff obtained a verdict against the defendant for $700 damages. Entry of judgment had been stayed and an appeal was pending. A motion to continue an interim injunction

restraining the defendant from disposing of certain shares of stock so as to defeat the plaintiff's claim was refused. The Chancellor, in delivering judgment, said:—

> The plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant until that is finally determined. There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment he can sue on behalf of himself and of all other creditors to attach a fraudulent transfer. If the plaintiff is a judgment creditor he can proceed by execution to secure himself upon the debtor's property, but if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.

See also *Campbell* v. *Campbell*, 29 Gr. 252; *Knapp* v. *Carley*, 2 O.W.R. 1186.

In *Hepburn* v. *Patten*, 26 Gr. 597, it was held that the Court will not restrain a debtor from dealing with his chattel property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his debt against the defendant.

Upon the same point, see *Lamont* v. *Wenger*, 14 O.W.R. 1037, and cases cited at p. 55 of Holmested's Judicature Act.

It may, on the other hand, be urged that the plaintiff, as to the amount of interim alimony due by virtue of an order of this Court and unpaid, had a debt to that extent established against the defendant which might give her the right to the interim injunction: *Walker* v. *Walker*, 10 P.R. (Ont.) 633, decided that the principle which underlies all the decisions is that the allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*. I infer that this means that it does not depend on the ordinary legal relations of debtor and creditor. If this is so, does it favourably affect the plaintiff's right to the injunction, and has the wife in an alimony suit any higher right to protection than an ordinary creditor? This line of argument was not taken by the plaintiff's counsel and I fail to see where any distinction can legally be made.

I understand the plaintiff to rely on the non-effectiveness of the order for interim alimony to protect her rights under it by registration against the defendant's lands afforded by sec. 19 of The King's Bench Act. The order, I understand, reads that alimony is to be paid up to the trial or adjudication of the action, and plaintiff contends that it ceases to be operative the moment

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judgment is pronounced, thus leaving the plaintiff unprotected by registration for the period that must necessarily elapse between delivery of judgment and entry and registration of a certificate of such judgment, during which period it was legally possible for the defendant to alienate his land and so defeat the plaintiff's claim to her interim alimony then unpaid and to the permanent alimony awarded by the judgment.

She also relies on the decision in *Bashford* v. *Bott*, 2 S. L.R. 461. One purpose of this action was to establish a vendor's lien. At p. 465 Wetmore, C.J., makes this statement of the law:—

> The power of the Court to grant injunctions to preserve property or continue the *status quo* in respect thereto *pendente lite* is well recognized, and being so recognized, the language both of Jessel, M.R. and Lindley, L.J. (previously cited in the judgment), would apply to an application for an injunction to so preserve the property.

The language of Jessel, M.R., referred to was in reference to the meaning of the words "just or convenient," found in the English Judicature Act, 1873, in the section relating to injunctions. *Aslatt* v. *Southampton* (1880), 16 Ch.D. p. 148. Jessel, M.R., says:—

> Of course the words "just or convenient" did not mean that the Court was to grant an injunction simply because the Court thought it convenient; it meant that the Court should grant an injunction for the protection of rights, or the prevention of injury, according to legal principles, but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that inury upon him it appears to me that the Court ought to interfere.

The expression "just or convenient" is found in sub-sec. (*o*) of sec. 26 of our King's Bench Act.

It seems to me that the application of the general principle enunciated in *Bashford* v. *Bott*, quoted above, ought to be confined to actions which have for their object in whole or in part the protection of rights or the prevention of injury according to legal principles, and not for the protection of anticipated rights which may or may not come into existence according to the result of litigation instituted for a different object, even though that objective when gained may ultimately be defeated by a defendant's acts *pendente lite*—such, for example, as the alienation to a *bonâ fide* purchaser for value without notice during progress of an action for debt, of property, which, if retained until judgment, will be available at law to satisfy such judgment.

I think the authorities, upon the whole, are against the

plaintiff's right to these costs, and that the order asked for must be refused. I therefore deny the application, but without costs, except necessary disbursements to the defendant, as the defendant appeared upon the motion in person. *Application refused.*

MAN.

K. B.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. March 3, 1916.

APPEAL (§ II A 1—35)—JURISDICTION OF CAN. SUPREME COURT—TITLE TO LAND—FRAUDULENT CONVEYANCE.

An action to set aside a conveyance of land as a fraud on creditors involves no question of title to real estate within the meaning of sec. 48 (*a*) of the Supreme Court Act (R.S.C. 1906, ch. 139), so as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

[See also *Lachance* v. *Cauchon*, 26 D.L.R. 744, 52 Can. S.C.R. 223.]

MOTION to quash for want of jurisdiction an appeal from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the plaintiff's action was dismissed. Statement.

The motion to quash an appeal from the judgment of the Appellate Division raised the single question whether or not a creditor's action to set aside a conveyance as fraudulent under the statute of Elizabeth brought in question the title to real estate and so gave the Supreme Court jurisdiction to entertain the appeal, which in all other respects was admittedly incompetent, under sec. 48 sub-sec. (*a*) of the Supreme Court Act.

G. F. Henderson, K.C., for the motion.

Chrysler, K.C., *contra*.

FITZPATRICK, C.J.:—I agree with Mr. Justice Idington. Fitzpatrick, C.J.

DAVIES, J.:—The claim of the plaintiff in this case was that a conveyance made to the defendant Margaret Scott, wife of the defendant Cornelius Scott by a third party for an alleged valuable consideration should be declared void as against the plaintiff because made for the purpose of defeating and delaying the plaintiff in the recovery of his claim against the defendant Cornelius and as being in contravention of the statute of Elizabeth. The trial Judge found Davies, J.

there was no fraud in the transaction and no intent on the part of either defendant to defeat, delay or hinder any creditor of Cornelius Scott in the recovery of any debt.

That was the real substantial question in controversy between the parties and on this finding of the trial Judge he dismissed the action.

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On appeal to the Appellate Division of Ontario the judgment of the trial Judge was confirmed and the appeal dismissed.

The defendant now moves to quash an appeal to this Court from the judgment of the Appellate Division on the ground of want of jurisdiction. The motion is made on the grounds that the claim of the plaintiff is in amount too small in itself to give jurisdiction and that the title to lands is really not directly in question though collaterally and indirectly it may be said to be so.

But the collateral effect or consequences of our judgment are not the test of our jurisdiction and the real substantial question upon which both Courts passed and which was the question in controversy between the parties and on which an appeal, if allowed, to this Court must alone turn would be the existence of a fraudulent intent to defeat creditors of Cornelius Scott by taking a conveyance of certain lands in the name of his wife. *Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 Can. S.C.R. 224. See also *Lamothe* v. *Daveluy*, 41 Can. S.C.R. 80.

The decisions of the Court below on that question of fraudulent intent in the negative settled and determined the action which was thereon properly dismissed.

Under these circumstances I do not think we should affirm our jurisdiction to hear an appeal on the ground that title to land is in question, because it is clearly only so indirectly and collaterally and the real question upon which the result of an appeal must depend is one of fraudulent intent to defeat creditors.

If the conveyance should be set aside, it would only be as against the plaintiff and other creditors of Cornelius Scott; and so far as appears, the claims of Scott's creditors are very much less than $1,000.

Idington, J.

IDINGTON, J.:—I think the motion to quash ought to prevail. It has been decided more than once that these cases merely seeking execution out of lands alleged to have been conveyed to defeat creditors, involve no question of title to land or any interest therein within the meaning of sec. 48 of the Supreme Court Act, and must exhibit a creditor's interest exceeding $1,000 to give this Court jurisdiction in such an appeal.

I can conceive of a case founded on a creditor's right to relief, developing in its progress or defence something that in fact raised

an issue where title to land might be involved, but that does not appear in this case.

The motion should be allowed with costs.

Duff, J.

DUFF, J. (dissenting):—On principle it appears to me to be very clear that a question of title to lands arises. The question arises in this way. The action is an action brought for a declaration that the husband, the judgment debtor, had a beneficial interest in the lands, the legal title to which stands in the name of the wife, which interest is available for the satisfaction of the judgment creditor's debt. I am unable to understand on what principle it can be said that such an action does not involve a question of title to land. The analogy is only superficial between such an action and some others; an action by a creditor, for example, to set aside a conveyance of property which was intended by the debtor to pass his beneficial as well as his legal interest on the ground that the conveyance is impeachable under the statutes prohibiting preferences; or an action to set aside a voluntary conveyance, on the ground that the intention was to benefit the grantee at the expense of the grantor's creditors; or an action to set aside a conveyance for consideration, on the ground that the real object and intent was to defeat creditors, although in point of fact the conveyance was intended between the parties to pass not only the legal but the beneficial title to the grantee. Such actions are not based upon an allegation that the judgment debtor has a title but that the title though vested in the grantee has been acquired by fraud and is held primarily subject to a charge in favour of creditors. A claim that land standing in the name of another is really the property of the judgment debtor stands, in my opinion, on a different footing.

Anglin, J.

ANGLIN, J.:—I concur in the opinion of Davies, J.

Brodeur, J.

BRODEUR, J. (dissenting):—This is a motion to quash for want of jurisdiction.

The plaintiff asked by his declaration that the property held by the defendant's wife, Mrs. Margaret Scott, had always been the property of the husband, Cornelius Scott.

The question now is whether under sec. 48 of the Supreme Court Act we have jurisdiction to entertain the appeal.

The respondent relies on the case of *Lamothe* v. *Daveluy*, 41 Can. S.C.R. 80. That case was an "*actio Pauliana*" brought to set aside

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the contract for sale of an immovable in Quebec and it was decided that such an action is a personal one and does not relate to a title to land so as to give a right of appeal to this Court.

The *actio Pauliana* is peculiar to the Province of Quebec, and though there is a great deal of divergence of opinion, it seems to be settled law that this is a personal action and not a real action. That was the basis of the decision in *Lamothe* v. *Davelu*, 41 Can. S.C.R. 80.

In the present case, the matter in controversy is whether the transfer made by the husband to his wife is valid and whether the husband should not be declared to be the absolute owner of the property. It is asked that it be declared that the deed passed between husband and wife was simulated and that virtually she is holding the property as a trustee for her husband.

It is, then, no more a personal action resulting from a personal right as in the *actio Pauliana;* but it is an action concerning title to real estate and should be considered as falling under the provisions of sec. 48(*a*).

The motion to quash should be dismissed. *Appeal quashed.*

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HILLMAN v. IMPERIAL ELEVATOR AND LUMBER CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 1, 1916.

1. APPEAL (§ II A 1—35)—TO CANADA SUPREME COURT—CAUSE ORIGINATING IN INFERIOR COURT.

No appeal lies to the Supreme Court of Canada from a cause originating in a District Court, even if subsequently removed to a Court of superior jurisdiction, and the proceedings, after the issue of the writ, carried on as if a new writ had been issued therein.

[*Tucker* v. *Young*, 30 Can. S.C.R. 185, followed.]

2. APPEAL (§ III F—95)—EXTENTION OF TIME—SPECIAL LEAVE.

The Supreme Court of Saskatchewan cannot, by virtue of sec. 71 of the Supreme Court Act (R.S.C. 1906, ch. 139), extend the time for hearing an appeal of the class to which sec. 69 applies.

[*John Goodison Thresher Co.* v. *Township of McNab*, 42 Can. S.C.R. 694, followed.]

Statement.

MOTION for special leave to appeal to the Supreme Court of Canada from the judgment of the Supreme Court of Saskatchewan, 23 D.L.R. 420, 8 S.L.R. 91, affirming the judgment of Newlands, J., at the trial, maintaining the plaintiffs' action with costs.

Chrysler, K.C., for the motion, on behalf of the appellant.

The judgment of the Court was delivered by

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is a motion for leave to appeal from the judgment of the Supreme Court of Saskatchewan, under

sec. 37*c* of the Supreme Court Act which gives an appeal by leave of the Supreme Court of Canada from a judgment in an action, suit, etc., not originating in a superior Court. If there is power to grant leave the case is eminently one for granting it. The writ was issued in the District Court for the purpose of enforcing a mechanic's lien. The appellant's proceedings in that Court were not continued but, instead of issuing a new writ, by consent of the parties the proceedings were transferred to the Supreme Court of Saskatchewan, and the statement of claim, pleadings and proceedings have all been in that Court, the intention between the parties being that the plaintiff should be in the same position as if he had issued a new writ. Unfortunately, according to *Tucker* v. *Young*, 30 Can. S.C.R. 185, it did not have that effect. It was held in that case that an action begun in the County Court, in Ontario, and removed under the provisions of the Judicature Act into the High Court was not appealable to the Supreme Court of Canada as the action had not originated in a superior Court.

When the case first came to this Court, Mr. Lafleur having doubts as to this Court's jurisdiction, had the case struck from the list. The plaintiff then applied to the Chief Justice of Saskatchewan, with the consent of the defendants, and obtained an order, professedly under sec. 71 of the Supreme Court Act, which gives to the Court below the power to allow an appeal, although the same was not brought within the 60 days prescribed by sec. 69. Sec. 37, however, does not give the Court below power to grant leave to appeal in a case of this kind, and it has been held by this Court in *John Goodison Thresher Co.* v. *Township of McNab*, 42 Can. S.C.R. 694, that sec. 71 does not authorize the Court below to extend the time for bringing an appeal so as to confer power on this Court to grant leave to appeal where the application to this Court for leave to appeal is made under sec. 48*c*.

I do not see how it is possible to distinguish this case from the *Goodison Case*, 42 Can S.C.R. 694, so as to hold that the order of the Chief Justice of Saskatchewan will authorize this Court, after the 60 days, to grant leave to appeal.

Motion refused.

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CLARK v. ENGLAND AND MORTON.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

SALE (§ III D — 75) — TITLE TO ANIMAL SOLD BY POUND-KEEPER — CONFISCATORY STATUTE — BURDEN OF PROOF.

Where a plaintiff claims title to a horse under bill of sale from a pound-keeper, sold under the provisions of the Rural Municipality Act (Alta. Stats. 1911-1912, ch. 3, secs. 206 *et seq.*), the onus is upon him to shew that there were no irregularities in the sale proceedings.

Statement.

APPEAL from the judgment of Greene, J. Reversed.

C. S. Blanchard, for plaintiff, respondent.

W. A. MacDonald, for defendant, Morton.

England not represented by counsel.

Scott, J.

SCOTT, J.:—I agree with the conclusion reached by my brother Beck that the onus was upon the plaintiff to prove that the sale made by the pound keeper to defendant England was one which the former was legally authorized to make and that, having failed to prove this, he has not shewn that he was entitled to recover in the action.

I would, therefore, allow the appeal of defendant Morton with costs.

I, however, entertain some doubt whether r. 192 referred to by my brother Beck is applicable to cases like the present where the trial Judge, instead of exercising the discretion given him by that rule, has disposed of the action by giving judgment and as to whether that discretion can now be exercised by this Court. Even if it can, I think that this is not a case in which it should be exercised.

I would, therefore, dismiss the plaintiff's action in the Court below with costs to defendant Morton. I would give the plaintiff leave to bring a new action.

Stuart, J.

STUART, J.:—In this case I think the burden of proving ownership was throughout upon the plaintiff. Of course where the property was in his possession at the time of the alleged conversion that is sufficient to shift the onus: Bullen and Leake, 7th ed. 282. But once it appeared as it very soon did, in the course of the proceedings, that the plaintiff's title, as against the defendant who had been until recently the true owner and had not sold, depended on a statutory confiscatory power of sale given to a public official then the regularity of the proceedings taken by that official was something which the plaintiff was bound

to prove. There is no real presumption of regularity in such a case: Wigmore on Evidence, sec. 2534 (note).

I think the plaintiff therefore failed to prove his title and that his action should have been dismissed at any rate upon the evidence as it stood. The consequence is that the appeal should be allowed with costs and the judgment below set aside.

Stuart, J.

I think, however, it would be unfortunate if this dispute between these parties were left thus decided in the absence of the real evidence upon which it turns. The plaintiff made a mistake and must suffer for it. I think his action must be dismissed with costs, but that he should have leave to bring a new one. He will not, in view of what has been said by my brother Beck as to the impropriety of his claiming a warranty of title against England, in which I concur, join England in the new action. There can be no doubt that the only point which will have to be decided in the new action will be the regularity of the sale proceedings, and a careful inquiry into these by solicitors for all parties, including the Local Improvement District, ought to lead to a settlement of the dispute without further litigation. If the local authorities see any ground for doubting the validity of what they did, in my opinion they ought to return the plaintiff his money, at least the $65, and let the defendant have his horse.

Beck, J.

BECK, J.:—The appellant is the defendant Morton; the defendant England did not appear upon the appeal.

The action is about a horse. The horse was impounded in a rural municipal pound and advertised for sale. The plaintiff and the defendant England were both bidders at the sale and England became the purchaser of the horse for $65. Before the purchase money was paid by England to the pound keeper, the plaintiff made an offer to England of $70 for the horse, which the plaintiff accepted. Then the plaintiff produced $70 and placed it on a table in front of the pound keeper and England. The pound keeper took $65 and England $5. Then the pound keeper made out a memorandum in favour of England, as follows:—

Bill of Sale—King Municipality No. 153. Sold by Public Auction at Pound No. 1.

This is to certify that I have sold this 8th day of October, 1913, one light bay gelding branded X9 and C.S. on right shoulder, markings, white stripe down face, two white socks on hind legs. Sold to Charlie England.

Roy Caines, Pound keeper, Carlstadt, Alta.

At the foot of this there was written: "For value received, I

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have sold horse described herein to R. S. Clark." This was signed by England.

The plaintiff took away the horse but it was taken from him some time in August, 1914, by the defendant Morton, who claimed to be the owner, and it seems clear enough on the evidence that he was the owner unless the pound keeper's sale was valid.

The plaintiff sought to make England liable upon an implied warranty of title. The trial Judge held that there was no warranty of title from England to the plaintiff, and therefore dismissed the action as against England. In this the Judge was undoubtedly right.

The law on the subject of implied warranties or conditions is codified in the Sale of Goods Ordinance C.O. (1898), ch. 39, sec. 14.:—

> In a contract of sale, *unless the circumstances of the contract are such as to shew a different intention, there is:*
>
> **1.** An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods.

In my opinion the circumstances in the present case are clearly such as to exclude the implied condition. The plaintiff had exactly the same knowledge as England himself of England's title to the horse. If he had not been outbid by England he himself would have taken the same title as England took. It seems to me to be useless to discuss the cases; they are discussed in the standard text books on sales of goods.

The question of the burden of proof, where it begins and when it shifts in the case of a title from an officer acting under statutory authority, is a difficult one upon which there seems to be little English or Canadian authority of a satisfactory character.

I take it that the municipality whose pound keeper sold the animal in question is one subject to the Rural Municipality Act, ch. 3 of 1911-12 (as amended by 4 Geo. V. 1913, 2nd sess., ch. 21, sec. 13).

That Act under the sub-title "Restraining animals at large," secs. 206 *et seq.*, gives municipalities whatever powers they had in this respect.

I set down as briefly as I can the several steps called for by the statute precedent to a sale by a pound keeper. (1) The by-law: Sec. 206 empowers the municipality to pass by-laws restraining animals at large and enacts that any such by-laws

shall contain provisions dealing with a number of designated points. Among other things it is to prescribe the manner in which animals . . . shall be distrained and kept during such distraint and the places at which and the persons with whom animals so distrained shall be impounded; and sec. 207 enacts that every such by-law *shall incorporate* substantially all the provisions of sections 206 to 216 inclusive substituting "by-law" for "Act" where the meaning requires it; but sec. 214 provides that no such by-law shall be passed without public notice being given of the intention to pass it. (2) The authority and duty of the impounder.

If such a by-law is passed apparently anybody may impound an animal running at large in contravention of it, as well as "any person claiming any damage for trespass by any animal impounded;" but by sec. 208 in the latter case, if the impounder wishes to collect damages, he must at the time of the impounding deliver to the pound keeper a statement in writing showing the nature and the amount of his demand.

(3) Duties of pound-keeper before notice of sale. If the owner of the animal is unknown to him and a claim for damages has been delivered to him by the impounder, he is to have the damages appraised (sec. 208).

If the owner is known to the pound keeper he is forthwith to deliver at or mail to the address of the owner a notice in a prescribed form—describing the animal, stating the place and date of the impounding and if there is a claim for damages a statement of the amount of the claim, the name of the claimant, etc. A copy of this notice is to be published in one issue of the Alberta Gazette and one posted up at the nearest post office and one at the pound (sec. 209).

(4) Duties of pound keeper on proceeding to sell. Sec. 211 provides that when any animal shall not have been released from the pound for thirty days after the publication of the notice already mentioned, the animal shall be sold by public auction after notice of such sale has been posted for eight days, etc.

Every plaintiff, in order to prevent his action from being dismissed, must, where allegations essential to his recovery are denied, make out a *prima facie* case.

Here the plaintiff proved that from some time in October,

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1913, to some time in August, 1914, he was in possession of the animal, the subject matter of the action; and that on the latter day the defendant Morton took it out of his possession against his consent.

Without more, I think, the plaintiff proved *prima facie* that he was the owner of the animal at the time Morton took it from him and that Morton was a wrong doer.

In Pollock and Wright on "Possession," p. 28, it is said:—

> Possession is *prima facie* evidence of ownership. . . .
>
> For the very reason that possession in fact is the visible exercise of ownership, the fact of possession, so long as it is not otherwise explained, tends to shew that the possessor is the owner; though it may appear by further inquiry that he is exercising either a limited right derived from the owner and consistent with his title, or a wrongful power assumed adversely to the true owner or derived from some one wrongfully assuming to be the owner, or possibly, again, an adverse but justified power.

In Halsbury's Laws of England, vol. 22 tit. Possession, p. 395, it is said:—

> The *prima facie* presumption of law is that the person who has *de facto* possession has the property and accordingly such possession is protected, whatever its origin, against all who cannot prove a superior title.

The defendant Morton, however, having shewn that he, immediately prior to the plaintiff having acquired possession, was the owner and had not parted with his property in the animal, the onus was shifted to the plaintiff to shew how the defendant's title was got rid of.

The plaintiff proved that England, from whom he bought, bought the animal at a pound keeper's sale and he produced what may be called a bill of sale from the pound keeper.

Was he bound to prove anything more?—that the pound keeper followed the directions of the statute as to notice of sale, and as to the notice of impounding; that the municipality had passed a proper by-law respecting the restraining of animals at large?

I think it was not sufficient for the plaintiff to stop at the bill of sale from the pound keeper. The maxim *omnia præsumuntur*, etc., carries only to the extent of dispensing with formal proof of the appointment of the pound keeper. The question whether there is any point at which in the case of a person whose title depends upon a tax deed can stop, so as to shift the onus to his opponent or whether he is bound to prove each step from the commencement of the proceedings to impose the tax, is discussed

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in *Alloway* v. *Campbell*, 7 Man. L.R. 506, and the Court there agreed that in the absence of statutory provisions curing defects or declaring that certain things should be *prima facie* or conclusive evidence all the proceedings must be proved. This seems the only logical conclusion. I think the same principle applies to a sale by a pound keeper. In so saying I do not mean to say what, if any, irregularities in the proceedings will or will not invalidate them.

As I understand, the result of the numerous cases on tax sales is that the requirements of the statute, so far as they relate to the imposition of the tax, are construed strictly and are for the most part mandatory; but so far as they relate to enforcement they are construed with less strictness and are for the most part directory. See *Local Improvement District* v. *Walters*, 1 A.L.R. 188.

For the reasons I have given I think the plaintiff failed to prove his title, and therefore on the evidence as it stood was not entitled to judgment. The evidence which, if it exists, will complete the proof of his title is purely documentary. I think he should have an opportunity of producing it if he can, in accordance with the *principle* of r. 192 and of the rule authorizing the hearing or directing of further evidence by the Court of Appeal.

I would, therefore, allow the appeal with costs and set aside the judgment against the defendant Morton, but instead of directing a new trial on the whole case, I would direct a new trial solely on the question of the title derived by the plaintiff from the pound keeper.

The costs of this new enquiry which the Judge below ought, I think, to treat for the purposes of costs as merely a continuation of the former trial ought to be quite small and should be borne by the plaintiff; the costs of the first trial should, I think, follow the ultimate result.

MCCARTHY, J., concurred with SCOTT, J. *Appeal allowed.*

McCarthy, J.

MEDICINE HAT WHEAT CO. v. NORRIS COMMISSION CO. Ltd.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

DISCOVERY AND INSPECTION (§ IV—33)—EXAMINATION OF EMPLOYEES OF INDIVIDUAL PARTNER.

The employee of one of the partners of a firm, though he is not the employee of all the partners, is the employee of a *party to the action*, and therefore examinable on discovery under the provisions of r. 234 of the Alberta Judicature Act.

[*McLean* v. *C.P.R. Co.*, 28 D.L.R. 550, referred to.]

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Stuart, J.

APPEAL from orders made by Hyndman, J., upon motions for examination for discovery. Reversed.

F. S. Albright, for defendants, appellants.

I. C. Rand, for plaintiffs, respondents.

STUART, J.:—The effect of r. 146 (*b*) is that where an action is brought in the name of a firm it shall continue to be carried on in that name, but nevertheless the real parties to the action are the members of the firm whose names have been given upon demand. There is no limitation possible, it seems to me, to the effect of the words "with the same consequences in all respects as if they had been named as plaintiffs in the statement of claim;" and the consequence is that the employee of a partner, though he is not the employee of *all* the partners, *i.e.*, of the firm, is the employee of a party to the action and therefore examinable under r. 234. I think the same result follows from r. 235, also. There is no injustice in this, because in any case he can only be examined if he has had to do with the transaction out of which the dispute has arisen, and if he has been connected with or has had something to do with a partnership transaction even though only as the employee or agent of one of the partners, I can see no reason why he should not be subjected to examination just as much as one who was the employee of all the partners together. It may, indeed, very often happen that a member of a firm should entrust his separate employee with the performance of some work in connection with the firm's business which the employer, as a member of the firm, has found it inconvenient to attend to himself.

It seems clear that a party desiring to examine an opposite party may insist that he inform himself on any point as to which the knowledge is in possession of his employee and then state the result of his enquiries. The new rule merely gives a means of getting the information first hand and upon oath. The examining party then has to choose between the two benefits open to him, viz.: (1) that of being able, subject to possible objection, to put in at the trial the second-hand information as part of the examination for discovery of his opponent; and (2) that of getting the person who really knows about the matter examined under oath but without the possibility of using the examination at the trial. There is no doubt that the new rule as to examining mere employees (134) extends considerably the principle of discovery.

Ordinarily under the old idea of discovery a party was able to use at the trial if he saw fit the evidence which he had obtained by the process provided. That was originally the very reason for the old bill of discovery. To let a person examine some one to ascertain facts and then say that he must not present the facts, thus discovered, in evidence unless he is prepared to make the person who has revealed them his own witness at the trial, is an extension of the principle of discovery which ought to be clearly recognized as so great an extension that a new attitude of mind altogether must be adopted in regard to it. I think the rule is quite proper and useful, but it appears as if the law were moving in the direction of allowing the examination before the trial of any person at all who had to do with the transaction. Just why the circumstance that the person is the employee of a party should now make so much difference when his evidence cannot be used in any case, may be a question.

Be that as it may, I am unable to see any reason why the separate employees of defendants who are being sued, for instance, on a merely joint note should not be examined. It must be remembered that it is only by comparatively recent rules that partners could sue in the firm name at all. It is only slowly that a partnership is being recognized as a separate legal entity. It is not a "person" in the sense that a corporation is a person. A person in the employ of a firm is an employee really of each member of the firm, though, of course, the converse is not true.

I would allow the appeal from the order refusing liberty to examine Knowles.

It appears that the plaintiff firm consists of Harry Yuill, William B. Finlay and Francis M. Ginther. It also appears that Findlay and Ginther were partners in a firm called The Ginther Land Co. The officers of the two firms were together in the same rooms. The plaintiff firm sue the defendant for the price of some carloads of wheat. The defence is that the defendant dealt with the Ginther Land Co. and had paid that company in full for the wheat, that if the plaintiffs did own the wheat they had left it in the possession of the Ginther Land Co with ostensible authority to deal with it. The members of the plaintiff firm were each asked certain questions as to the terms of the plaintiff's partnership agreement and as to the state of the partnership

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affairs. What the defendant evidently expected or hoped to show was that the connection between the two firms was so intimate (the same two persons being members of both and a third Yuill being a special partner of the plaintiffs, perhaps if the truth were known only a creditor, or entirely paid off), that any dealings with the Ginther Land Co. would practically be dealings with the plaintiffs. I think the questions asked were all proper questions in the circumstances. It is difficult, even at the present stage of the action, to say what may and what may not ultimately prove to be very material to the real dispute or what the exact issues will be. It is a case in which much latitude should be allowed, particularly when it must be a matter of indifference to the plaintiffs. I can conceive no collateral source of harm to the plaintiffs if they should answer the questions. See Bray on Discovery, pp. 17, 18.

Then with regard to the documents, what I have already said applies to one of them, *i.e.*, the partnership agreement, which I think should be produced. In regard to the power of attorney, if there is only one copy and that in the possession of Knowles, its production must be obtained from him. If there is another copy in Yuill's possession he should produce it on his re-examination. Subject to this exception and direction in Yuill's case I think the appeal should be allowed with costs, the orders appealed from should be reversed and the applications granted and the costs of the applications to Hyndman, J., should be costs to the defendants in any event on final taxation. The plaintiffs should attend at their own expense for further examination and answer the questions asked and any further proper questions.

Scott, J.
McCarthy, J.

SCOTT and MCCARTHY, JJ., concurred.

Beck, J.

BECK, J.:—There is an appeal from each of three orders made by Hyndman, J.: (1) an order dismissing a motion by the defendants for the examination of one Knowles, an employee of Yuill, one of the members of the plaintiff firm; (2) an order dismissing a motion by the defendant to compel the several members of the plaintiff firm to answer certain questions upon their examinations for discovery; (3) an order dismissing defendants' motion to compel the several members of the plaintiff firm to produce certain documents referred to in their examination for discovery.

The appeal from the 1st order raises again the question of the

effect of r. 234, which provides for the examination for discovery 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;" a rule which we had occasion to consider recently in the case of *McLean* v. *C.P.R. Co.*, 28 D.L.R. 550. We there held that the rule was limited to such employees as were directly connected with the transaction or occurrence, not because of being merely witnesses but because of the character of their employment. The question now before us is somewhat different. The plaintiff firm consists of three persons: Harry Yuill, William B. Finlay, and Francis M. Ginther. Yuill appointed Knowles under power of attorney to act in his stead in relation to the partnership affairs. The defendants wish to examine Knowles respecting the partnership affairs. The plaintiffs object on the ground that Knowles was not an employee of the firm but only one of the members of the firm.

Rule 146 provides that where an action is commenced in the name of a firm the names of the members shall be declared if demanded, and that where the names are declared the action shall proceed in the same manner and *with the same consequences in all respects as if the members had been named as parties in the statement of claim.*

The question then is to be decided as if Harry Yuill, William B. Finlay, and Francis M. Ginther were named as parties without more.

The statement of claim shows that the cause of action which they set up is a claim by the plaintiffs jointly and the precise question for decision is whether in such a case an employee of one of the plaintiffs can be examined under the rule. Undoubtedly each of the parties may be examined. Their examination must be "touching the matters in question" (r. 234)—that is, touching the cause of action alleged in the statement of claim or touching any defence or counterclaim set up by way of answer thereto. Undoubtedly, also, an employee of all the plaintiffs may be examined subject to the same limitation and subject to the restriction which in *McLean* v. *C.P.R. Co.*, *supra*, we have held attaches to the examination of any employee.

This case happens to be a joint claim, but there are, of course,

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cases in which the right of several plaintiffs is not a joint right or a joint right only. There were some such cases in the earlier practice; their number has increased by reason of r. 15 (corresponding to English o. 16, r. 1), providing for the joinder of one or more persons as plaintiffs or defendants in the case of claims in respect of or arising out of the same transaction or occurrence or the same series of transactions or occurrences. In such cases if the claim of the several plaintiffs or the defence or counterclaim of the several defendants was not joint there would seldom, if ever, be an employee of all the plaintiffs or of all the defendants. I think that in such cases the intent of the rule is that the employee of any individual party may be examined, and I see no ground in the words of the rule why, if this is so where the rights are several, it should be otherwise where the rights are joint.

It is a common rule of construction of statutory provisions that they are to be interpreted distributively, that is, that what is said of all of several is intended to be said of each of them.

I think that the rule in question (rule 234) should be so interpreted and that the defendants were entitled to an order for the examination of Knowles, the employee of Yuill, touching his knowledge of the matters in question or the action acquired by virtue of his employment.

To understand the matter in controversy upon the second order it is necessary to look at the pleadings.

The plaintiffs' claim is for the price of a number of cars of wheat alleged to have been sold and delivered by the plaintiff firm to the defendant company. One of the defences set up is in substance this:—(1) that the owners of the wheat were not the plaintiff firm but either Francis M. Ginther or the Ginther Land Co. from whom the defendant company bought and to whom they paid the purchase price. (The defence says: "The Ginther Land Company *Limited*," but it is stated by counsel for the defendant that the insertion of the word "Limited" was a mistake and that the company is a firm composed of Francis M. Ginther and William B. Finlay, two of the members of the plaintiff firm, and that it was quite understood with the plaintiffs' solicitors that there would be an amendment in this respect. I think this application ought to be dealt with as if this mistake had been already made); (2) that if the wheat was the property of the

plaintiff firm they "delivered the same into the possession of" F. M. Ginther or the Ginther Land Co., who sold and delivered the wheat to the defendant company on their own behalf without any knowledge by the defendant company that the plaintiff firm was the owner and that still without such knowledge the defendant company paid the purchase price to F. M. Ginther and the Ginther Land Co.

Under this defence I suppose the defendants intend to rely in part at least upon sec. 23 of the Sale of Goods Ordinance C.O. (1898), ch. 39, and the Factors Ordinance C.O. (1898), ch. 40.

Questions 4, 5, 7, 9, 11, which Yuill declined to answer, relate to the production of the articles of partnership and in the absence of their production to their contents, I think the defendants were entitled to have these questions answered. The real question in dispute as will be seen by my statement of the substance of the defence is this: the defendants say they dealt with Ginther or with Ginther and Finlay; the plaintiffs say the defendants dealt with a firm composed of Yuill, Ginther, and Finlay, or at all events that the wheat was owned by the three, not by the two. The real precise relationship of Yuill to the other two is, therefore, of the utmost importance.

The fifth question was: "Did you appoint a manager?" Whetner "you" referred to Yuill or to the plaintiff, I think the question ought to have been answered. Yuill appointed Knowles to act for him; was he his manager? If Ginther or Finlay was manager for the plaintiff firm, it would be a very material fact.

Questions 54 and 59. It appeared during the examination of Yuill that he claimed to be a special partner. In view of the limitations upon both the liability and responsibility of a special partner (see The Partnership Ordinance, ch. 7 (1899), secs. 47 *et seq.* and see also sec. 4 (*d*)), I think it open to the defendant to examine fully into the relationship existing between Yuill on the one hand and Ginther and Finlay on the other. These two questions were directed to the point whether Yuill had been paid off the amount of his advance. I think they were permissible.

Question 60 was directed to the amount of Yuill's advance; and the remaining questions 71, 88, 91 and 92 are all directed to the ascertaining what, if any, interest Yuill had in the plaintiff firm. For similar reasons I think they were permissible.

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Of the questions which Finlay refused to answer, 3, 4, 70, 73 and 74 are similar in character and purpose to those asked of Yuill.

Question 107. As I understand the purport of the question in view of those that precede it, it refers to the history of one or more of the car load lots of wheat in question in the action. If it does, clearly the question ought to be answered. If it does not, I still think it should be answered because it then must refer to a car which the defendant hopes to show was dealt with in such a way by the plaintiffs or some of them as to show a course of dealing which will furnish evidence material to the questions in issue.

The questions 181, 182, 183, and 184 which Ginther refused to answer are questions similar to those asked of Yuill, which, I think, he is bound to answer.

The third order raises in addition to questions which I have already dealt with (1) the question whether the plaintiffs are bound to produce on their examination for discovery their articles of partnership, and (2) the question whether Yuill is bound to produce the power of attorney from himself to Knowles. As to the articles of partnership, I have already made it clear that in my opinion they must be produced. As to the power of attorney, if there is but one original and that is in the possession or Knowles, it is Knowles' property and not in the custody, power or possession of Yuill. The defendants must get it from Knowles not Yuill. If, however, there was a duplicate or copy in the possession of Yuill, I can see no ground on which he can refuse to produce it.

An examination for discovery has a wider range than an examination at the trial except that questions are not permissible which go only to impeaching the credit of the party under examination. Questions are relevant which go to the matter really in issue between the parties though strictly speaking an amendment may be necessary to bring them within the issues actually raised by the pleadings. See cases collected Holmested and Langton Jud. Act, 4th ed., p. 817.

My conclusion is that each of the three orders ought to be reversed with costs, the costs of the application to Hyndman, J., being costs to the defendants in any event, and that an order should go that the several plaintiffs answer the questions which

they refused to answer and such other proper questions as may be put to them on their further examination, and that as regards the articles of partnership, they produce them on their further examination, and that as regards the power of attorney from Yuill to Knowles, any duplicate original or copy in the custody, power or control of the plaintiff Yuill be also produced. The plaintiffs should attend for such further examination at their own expense.

Appeal allowed.

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Manitoba King's Bench, Galt, J. February 18, 1916.

PLEADING (§ I S—145)—STRIKING OUT DEFENCES TO FOREIGN JUDGMENT—"EMBARRASSMENT AND DELAY."

Where in an action on a foreign judgment the defendant sets up defences already heard and adjudicated upon by the foreign tribunal, they may, at the instance of the plaintiff, be struck out, upon the ground of embarrassment and delay, and under rule 625 (King's Bench Act, R.S.M. 1913, ch. 46) the plaintiff may sign judgment.

[*Gault* v. *McNabb*, 1 Man. L.R. 35; *Meyers* v. *Prittie*, 1 Man. L.R. 27, followed; *Hickey* v. *Legresley*, 15 Man. L.R. 304, distinguished; *Stratford Gas Co.* v. *Gordon*, 14 P.R. (Ont.) 407, referred to.]

Statement.

MOTION by plaintiff to strike out the defences filed by defendant on the ground of embarrassment and delay, and for leave to sign judgment.

D. A. Stacpoole, for plaintiff.

W. S. Morrissey, for defendant.

Galt, J.

GALT, J.:—This is a motion on behalf of the plaintiff company for an order that the defences as filed by the defendant be struck out on the ground that they tend to embarrass and delay the plaintiff, and on the ground that the said defences have been adjudicated upon in the Supreme Court of Ontario, in which last mentioned Court all the points in question in this action have been tried and decided against the defendant, and for an order that the plaintiff be at liberty to sign final judgment for the amount claimed in the statement of claim after allowing a credit of $850.76 realized under execution in Ontario.

The plaintiff's original claim was tried out before Sutherland, J., in Ontario, and on June 4, 1915, judgment was rendered in favour of the plaintiff, and subsequently judgment was entered for the plaintiff for the sum of $1,627.52 and $586.12 costs. The defendants entered an appeal from such judgment, but this was discontinued by notice on August 5, 1915. It is admitted that the defences sought to be raised in the present action in Manitoba

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are practically the same defences as were dealt with in the Ontario action. Counsel for the plaintiff in the first instance based his motion upon sec. 25, sub-sec. (*l*) of the King's Bench Act (ch. 46, R.S.M. (1913), which reads as follows:

(*l*) A defendant in any action upon a judgment obtained in any Court out of the province, or upon a foreign judgment may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered; provided, always, that the opposite party shall be at liberty to apply to the Court or Judge to strike out any such pleading or defence upon the ground of embarrassment or delay.

In *Gault* v. *McNabb*, 1 Man. L.R. 35, an action was brought upon a judgment obtained in Ontario for goods sold and delivered to a firm of which the defendant was a member. The defendant defended the original action upon the ground that prior to the sale of the goods he had left the firm and had so notified the plaintiff. After the verdict had been entered for the plaintiff the defendant moved in term for a new trial upon the ground that the verdict was against law and evidence and the weight of evidence, but his motion was refused and judgment was entered for the plaintiff. In an action on the judgment in Manitoba the defendant pleaded the same defence. On a motion to strike out the pleas upon the ground that they delayed and embarrassed the plaintiff: held, that the pleas should be struck out and the plaintiff permitted to sign judgment.

In *Hickey* v. *Legresley*, 15 Man. L.R. 304, the same point arose for decision before the Full Court in Manitoba. The original action had been brought in Cape Breton, but the defendant set up by affidavit that he had fully intended to defend the Cape Breton action but that, owing to misunderstandings, he was unable to be present when that action came on for trial and that, as a result, the action went against him by default. He claimed to have a *bonâ fide* defence. The Full Court distinguished this case from *Gault* v. *McNab*, *supra*, upon the ground that in the latter case the defences sought to be raised in this Court had been set up in the original action and had been fully gone into at the trial and finally decided in favour of the plaintiff, whereas in *Hickey* v. *Legresley*, *supra*, the judgment had practically gone against the defendant by default. The following quotations from the judgments indicate very clearly the grounds upon which the Full Court relied:

Richards, J., says, at p. 308:—

In *Gault* v. *McNabb*, the defences struck out in this Court had, as in the present case, been pleaded in the action in which the judgment sued on had been recovered. But the judgment had not there been got by default, as it was in this case. On the contrary, the defences had been fully gone into at the trial, and, after verdict, the defendant had moved for but had been refused a new trial. All that the report of that case shews is that the Judge felt that, under the particular circumstances of that case, it was useless to allow to be again set up defences which had been already fully fought out. He, therefore, struck them out as tending only to embarrass and delay the plaintiff.

And again, at p. 310:—

The provision giving power to strike out, on the ground of embarrassment or delay, was meant to cover cases where, as happened in *Gault* v. *McNabb*, no good result could arise from pleading as allowed by the prior part of the statute.

Perdue, J., says, at p. 315:—

The plaintiffs relied strongly in this application upon *Gault* v. *McNabb*, 1 Man. L.R. 35. In that case Dubuc, J., struck out certain pleas which appear to have been pleaded in the merits in an action on a foreign judgment. The case is meagrely reported and does not indicate the grounds upon which he proceeded. The pleas may have been struck out as embarrassing under the proviso contained in the section.

Meyers v. *Prittie*, 1 Man. L.R. 27, was also cited by the plaintiff as an authority in favour of his contention. In that case Taylor, J., struck out the pleas pleaded in an action on a foreign judgment as being under the special circumstances of the case embarrassing and dilatory.

Whatever authority *Gault* v. *McNabb* and *Meyers* v. *Prittie* might afford as precedents, justifying the striking out of pleas as embarrassing, in a proper case, and as shewing the discretion a Judge might exercise under the proviso in sec. 38, they cannot be considered as authorities binding on the Court in the present application. . . . I think the Chief Justice properly refused the application to strike out the paragraphs of the defence sought to be struck out.

The Full Court, as appears by the above extracts, recognized the decision of Dubuc, J., in *Gault* v. *McNabb*, as being correct in a case where the defences set up in the foreign Court had been fought out and adjudicated against the defendant. That is exactly the position in the present case. All the defences raised by the Brenton Co. Ltd. in Ontario, including the Statute of Frauds (which was allowed to be set up at the trial), were fought out and decided in favour of the plaintiff.

The meaning of "embarrassing" as applicable to pleadings is bringing forward a defence which the defendant is not entitled to make use of: *Stratford Gas Co.* v. *Gordon*, 14 P.R. (Ont.) 407. This was the effect of the decision in *Gault* v. *McNabb*, and it governs this case.

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As a second or alternative basis for the motion, counsel for the plaintiff also relies upon rule 625, which reads as follows:—

Where a defendant files a statement of defence in an action in which the plaintiff's claim is such a demand as comes within the classes of cases mentioned in par. (*d*) of r. 300, or in which the plaintiff's claim is for the recovery of land, and the plaintiff is not entitled to a judgment or order under the preceding rules, he may, on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action and stating that in his belief there is no defence to the action, serve the defendant with a notice of motion to shew cause before a Judge why the plaintiff should not be at liberty to sign final judgment for the amount claimed in the statement of claim, together with interest, if any, or for the recovery of the land, with or without rent or mesne profits as the case may be and costs. A copy of the affidavit shall accompany the notice of motion. The Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfies him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

The material produced before me was incomplete at the time, but it was admitted by Mr. Morrissey, counsel for the defendant, that the plaintiff had sufficiently complied with the requirements cast upon him by the rule.

In dealing with this rule it must be borne in mind that the plaintiff's claim is based on the Ontario judgment. It is a simple contract debt or liquidated demand. After the judgment had been obtained in Ontario by the plaintiffs, and after the defendants had discontinued their appeal from said judgment, letters were written by Proudfoot & Co., solicitors for the defendants in Ontario, to McMaster & Co., solicitors for the plaintiffs in Ontario, admitting the plaintiff's claim on the judgment. I refer particularly to the letters bearing date September 24, 1915; October 29, 1915, and November 4, 1915, and there was a similar letter written by the defendants to the plaintiffs bearing date November 8, 1915. These letters were distinct admissions of liability by the defendants on the several dates mentioned. It is true that some, if not all, of these letters were written in reply to letters received by or on behalf of the defendants. These last-mentioned letters were not produced by the defendants on the argument before me, so I am entitled to assume they do not assist the defendants at all.

The defendants have entirely failed to satisfy me that they have a good defence to the action on the merits and they have disclosed no such facts as I would deem sufficient to entitle them to defend the action in Manitoba.

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I am, therefore, of opinion, that the plaintiffs are entitled to an order under sec. 25 (*l*) of the King's Bench Act striking out the defendants' pleadings upon the ground of embarrassment and delay, and to an order under rule 625 empowering the plaintiffs to sign judgment for the amount of their claims, after deducting the moneys realised on execution in Ontario.

The plaintiffs are entitled to the costs of this motion.

Judgment for plaintiffs.

WRIGHT v. STANDARD TRUST.

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Manitoba Court of King's Bench, Mathers, C.J.K.B. May 2, 1916.

WAREHOUSEMEN (§ I—9)—DEFECTIVE INSURANCE POLICY—LIABILITY FOR LOSS.

Failure on the part of a warehouseman to examine policies of insurance placed by him upon goods bailed with him, to see that they contain a sufficient description of the buildings in which the goods are placed, is gross negligence, and where the insurance company escapes liability for loss occasioned by fire on the ground that the description of the buildings was inaccurate, the warehouseman is liable for the full amount of the loss.

Statement.

ACTION against a warehouseman for loss occasioned through his negligence.

T. R. Robertson, K.C., for plaintiffs.

W. Redford Mulock, K.C., and *J. W. E. Armstrong*, for defendants.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The late Thomas Black conducted the business of a warehouseman and the plaintiffs were customers of his.

In December, 1912, the plaintiffs shipped to Black 2 carloads of their goods for storage, and these cars duly arrived at Black's warehouse. On December 24, the plaintiffs wrote Black requesting that the goods be insured. On December 30, Black replied that one car only had been unloaded and about half of it had been distributed and that he had, in compliance with the plaintiffs' request, covered the balance by $1,000 insurance. The other car was unloaded on or before January 7, 1913, and on that day Black wrote the plaintiff that he had added an additional $2,000, making a total of $3,000 on the plaintiff's stock in storage. He added: "We have kept the policies here in our vault as we do not know whether you prefer having them sent to your office or not; if you do, kindly advise us and we will send them forward." On January 15, the plaintiffs replied requesting Black to keep the policies so that if there was any refund he could collect it

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for them. Just about that time a fire occurred in the old portion of Black's warehouse, by which the plaintiff's goods were damaged to the extent of $1,698.57. The insurance consisted of one policy in the Millers National Ins. Co. of Chicago for $1,000 and two policies of $1,000 each in the Hudsons Bay Ins. Co. of Vancouver. Both of these companies refused to pay the loss on the ground that the goods destroyed or damaged were not situate in the premises described by the policies.

The Black warehouse is built of brick and is situate on the south-west corner of Lombard and Mill Sts., in the city of Winnipeg, fronting on Lombard St. The portion of the building adjacent to the corner of the street was built several years before the other part. This older portion is only 3 storeys high. The newer and larger portion surrounds the old building on the south and west sides, and is 4 storeys high. The ground floor of the old building was formerly used as an office, but when the new part was erected about 1910 the office was moved to the ground floor portion of the new part. For insurance purposes the building was divided into 4 sections, the old building, constituting one section, that to the rear of it another, and that on the west side into 2 others.

Part of the plaintiff's goods were stored in the ground floor of the old building in the space used by Black as an office prior to the erection of the new portion.

The risk, and consequently the rate of insurance, varied on each section, but Black had an arrangement with the agents of the insurance companies whereby he got a uniform rate of $1.09 no matter in what part the goods were situate. It was to get advantage of this low rate that the plaintiffs applied to Black to place insurance for them.

The insurance was placed through the insurance brokers who had done Black's insurance business for several years. The policies all described the goods as insured

only while contained in the four storey and basement brick building of Mill construction roofed with composition, occupied as a builders' supply warehouse and storage, situate and being 78 on the South side of Lombard St., Winnipeg, Manitoba; Goad's plan: vol. 1, sheet 10, block 61, risk 78.

There is an entrance from Lombard St. to the old building, but there is no street number upon this part of the warehouse. There is also an entrance from Lombard St. to the new portion and over this door the street numbering is "80 to 82." In the

ordinary course the number on the old part ought to be 78. The old part is, however, only 3 storeys high, and it is not of "mill construction," whereas the new portion is of that construction. A reference to Goad's plan shows opposite the new portion the street numbers "80 to 82," between them the number "78" and opposite the old warehouse on that plan is the number "76."

This action is to recover from the defendant the amount of the loss on the ground that it was occasioned by Black's gross negligence. The negligence charged is first in wrongly describing the location of the goods insured, and secondly, in not reading the policies when they were received and thus discovering the misdescription.

The defendant contends that the description was sufficient and the policies therefore valid and enforceable; but, if not, that Black was not guilty of gross negligence.

Obviously the first point to arise is, were the policies enforceable against the insurance companies. If they were, the plaintiffs have suffered no loss by reason of any conduct of Black.

I am of opinion that the goods damaged were not in the portion of the building described in the policies and therefore that the companies were not liable for the loss. I do not see how it can be reasonably contended that the description given in the policies, viz., a 4 storey building of mill construction, can be reasonably construed as covering goods in a 3 storey building not of mill construction. It is elementary law that such a description of the locality of the subject matter as will enable it to be identified is an essential part of the contract, and that a substantial misdescription is fatal: Welford & Otter-Barry on Insurance, 18. In the present case it is quite clear from the evidence that the policies were intended to cover goods in the 4 storey section and not goods in the 3 storey section.

As to the question of negligence. The insurance broker Hawkins, who was intrusted by Black's manager with the placing of this insurance, asked by telephone in what part of the building the goods were placed or to be stored. He says he was told by Belyea, Black's manager, that they either were then or would be stored in the office section. He was familiar with the building and knew that the office was in the front of the 4 storey section,

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and he wrote the description for the policies covering goods in that section. As a matter of fact part of the plaintiff's goods were stored in the portion of the building described in the policies. Belyea says he told the broker that they were or would be stored in the "old office," meaning the ground floor of the 3 storey section. Whatever he said, I have no doubt that the broker understood him to say the office section, which could only mean the 4 storey part. There can be no manner of doubt that the policies were written to cover goods in the 4 storey portion only. After the policies were issued they were sent to Black. Belyea received them, and without any examination, placed them in Black's vault, where they remained until after the fire. Had Belyea looked at them he would have seen at a glance that the plaintiff's goods were not covered by these policies. Neglect to read these policies was, I think, such an act of negligence as entitles the plaintiffs to succeed.

Beven on Negligence, 3rd ed. at 36, says: "The failure to exercise reasonable care, skill and diligence is gross negligence." A gratuitous bailee must exercise the same degree of care and diligence as persons ordinarily use in their own affairs. Any ordinarily prudent man of business on receipt of an insurance policy purporting to cover his property would examine the policy to see whether it was what it purported to be. It may be that many business men neglect that precaution, but the standard of care which the law requires is that which the ordinarily prudent man observes. Belyea received policies purporting to cover the plaintiffs' goods, and he notified the plaintiffs that there was insurance, "$3,000 on your stock now in storage here." As a matter of fact that statement was not true, but the plaintiffs were thereby lulled into security only to discover when too late that they had no insurance.

I find that in not examining the policies when he received them Belyea failed to exercise that degree of care and diligence which, under the circumstances, he was bound to exercise, and that the plaintiffs are entitled to recover.

There will be judgment for the plaintiffs against the estate of Thomas Black for $1,698.59 and costs of suit.

Judgment for plaintiff.

POLSON v. THOMSON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. May 29, 1916.

1. MECHANICS' LIENS (§ VIII—63)—ALLEGATION OF OWNERSHIP—DESCRIPTION OF PROPERTY—AFFIDAVIT BEFORE SOLICITOR.

It is not necessary under sec. 15 (*a*) of the Mechanics' Lien Act (R.S.M. 1913, ch. 125) that the true ownership of the property be stated in the claim. The main object of the statute is to secure it on the buildings and land; it is immaterial that the claim describes more land than is required; nor is it void if sworn before a solicitor for the claimants.

2. MECHANICS' LIENS (§ V—32)—SEPARATE LOTS—SEVERAL OWNERS—EFFECT.

The lien may also attach against several pieces of property as one individual claim; the fact that the houses are subsequently divided between different owners cannot impair the lien, which, under sec. 4 (2) of the Act (R.S.M. 1913, ch. 125), becomes effective from the time of the commencement of the work.

Statement.

APPEAL by a mortgagee against a judgment in an action under the Mechanics' Lien Act (R.S.M. 1913, ch. 125).

R. F. McWilliams, for appellant Watt, and defendant Thomson.

A. C. Campbell and *G. C. Porter*, for plaintiffs.

F. C. Kennedy, for Lake Winnipeg Shipping Co.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The lands in question in the two actions brought to enforce liens tried before the referee were part of lands owned by Maria J. Lane, Annie A. Lane and Lillian Georgina Quinn, who, by agreement of sale, sold a portion of the lands owned by them, including those in question, to one Carter, in January, 1913, who, in turn, assigned his agreement to the defendant Robert M. Thomson. In or about May, 1913, Thomson sold to Thomas Kerr, a contractor and builder, a portion of these lands. This sale was verbally made and the only evidence of it appears in Thomson's evidence on discovery. A proposed plan of subdivision was made and printed, but was never registered. Kerr proceeded to erect houses on five lots on Douglas St. Then he proceeded to erect four houses on Wallace Road—the first two for himself on lots marked 23 and 24 on proposed plan. At the end of July, 1913, Kerr proceeded to erect two houses for J. A. and Stuart Comba on the lands represented by lots 25, 26, and 27 on proposed plan. These last named lots are those immediately in question. Whether Kerr acquired them from Thomson at the same time as he acquired the rest of the property, or later, is not clear. The first lien in this matter was filed jointly by five

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workmen, the plaintiffs in the action, for wages amounting to $1,128.90. In this lien the land affected is described by metes and bounds and includes lots 25, 26, and 27, according to the proposed plan, ex. 5. The second lien was filed by the Lake Winnipeg Shipping Co. Ltd., for material furnished against lots 34, 35, 36, 37 and 38, according to the registered plan and shown in dotted figures on ex. 5, and includes the lands described by metes and bounds in the first lien.

The defendant John Watt, who is the appellant here, is a mortgagee of the lands purchased by the Combas under two mortgages given by Kerr, dated June 25, 1913, for $3,000 each. The Lanes conveyed to one Campbell, who in turn conveyed to Kerr for the purpose of enabling him to give these mortgages. The registration of these mortgages was delayed until June 25, 1914, long after the filing of the liens.

The referee, before whom this matter came for trial, held that the Lake Winnipeg Shipping Co. and the plaintiffs were entitled to liens upon the lands described, being those set out in the plaintiffs' claim of lien and statement of claim, for the sums set forth, being $468.56 and $153.17 costs, and $1,135.75 and $257.15 costs, respectively, and to a personal judgment against Thomas Kerr. He further gave Thomson priority over the plaintiffs and the Lake Winnipeg Shipping Co. to the extent of $5,280 and costs, subject to the discharge by Thomson of two certain prior mortgages on these lands, but, save as aforesaid, the claims of the plaintiffs and the Lake Winnipeg Shipping Co. are held prior to all other claims against the lands in question, including the mortgages to the defendant Watt.

In default of payment of the amount due by Kerr the lands are to be sold and the proceeds applied as set forth in the judgment, whereby the claim of Watt as mortgagee is expressly made subsequent to the prior payment of the claims of the plaintiffs and the Lake Winnipeg Shipping Co.

The defendant Watt, the mortgagee, appeals against this judgment on various grounds. The question is whether the parties held entitled to a lien have established such according to law.

The first objection taken by the appellant was that the lien in both cases was sworn before the solicitor for the claimants

and that it must therefore be void on the authority of *Baker* v. *Ambrose*, [1896] 2 Q.B. 372, and *Re Bagley* [1911] 1 K.B. 317. With regard to the first named case, that was decided on the wording of the English rule. Our rule 533 contains the words "in the cause" not to be found in the English rule, and, in my opinion, refers to matters actually in litigation. I think that a reasonable construction when we consider the rule is found in the King's Bench Act, and must naturally refer to matters in the Court of King's Bench. The provision of the English Bills of Sales Act under consideration in *Baker* v. *Ambrose*, *supra*, required registration with a registrar of the King's Bench Division, and it did not require any very liberal construction of the English rule to include in it the proceedings before the Court in that case. In *Re Bagley*, the question before the Court hinged largely upon a section of the Commissioners for Oaths Act, referred to at p. 324 of the judgment of the Master of the Rolls, a provision not found in our legislation. The Ontario rule is substantially the same as ours, the principal difference being that our rule has the words "in the cause" which the Ontario rule has not. It is said in Holmested & Langton, at p. 731, referring to the Ontario rule, that it only applies to actions or proceedings in Court, citing *Canada Permanent* v. *Todd*, 22 A.R. (Ont.) 515.

It is objected that the statement of claim alleges that the plaintiffs did their work "on or about" May 10, 1913, whereas the evidence shows it was not commenced until August 4. But I cannot imagine such a variation to be material. It is shown in the claim that the last work done was on October 18, 1913.

The lien of the individual plaintiffs claimed a lien upon the estate of Mary Jane Lane and Annie Jane Lane. In fact, a third sister, Mrs. Quinn, was also co-owner. The evidence is that the work was done for, and on the account of, Kerr, whose title was derived through Thomson from the Lanes. The term "owner" is defined by the Act (R.S.M. 1913, ch. 125) sec. 2, sub-sec. (*c*). It appears frequently in the Act and particularly in sub-sec. (*a*) of sec. 15:

> A claim of lien shall state the name and residence . . . of the owner of the property to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged).

The objection is that the claim of lien is against the two Lanes, whereas there should be three of them, and, in any event, the judgment does not affect them or their interest, but the

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interests of other parties. It is argued that as the claim of lien is statutory and must be registered within a certain time, and as the statement of claim must follow the claim of lien and must be filed within a certain time, it is impossible subsequently to vary or amend the proceedings, and if the evidence is not such as to establish the allegations as originally made, the whole claim must fail.

I do not think, however, that it was the intention of the legislature to declare that the true ownership of the property must be stated in the claim, otherwise the lien shall not come into existence. By the terms of the sub-section quoted, it is obviously sufficient if the person claiming the lien, or any one acting for him, supposes a certain person to be the owner, and inserts the name of such person in such lien. In that case the name inserted by error might possibly be that of some non-existent person. Yet, if the mistake were made in good faith the statute would be complied with. I would say we are entitled to hold that these names in the claim were placed there by some person, authorized to act for the plaintiffs, as the names of those supposed to be the owners. I can see no difficulty in the point. The object of the statute is to secure the lien on the building and land. I think a sound view is taken by Riddell, J., in *Barrington* v. *Martin*, 16 O.L.R. 635 at 638, where a similar objection was taken and overruled:

> Every one must be taken to know that the lien given by the statute is a lien upon the building or erection, etc., and the land occupied thereby or enjoyed therewith. Anyone, seeing this claim, would know that the claim, for the lien was against the property, no matter who owned it or had an interest in it.

The two Combas agreed to purchase from Kerr the two houses under the written agreement, ex. 40. I read that as an entire contract by which Kerr was to complete and deliver to the Combas the two houses according to the plans and specifications on the terms set forth. The Combas agree to accept the houses when completed and on those terms. Evidently Kerr's contract with the Combas was fulfilled only when he was in a position to offer them both houses in a completed state. The real interest to be affected by the lien was that of Kerr and of those claiming through him. It seems to me this agreement of purchase was a joint agreement on the part of the Combas and the fact that the houses were subsequently divided by them amongst themselves cannot impair the lien which under sub-sec. 2 of sec. 4 of the Act takes

effect on the property from the time of the commencement of the work. This case is distinguishable from *Fairclough* v. *Smith*, 13 Man. L.R. 509, where the lots in question were severally vested in two different owners.

Objection was further made to the evidence held by the referee sufficient to establish the date when the last work was done by the individual plaintiffs. Reid swears the date was that shown in the claim of lien, and all the parties joined in the affidavit. The whole evidence bearing on this point seems to me ample to justify the finding of the referee.

As to the claim of the Lake Winnipeg Shipping Co.: It is pointed out that materials furnished by the company went into ten different ownerships. The amount claimed by the company's lien is $1,493.74, and the land is described as lots 34, 35, 36, 37, and 38, according to plan 906. The amount found by the referee as due to the company in respect of the Comba houses and the lands on which they were erected, is $468.56. The referee gives his reasons for arriving at this liability, and they seem to me warranted by the facts and evidence. Smith, the manager of the company, states the only evidence as to the arrangement between the company and Kerr. It was an agreement to supply Kerr with materials for ten houses or more in Douglas Park and vicinity—one arrangement to supply for all the houses such materials as the company dealt in.

It was argued that the material must be furnished for the purpose of being used in the particular building upon which a lien is claimed, or otherwise a statutory lien does not arise. In *Sprague* v. *Besant*, 3 Man. L.R. 519, it was held that where lumber was sold generally in the course of trade, a claim of lien on a building in which it had been used could not be established. But that is not this case. The material here was not sold to Kerr for general purposes, but for the particular purpose of being used in the construction of the houses covered by the arrangement and was delivered on the spot and in the vicinity for that purpose. I do not gather that it was intended to be laid down in *Sprague* v. *Besant*, *supra*, that a materialman, furnishing materials to be used in the erection of several buildings, could not have a lien against any one of them unless he could shew that the particular materials in that building were furnished for that one particular building.

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It was urged that it is pure guesswork to ascertain, or to attempt to ascertain, what material of the company's there is in each building and that it is also mere guesswork to apportion the credits as has been done. I think a fair answer to that criticism is that the matter is, after all, one of evidence, that there was pertinent evidence (particularly that of the foreman) before the referee, and that it was not shewn by the appellant that we are in a position to hold that the referee has arrived at conclusions unwarranted by evidence.

But the main objection to the company's claim is that it constitutes a claim for one amount against the property of three different owners—the Lanes, Kerr, and the Combas—and is, therefore, unauthorized by the statute. I do not understand that there was a contention that the material supplied for the Lane house had any connection with the contract with Kerr in question in this case. Smith is the sole authority for this contract, and I have already referred to his evidence. The houses for which the supplies were to be furnished under this contract were in Douglas Park and on Wallace St., on property owned by Kerr. Their number was not exactly ascertained, nor were the amounts of the supplies fixed, but the prices and terms were. Payment was to be made for material supplied for these houses out of the loans to be made on them. In other cases, where separate arrangements were made, cash or "practically cash" was to be paid. The Lane house, where the company supplied material for the basement of a house that was moved, was the subject of a separate arrangement and in no way a part of the contract here in controversy.

Sec. 16 of our Act, practically identical with sec. 18 of the Ontario Act, provides that:—

> A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in the last preceding section.

With reference to the objection we were referred to *Dunn* v. *McCallum*, 14 O.L.R. 249, where it was held by the Divisional Court, on appeal from Falconbridge, C.J., that a materialman is not entitled to register a lien, as one individual claim, for an amount due by a contractor, against all the lands jointly of the owners of different parcels of land, who have had separate con-

tracts with the contractor for building houses on their respective parcels of land.

Falconbridge, C.J., had refused to hold that he had the right to read into the above section of the Act the words "of the same owner" after the word "properties." On appeal his judgment was reversed, but Magee, J., agreed with him in this construction.

Dunn v. *McCallum*, *supra*, was reviewed and distinguished by Middleton, J., in *Ontario Lime Assoc.* v. *Grimwood*, 22 O.L.R. 17. That case, he says,

differs materially from the case where one owner chooses to enter into an entire contract for the supply of material to be used upon several buildings. From the nature of the contract the onus is here shifted, and the claimant can ask to have his lien follow the form of the contract, and that it be for an entire sum, upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, which must be peculiarly within his own knowledge, and if, as often must be the case, the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the legislature apparently intended a lien to exist.

Amongst other authorities in the United States Courts, he cites *Wall* v. *Robinson*, 115 Mass. 429, where it was thus held:

The parties by their contract have connected the several buildings and treated them as one estate. Under the contract the labor performed upon each building creates a lien upon the whole lot and therefore upon all the other buildings.

I refer also to *Batchelder* v. *Rand*, 117 Mass. 176, where this conclusion is stated:

The case cannot be distinguished, so far as the claim under the contract is concerned, from *Wall* v. *Robinson*, 115 Mass. 429. That the land was conveyed in separate lots, or designated as separate lots on the plan of lots owned by the City of Boston, or that one parcel was on Sharon Street and the other on Harrison Avenue, being contiguous to each other in the rear, or that the buildings were separate, one standing on each parcel so conveyed, are facts not material, and do not affect the principle upon which *Wall* v. *Robinson*, *supra*, was decided. The whole constituted one parcel of land owned by the same parties, which they could divide as they pleased, and upon any portion of which they could erect buildings. The contract was an entire contract to perform labor and furnish materials upon two houses situated on this parcel of land, and a lien attaches upon the whole estate for the value of the labour and material so furnished.

The subject is discussed in Phillips on Mechanics Liens, p. 647. See also Cyc. XXVII., 224.

Now, when the contract was made between the company and Kerr, he was the owner of all the property on which the houses were to be built. He was both owner and contractor. There

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was but one contract under which the company was to deliver the materials for the houses mentioned in the arrangement. That Kerr subsequently sold or agreed to sell to the Combas the land on which he was to erect two houses could not affect the company or the contract between him and the company. I see no reason, therefore, for differing from the method followed or the conclusion reached by the referee on the evidence as to this branch of the case. Apart from that view of the evidence, as Middleton, J., says, the onus is on the owner in such a case, if he wishes to have the lien confined to the value of the material going into the building to shew the facts, and the mortgagee is in no better position than the owner.

The ownership, so far as it affects the Lane property, can be eliminated. The contract as to the Lane house was a separate arrangement as we have seen. No relief is sought or given as against that interest. For the rest, it appears that Kerr was the owner of all the lots on which houses were to be built at the time the contract for supplying material was made with the company. His subsequent agreement to sell to the Combas was expressly conditioned on the completion by him of the houses. The Combas favoured the lienholders by delaying the registration of their title, and the mortgagee did the same. Under the authorities we must, as well as we can, give effect to the spirit of the statute. In my judgment this objection fails.

The fact that too much land was mentioned in the claim of lien is not a material objection. "Claiming a lien upon too much property will not invalidate it altogether," per Middleton, J., in *Ontario Lime Assoc.* v. *Grimwood*, 22 O.L.R. 17 at p. 23:

> As a general rule the fact that the claim or statement describes more land than is subject to the lien does not defeat the lien as to the land properly subject thereto, if there is no fraudulent intent and no one is injured thereby. Cyc. XXVII., 159.

Sec. 17 of the Act provides that substantial compliance only with secs. 15 and 16 shall be required, and no lien shall be invalidated by reason of failure to comply with those sections unless the owner, contractor or mortgagee is prejudiced thereby. This section, its object and meaning are dealt with by Killam, C.J., in *Robock* v. *Peters*, 13 Man. L.R. 124 at 141. He holds that the onus on the question of prejudice is on the party objecting to the registered claim. There is nothing here before us to suggest that

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the mortgagee was in any way affected by the form of, or the statements made in, the registered claim.

A further ground was taken that the company should have filed separate liens for each lot of material delivered. But the arrangement between the company and the contractor seems to have been entire and, consequently, the time for filing the lien ran from the last delivery of material, as to which there was evidence before the referee. In *Robock* v. *Peters, supra*, Killam, C.J., followed *Morris* v. *Tharle*, 24 O.R. 159, and held that the whole transaction (supplying tin roofing, furnace, water tanks and pumps) was so linked together as to constitute a single cause of action and that the time for registration or bringing an action ran from the supply of the last of the materials in respect of the whole bill, p. 136.

We were urged to give the statute a strict construction particularly in view of the position of the defendant, a mortgagee whose security may be impaired by priority being given to an indebtedness to which he was not a party and with which he had nothing to do. But he might have protected himself, as to advances actually made, by prompt registration. In any event the authorities now seem to indicate that it is for the Courts to work out as best they can the problems arising under the Act by giving effect to its spirit rather than its letter, and it is undeniably the intention of the statute to afford protection to the men who supply labour and materials.

Upon my best consideration of the numerous questions raised in this case, I would dismiss the appeal with costs.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin and Brodeur, JJ. May 2, 1916.

1. TAXES (§ I E 1—48*a*)—"OCCUPANTS OF LAND"—CONDITIONAL PURCHASERS OF CROWN.

A purchaser of Crown lands under the Irrigation Act (R.S.C. 1906, ch. 61), entitled to possession thereof, with title reserved to the Crown until completion of the agreement, is an "occupant of land" within the assessment provisions of sec. 250 of the Rural Municipality Act (Alta. Statutes 1911-12, ch. 3, as amended by Acts 1913, 1st sess., ch. 7, sec. 30) and has an interest therein taxable under the statute.

2. CONSTITUTIONAL LAW (§ II A 4—212)—TAXING POWER—CROWN LANDS—PURCHASERS.

The fact that the Crown has a reversionary interest in land does not thereby render it, as far as the interest of a purchaser is concerned,

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exempt from taxation under sec. 250 (Alta. Statutes 1911-12, ch. 3), or sec. 125 of the British North America Act, 1867.

[*McLean* v. *Southern Alta. Land Co.*, 23 D.L.R. 88, affirming 22 D.L.R. 102, affirmed.]

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 23 D.L.R. 88, affirming the judgment of Harvey, C.J., at the trial, 22 D.L.R. 102, by which the plaintiff's action was maintained with costs. Affirmed.

I. C. Rand, for appellants.

Chrysler, K.C., for respondent.

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FITZPATRICK, C.J. (dissenting):—The respondent, plaintiff in the action, sued the appellant as occupant of certain lands in the municipality for taxes assessed thereon for the year 1913.

The action raises various questions of importance on which I do not desire to express any opinion, confining myself to the single point which I think necessary for the decision of the case.

Harvey, C.J., in his reasons for judgment, says:

It is well settled that the interest of a person in Crown lands may be taxed. It is also perfectly clear by the terms of the Rural Municipality Act that it is the intention to tax such interests.

I will assume the first proposition and as to the second I do not know that I am much concerned, the question being, I think, whether the intention, if such there were, has been carried out by the statute.

So far as the particular case is concerned I have come to the conclusion that there is nothing in the statute imposing on the appellant a liability for the taxes sought to be recovered.

The Rural Municipality Act (Alberta statutes, 1911-12, ch. 3, sec. 250), provides that in every municipality all land shall be liable to assessment and taxation with the exceptions therein mentioned, the first of these being lands belonging to Canada, or to the province. Then sec. 251, in part:

the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out (*a*) the name of the owner and the name of the occupant of each lot or parcel of land in the municipality which is not exempt from taxation; . . .

(2) Such assessment roll shall be in the form following or to the like effect.

There is nothing in this form concerning lands exempt from assessment and taxation.

It is clear, therefore, that secs. 250 and 251 make no provision whatever for the assessment and taxation of exempted lands, their owners or occupants. But then sec. 251 has been amended by

sec. 30 of ch. 7 of the statutes of 1913 (1st sess.). There is no change except that par. (*a*) of sub-sec. 1 is repealed and, in its place, is substituted the following:

> The name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment and the name of the occupant of any lot or parcel of land within the municipality which is exempt from assessment.

What may be the effect of this incongruous direction for the insertion on the assessment roll of the names of occupants of lands exempted from assessment it is unnecessary to inquire; it is sufficient to point out that by itself it is quite incompetent as a law imposing taxation on the occupants of land which are not liable to assessment or taxation.

Sec. 250, which is the charging section, imposes no liability on the occupants of exempted lands and sec. 251 is merely concerned, pursuant to sec. 249, with directions to the assessor as to the manner of preparing the assessment roll.

In the Town Act, 1911-12, ch. 2, passed on the same day as the Rural Municipality Act, there is, in sec. 266, after a statement of the lands exempt from assessment the following provision:

> 3. If any land mentioned in the two preceding clauses is occupied by any person otherwise than in an official capacity the occupant shall be assessed therefor, but the land itself shall not be liable.

A similar provision to the one in the Town Act is to be found in sec. 82 of the Village Act, 1913, ch. 5, which was passed on the same day as the Act amending the Rural Municipality Act.

These provisions are the same as one to be found in the Consolidated Statutes of Upper Canada, ch. 55, sec. 9, sub-sec. 1.

There is another argument in favour of the above conclusion to be drawn from the fact that the Act contemplates nothing but the levy of taxes upon the assessed value of land, which value is to be its actual cash value (secs. 249 and 252). Harvey, C.J., says that it is well settled that the interest of a person in Crown lands may be taxed. "*May* be taxed,"—but there is not a word in this Act about the taxation of the interest of a person in Crown lands. The interpretation of "occupant" by sec. 2 is of the widest character, and, amongst others, includes

> any person having or enjoying in any way or to any degree or for any purpose whatsoever the use of land exempt from taxation.

If the occupant is taxed at all, then no matter what his interest in such lands may be, no matter what the value of such interest may be, he is to be held liable for the full amount assessed on the

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cash value of the land. Whilst I am not prepared to say that the legislature could not impose such a tax without reference to the value of the taxpayer's interest, I think it would require to be done in plain and unmistakable language such as we certainly have not got here.

Though couched in rather obscure language there are some directions evident in the Town Act for assessing the interest of the occupant as may be seen in sec. 269 and the form given in sec. 270.

In the Village Act the difference is clearly recognized in sec. 84 which provides, in part,

> the secretary-treasurer shall prepare an assessment roll which shall set out (*a*) the name of the owner and in case the land is exempt from taxation under this Act, the name of the occupant thereof and, etc.; (*b*) a brief description of each such lot or parcel of land, the number of acres which it contains, the nature of the interest therein of each person assessed in respect thereof and the assessed value of such interest.

Again, it is to be noted that the whole scope of the Act is dealing with the land alone. It provides for the forfeiture of lands for non-payment of taxes. There is no such provision for selling and conveying only the interest of the occupant in Crown lands as we find in the Consolidated Statutes of Upper Canada, ch. 55, sec. 138, continued through intermediate statutes to the Assessment Act, R.S.O. 1914, ch. 195, sec. 157.

The appeal should be allowed with costs.

Anglin, J., says: "It is in regard to lands exempt from taxation only that there is any provision for the assessment of an occupant."

This may be open to question; grammatically, the words "the use of land exempt from taxation" at the end of the definition of "occupant" have no reference to the first and second classes of persons mentioned but only to the third and fourth. Sec. 251 provides that the assessor shall assess any person the owner or *occupier* of land in the municipality and, by the original para. (*a*), the assessor is to set out the name of the owner and the name of the *occupant* of each lot of land not exempt from assessment. It seems possible that the amending Act meant to preserve this provision of sec. 251 as regards the occupant of lands not exempted.

However that may be, it is clear that in the Act itself there is no express provision for assessing lands exempted from taxation or the occupiers thereof. Then the only provision regarding such

lands is the amended sec. 251 (*a*) and that, in itself, is quite incompetent to impose any taxation.

But, apparently, Anglin, J., would hold that the amendment of sec. 251 (*a*) necessitates a different reading of all the taxation provisions in the Act and notably sec. 250 which provides that

in every municipality all land shall be liable to assessment [except] 1.—All lands belonging to Canada or to the province.

Here Anglin, J., would read land, as defined in sec. 2, par. 15, to include any estate or interest therein.

This interpretation would have had its application to the section of the Act before the amendment of sec. 251 (*a*), yet admittedly the Act did not originally tax exempted land, its owner or occupier.

DAVIES, J.:—The controversy in this appeal raises several questions. One, the constitutional validity of those sections of the Rural Municipality Act which, it is contended, impose liability for assessment and taxes upon the "occupant," as therein defined, of land exempted from assessment and taxation; and the other whether even if *intra vires* the clauses really authorize the imposition of taxes upon an "occupant" of exempted land; and, assuming they do so, whether the defendant, appellant, is such an "occupant" under the facts stated in the record as makes it liable to be assessed and taxed for them.

Under the interpretation clause of the Act, the "owner" of lands *not exempt* from taxation and the "occupant," within the meaning of that term, of exempted lands are to be so assessed and consequently liable for the assessment.

"Land" is defined, for the purpose of assessment and taxation, to mean

land or any estate or interest therein exclusive of the buildings or other improvements thereon

and "improvements" to mean

any increase in the value of the land caused by any expenditure of either labour or capital thereon.

Secs 249, 250 and 251 are the sections which, construed in the light of the interpretation sections, relating to the terms "owner," "occupant" and "land," have to determine the questions for our decision.

The scheme of the Act appears to be to make all lands within the province liable to be assessed and taxed at their prairie value, or value without improvements, which, not being exempt from

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taxation, are held by an "owner" as defined, or, being so exempt, are held or possessed or entitled to be so by an "occupant," as defined, and to make such owner or occupant as the case may be liable for the taxes so assessed.

Sec. 249 is as follows:

All municipal taxes shall be levied equally upon all ratable land in the municipality according to the assessed value of such land and it shall be the duty of the assessor to make the assessment of such land in the municipality in the manner hereinafter provided.

Sec. 250: In every municipality all land shall be liable to assessment and taxation subject to the following exemptions:

1. All lands belonging to Canada or to the province.

The other exemptions do not affect this case.

Sec. 251: As soon as may be in each year, but not later than the first day of July, the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be—

(*a*) The name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment, and the name of the occupant of any lot or parcel of land within the municipality, which is exempt from assessments and post office address, if known, of every such owner or occupant.

(*b*) A brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof.

(2) Such assessment roll shall be as in the form following or to the like effect or in such form as may be prescribed from time to time by the Minister:

So that by these sections "municipal taxes" are to be levied equally upon "all" *ratable land* in the municipality according to the assessed value of such land

and the assessor is bound to assess every person the owner or occupant of land in the municipality

and to prepare an assessment roll setting out, as accurately as may be, the name of every owner of every lot or parcel of land in the municipality not exempt from assessment and the name of the "occupant" of every lot or parcel which is "exempt."

The appellant company is the assignee of an agreement made, in 1906, between the Minister of the Interior of Canada and one Robins whereby the Crown agreed to sell and Robins agreed to purchase a large tract of land in Alberta at a specified price for irrigation purposes, expenditure on these works approved by the Crown to be credited on the purchase money and balance to be paid in cash.

All available lands in two defined sections were allocated by order-in-council to this agreement and the lands in question in this appeal are within one of these sections. No questions as to

selection or availability are involved. At the date of the assessment in dispute about $5,000,000 had been spent by the appellant upon these lands in irrigation works, and it was estimated that it would take another $2,000,000 to complete the works. Under clause 7 of this Robins' agreement, provision is made entitling the purchaser

> to complete the purchase and take title for any part of the lands applied for after not less than $100,000 has been expended in connection with the works.

The purchase money was made payable in 6 annual instalments beginning July 1, 1910. Clause 10 provided that

> any of the lands that remain unsold at the expiration of 15 years from the date of these presents shall revert to the Crown.

Now under the facts of this case as they appear in the record, and of which I have sketched above the merest outline, I do not entertain any doubt that the appellant at the time of the assessment complained of was an "occupant" of these lands within the meaning of that term as interpreted by the statute and to such an extent as to render it liable to be assessed and taxed in respect of them. Its rights under the Robins' lease, license or agreement from the Crown, whatever you may choose to call it, were such as to entitle it to enter upon the lands and make the irrigation improvements. As a fact it did so enter and had made an expenditure of some millions of money for these improvements.

The legal title to the land was, it is true, still in the Crown but the company's right to extinguish that title and obtain its patent under the agreement was clear as and when it chose to do so.

Beyond any doubt it had an equitable and beneficial interest in these lands capable of being enjoyed and enforced as against the Crown and such an interest as I cannot doubt comes within the very words of the interpretation of "lands" in the Act.

As such it seems to me to come within the decision of this Court in the *Calgary and Edmonton Land Co.* v. *The Att'y-Gen'l of Alberta*, 45 Can. S.C.R. 170. The interest of the appellant in these lands was a beneficial one and the facts of the case, I agree with the Courts below, bring it within the interpretation clause of "occupant" as above set out and within the principle upon which the *Calgary and Edmonton Land Co.'s* case, 45 Can. S.C.R. 170, was decided by this Court. The interest of the Crown, whatever it might have been, could not of course be taxed, but

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the beneficial or equitable title of the appellant was certainly not exempted under the B.N.A. Act, 1867.

It seems to me, therefore, that the only question open is whether the language of the Rural Municipality Act covers such a case as this and such an interest in these lands as under the agreement the defendant appellant had. I have already set out the clauses of the Act and in my judgment these clauses are comprehensive and clear enough to enable that beneficial and equitable interest of the appellant in these lands to be assessed and taxed and to impose upon the company a liability to pay them as found by the judgments appealed from.

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

Duff, J.

DUFF, J. (dissenting):—I think the appeal should be allowed and the action dismissed with costs.

Anglin, J.

ANGLIN, J.:—Two questions are presented on this appeal:—

(*a*) Whether the appellant company is an "occupant" of certain lands within the meaning of the assessment clauses of the Alberta Rural Municipality Act of 1911-12 (ch. 3), as amended by ch. 7 of the statutes passed in the first session of 1913:

(*b*) Whether the taxation in question offends against sec. 125 of the B.N.A. Act, by which it is enacted that

> no land or property belonging to Canada . . . shall be liable to taxation.

By an agreement, made in 1906, under sec. 51 of the Irrigation Act (R.S.C., ch. 61) His Majesty the King, represented by the Minister of the Interior, agreed to sell, and the assignors of the appellant agreed to purchase 380,573 acres of land within a defined tract at the price of $3 an acre, of which $2 might be paid by crediting expenditure to be made by the purchasers on irrigation works approved by the Crown, and the balance in cash. At the instance of the company all available lands in two defined sections were allocated by order-in-council to this agreement, and it was provided that the balance of the agreed acreage should be selected by the purchaser from available lands in another section. The lands in question are within one of the two former sections and their availability is not in question. The works were approved and their construction authorized under sec. 20 of the Irrigation Act on March 16, 1909, and at the date of the assessment in question about $5,000,000 had been spent on them, and it was estimated that a further expenditure of about $2,000,000

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would complete them. After the company had spent $100,000 under clause seven of the agreement, it was entitled to complete the purchase and take title for any part of the lands applied for. The purchase money was made payable in six equal annual instalments, of which the first fell due on July 1, 1910. All land unsold on June 26, 1921, reverts to the Crown. There is no evidence that title to any lands had been acquired under clause 7 of the contract, but it is conceded that in the tracts specified there are 412,041 acres of available lands.

The appellant was assessed as "occupant" of the lands under secs. 249-251 of the Rural Municipality Act of 1911-12, as amended by ch. 7 of the statutes passed at the first session of 1913. The material parts of the legislation, as so amended, are as follows:

Sec. 2. In this Act, unless the context otherwise requires, the expression

(8) "Owner" means and includes any person who appears by the records of the Land Titles Office for the land registration district within which such land is situated, to have any right, title or interest in the land within the limits of the municipality other than that of a mortgagee or incumbrancee not exempt from taxation.

(9) "Occupant" includes the inhabitant occupier, or, if there be no inhabitant occupier, the person entitled to an absolute or limited possession; any person holding under a lease, license, permit or agreement therefor; any person holding under an agreement of sale or any title whatsoever, and any person having or enjoying in any way or to any degree or for any purpose whatsoever, the use of land exempt from taxation. . . .

(15) "Land" or "property" includes lands, tenements and hereditaments and, for the purpose of assessment and of taxation only, "land" means land or any estate or interest therein exclusive of the value of the buildings or other improvements thereon.

Sec. 249. All municipal taxes shall be levied equally upon all ratable land in the municipality according to the assessed value of such land and it shall be the duty of the assessor to make the assessment of such land in the municipality in the manner hereinafter provided.

Sec. 250. In every municipality all land shall be liable to assessment and taxation subject to the following exemptions:

(1) All lands belonging to Canada or to the province.

. . . . . .

Sec. 251. As soon as may be in each year but not later than the first day of July the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be

(*a*) the name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment and the name of the occupant of any lot or parcel of land within the municipality which is exempt from assessment and post-office address, if known, of every such owner or occupant;

(*b*) a brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof.

Under sub-sec. 15 of sec. 7 of the Interpretation Act, ch. 3 of

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the Alberta statutes of 1906—the expression "person" includes any body corporate and politic.

The judgment of the Chief Justice, who tried the action, rested upon his view that the fact that

> the defendant is entitled to become owner of the lands upon compliance with the terms of the purchase agreement brings it within the definition of the word 'occupant' in the Act, it being "perfectly clear by the terms of the Rural Municipality Act that it is the intention to tax such interests."

In delivering the judgment of the Appellate Division, Walsh, J., apparently proceeded upon what he regarded as

> a written admission in the record "that the defendant is the holder of the land . . . under and by virtue of the contract in question," the assignment thereof to it and the orders-in-council relating to it.

But the only admission to that effect which I can find in the record is contained in a document entitled

> Facts admitted *by the plaintiff* for the purposes of the trial herein.

There is no such admission by or on behalf of the defendant. In its statement of defence "the defendant denies that it was in 1913, or in any year, the occupant of any of the lands in the statement of claim mentioned," and, in the document of admissions by the plaintiff, it is stated that "the defendant is not in actual occupation of the lands mentioned."

The first question, therefore, is whether upon the finding of the trial Judge (which the documents in evidence appear to justify) that at the date of the assessment the defendant was entitled, upon compliance with the terms of its contract of purchase, to become the owner of the lands in question, as lands definitely allocated thereto, it should be held to be a "person entitled to a limited possession," or a "person holding under an agreement of sale or any title whatsoever," or a "person having or enjoying in any way to any degree or for any purpose whatsoever, the use of land exempt from taxation."

Having regard to the terms in which "owner" is defined in the sub-section immediately proceeding, and to the obvious purpose made manifest by the provisions of sec. 251, I have no difficulty in reading into sub-sec. 9, defining "occupant," immediately after the words, "absolute or limited possession," the words, "of land exempt from taxation." It is in regard to such lands only that there is any provision for the assessment of an "occupant." (See 251 (*a*)).

The lands which the defendant company is entitled to acquire

are within the tract for the improvement of which by irrigation its system of works is designed and approved, as the agreement itself shews and sec. 51 of the Irrigation Act (R.S.C., ch. 61) requires. The defendant company, no doubt, had the right, without taking the expropriation proceedings provided for by secs. 28 and 29 of the Irrigation Act, to enter upon and take possession of any part of the lands in question required for the construction of its works and is thus an occupant within the words of the definition; "a person having or enjoying in any way or to any degree or for any purpose whatsoever the use of land exempt from taxation;" and also as "a person entitled to a limited possession." Having regard to the definition of "land" as meaning "lands, tenements and hereditaments and any estate or interest therein," the company is likewise a "person holding under an agreement of sale."

A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another; he does not necessarily occupy. *Rex* v. *Ditcheat*, 9 B. & C. 176, at 183.

Two persons may be "holding" the same lands in distinct rights and with distinct interests. *Ward* v. *Const*, 10 B. & C., 635, at 647. Under an agreement to purchase land the interest of the purchaser is "held" by him although he should have neither possession nor an immediate and unconditional right to possession; and it is unquestionably an interest in the land. *Williams* v. *Papworth*, [1900] A.C., 563, at 568. The Courts of Saskatchewan, in my opinion, have rightly held that the appellant was an "occupant" of land exempt from assessment within sec. 251 of the Rural Municipality Act and that its "interest therein" was assessable and liable to taxation, being "ratable land" under sec. 249, and "land" under sec. 250.

So long as the assessment is confined to the interest in the land with which the Crown has parted to such an occupant, it neither exceeds the power of "direct taxation within the province in order to the raising of a revenue for provincial purposes" conferred on the province by clause 2 of section 92 of the B.N.A. Act, nor conflicts with the exemption of "lands or property belonging to Canada" under sec. 125 of that Act. This Court has so held in *Calgary and Edmonton R. Co.* v. *Att'y-Gen'l. of Alberta*, 45 Can. S.C.R. 170, and in *Smith* v. *Rur. Mun. of Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563.

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It was argued, however, that because sec. 249 directs the levying of taxes "upon all ratable land in the municipality according to the assessed value of such land" and sec. 251 (*b*) requires the assessor to state the assessed value of each lot or parcel of land, exempt or not exempt, and sec. 252 requires that "land shall be assessed at its actual cash value," the subject of assessment and taxation is the land itself and not merely the interest therein of the "occupant." But this construction ignores not only the provision of clause 15 of the interpretation section under which, unless the context otherwise requires, "land" may be read "interest in land," but also the facts that under sec. 249 only "ratable land" is subjected to taxation, and that the concluding clause of that section directs the assessor to make the assessment "in the manner hereinafter provided." There immediately follows in the charging section (sec. 250), an explicit declaration of the exemption of "all lands belonging to Canada," *i.e.*, of the interest therein of the Crown, and, in sec. 251, a direction for the entry, in the case of such exempted land, of the name not of the "owner" but of the "occupant" whom the assessor is to "assess" for it. Secs. 249 and 251 deal with land not exempt as well as with exempted land, and there is no reason why as to the former for which the "owner" is to be assessed, "land" should not be read as meaning "lands, tenements and hereditaments," and as to the latter, for which the "occupant" is to be assessed, as meaning an "estate or interest therein," *i.e.*, in the "lands, tenements or hereditaments." Liability is thus imposed on the occupant personally as well as upon his "interest" in the land otherwise exempted. Both are "assessed."

The intention of the legislature to provide only for the assessment of interests liable to taxation, and in no wise to impinge upon the prohibition of sec. 125, B.N.A. Act seems manifest. The statute being readily susceptible of a construction which will carry out that intention and thus keep it within the legislative jurisdiction of the province, that construction should certainly be given to it rather than one from which "it would follow as a necessary result that the statute was *ultra vires*." *Macleod* v. *Att'y-Gen'l for New South Wales*, [1891] A.C. 455, at 459; *Llewellyn* v. *Vale of Glamorgan R. Co.*, [1898] 1 Q.B., 473, at 478; *Countess of Rothes* v. *Kirkcaldy and Dysart Water-Work Commissioners*, 7 App. Cas., 694, at 702.

There is nothing in the record to warrant a finding that the taxes in question have in fact been imposed on anything greater or other than the ratable interest (sec. 249) of the appellant in the land, or that anything other or greater than the assessed value of such interest (sec. 249 and sec. 251 (*b*)), which alone is ratable, the interest of the Crown being expressly declared exempt (sec. 250), has been entered upon the assessment roll. It is with an interest therein other than that of the Crown and its value only, as I read the statute, that the assessor is directed to deal in the case of land belonging to Canada.

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

BRODEUR, J.:—The question in this case is whether the appellant company is an occupant within the meaning of the Rural Municipality Act of Alberta (ch. 3, 1911-12, sec. 2).

By that Act the municipality, respondent, is empowered to levy taxes on the owners and occupants of land of that municipality. Lands, however, belonging to the Dominion of Canada are exempt from taxation. It is provided, however, that the occupant of land exempt from taxation is liable to be assessed.

The "occupant," says sec. 2 of that Act as amended in the first session of 1913 by ch. 7, includes the inhabitant occupier, etc. (see judgment of Anglin, J.)

The appellant is carrying out irrigation works in the Province of Alberta under the provisions of the Dominion Irrigation Act. The Canadian Government have agreed to sell to that company (at the price of $3 per acre) 380,573 acres within the said tract "hereinbefore described" if that number of acres is available, and if not as many acres in the said tract as are available for such sale and purpose.

In the other clauses of the agreement, the terms of payment, the construction and operation of the irrigation works, the completion of the purchase and the taking of title for any part of the lands upon certain terms are provided for.

Clause 10 provided that any of the said lands that remain unsold at the expiration of 15 years from the date of these presents shall revert to the Crown.

By a subsequent agreement, certain other lands were substituted for those above mentioned but the agreement of substitution was made subject to the same clauses as above described.

It is pretty clear that this agreement binds the Crown to sell and the defendant to buy the available lands. Those lands

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which are the subject of this agreement are within the area of the municipality of McLean. The municipality, acting under the provisions of the Rural Municipality Act, has assessed the land in question and claims by the present action the amount of that assessment.

Nobody will dispute the fact that the company appellant has an interest in those lands. They are under its control. It may make irrigation works upon them and can prevent anybody else from exercising that right of occupation. The company has paid instalments on the purchase price and can dispose of them in favour of settlers.

It seems to me, then, that the company enjoys for those purposes the use of lands which otherwise would be exempt from taxation. But by the fact of that enjoyment, by the fact that it has an agreement for the selling of those lands, it has become an occupant as described in sec. 2 of the Rural Municipality Act.

The agreement for sale has vested in the appellant company an estate and property in the land and from that day as owner or occupant it became liable for assessments which could be raised in connection with the land. It got the benefit of municipal institutions and should then pay its share for the maintenance of the municipality.

Those assessments do not affect in any way the rights of the Crown because if the property had to revert to the Crown the taxation could not affect the land and could not be claimed against the Crown. That statute does not assume to impose any taxes upon any such lands as against the interest of the Crown. An interest has been granted by the Crown in the lands and taxation of the person holding that interest is not taxation of the property of Canada. A provincial legislature has the right to impose taxation upon individuals by a reference to the value of land occupied by them, even though the land should be owned by Canada. *Church* v. *Fenton*, 5 Can. S.C.R. 239; *Rur. Mun. of Cornwallis* v. *C.P.R. Co.*, 19 Can. S.C.R. 702; *Rur. Mun. of South Norfolk* v. *Warren*, 8 Man. L.R. 481; *Smith* v. *Rur. Mun. of Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563; *Calgary and Edmonton Land Co.* v. *Att'y-Gen'l of Alberta*, 45 Can.S.C.R.170.

I am of opinion that the assessments claimed from the appellant company have been rightly made and that the judgment condemning them to pay those assessments should be confirmed with costs. *Appeal dismissed.*

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Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. June 30, 1916.

PRINCIPAL AND SURETY (§ I B—12)—EXTENSION—MORTGAGE TRANSFEROR'S PROMISE TO INDEMNIFY DEFAULTS AS NO GUARANTY.

A covenant by the transferor of a mortgage that "in case of default in payment by the mortgagor of any sums of money which shall become due and owing under the said mortgage, and that any such default continue for (a period stated) I will forthwith on demand . . . pay . . . to the said transferee . . . any sum or sums so in default" cannot be construed as a *guarantee*, and does not put the transferor in the position of a *surety* for the performance of the mortgage contract. The transferor has therefore no just cause to complain, in an action against him founded upon his covenant, that the transferee had given to the mortgagor an extension of time for payment of sums falling due under the mortgage.

[*Walker* v. *Bowen*, 26 D.L.R. 22, affirmed.]

Statement.

APPEAL by the defendant from the judgment of Simmons, J., 26 D.L.R. 22, in favour of the plaintiff. Affirmed.

McDonald & Tighe, for plaintiff, respondent.

Ewing & Harvey, for defendant, appellant.

Scott, J.

SCOTT, J.:—I would dismiss the appeal with costs. *Prendergast* v. *Dewey*, 6 Madd. 124, referred to by the trial Judge in his judgment, appears to me to be conclusive upon the question involved in this appeal, and I cannot find that the principle there laid down has ever been questioned.

McCarthy, J.

MCCARTHY, J., concurred.

Stuart, J.

STUART, J.:—On October 23, 1912, one R. B. Thompson mortgaged to the defendant, Herbert Bowen, certain lands in Prince Albert, Sask., to secure the sum of $18,863.90, payable one-half on August 2, 1913, and the other half on August 2, 1914, with interest at 7% per annum, payable yearly on the said dates. The mortgage contained the usual personal covenant for payment.

On or about October 30, 1912, the defendant, Bowen, transferred the mortgage to the plaintiff, Walker, by a transfer in the form prescribed by the Land Titles Act, the consideration being $16,968. The transfer of the mortgage contained the following special clause:—

I do further for myself, my heirs, executors, administrators and assigns covenant, promise and agree to and with the said transferee, his heirs, executors, administrators and assigns that in case of default by the mortgagor in payment of any sum or sums of money which shall become due and owing under the said mortgage and that any such default shall continue to November 2, 1914, I will forthwith on demand well and truly pay or cause to be paid to the said transferee, his heirs, executors, administrators, or assigns any sum or sums so in default.

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Thompson was unable to pay either the principal or interest which fell due on August 2, 1913. On August 25, 1913, the plaintiff made an arrangement with Thompson, which was committed to writing in the form of a letter addressed to him:—

> The arrangement arrived at between ourselves with regard to the mortgage (in question) an instalment of which amounting to $9,426.95 on account of principal fell due on August 2, 1913, is that the interest be paid and that an extension of time to August 2, 1914, be allowed for the instalment already due. In return for this extension I am to receive your note for $700 as a bonus and the whole moneys under the mortgage to bear interest at 7%.

Thompson accordingly gave the plaintiff a note for $700, falling due August 2, 1914, bearing no interest. The interest due August 2, 1913, was also paid. But Bowen was not informed of this arrangement, and in this circumstance lies the whole point of the case.

Thompson never made any further payments, but went to the war. After November 2, 1914, the plaintiff demanded payment from the defendant, and, failing to obtain it, he began the present action on February 4, 1915.

The defendant raised two defences. First, the Statute of Frauds; second, the extension of time to the principal debtor. The first reference was directed to the circumstance that the covenant of guarantee above quoted was, along with other covenants, written on a separate slip of paper, which was gummed to the top of the first page of the transfer of mortgage before the execution of the transfer, and which did not itself bear the signature of Bowen. During the argument the Court intimated that there was nothing in this defence.

The action was tried by Simmons, J., who gave judgment for the plaintiff, and the defendant appealed.

The sole point to be decided is whether, in the circumstances, the extension of time given to Thompson without the knowledge of the defendant operated as a discharge.

It should be mentioned, because something may turn upon it, that the mortgage contained an acceleration clause providing that, in case of default in payment of principal or interest, the whole principal should become due and payable in like manner as if the time mentioned for such payment had come and expired.

Now, there is no doubt that the general rule is that if the creditor, without knowledge or consent of the surety, by a binding agreement, gives time to the principal debtor, the surety is thereby

discharged. One reason usually given for the rule, although there are also other reasons, is that the contract has been altered, and it was the first one that the surety guaranteed and no other. The first one being ended, the surety's liability is ended.

The real difficulty in the cases arises from the peculiar nature of the guarantee. The principle upon which the defendant seeks to be discharged was worked out in the Courts in a series of cases, beginning very early, in which the liability of the surety arose simultaneously with the default of the principal debtor. They were cases where the surety and debtor were on the same bond, or were respectively drawer and acceptor of a bill of exchange or endorser and maker of a promissory note. If Bowen had bound himself to pay immediately upon default by Thompson, there could, of course, under the law as now well settled, be no defence whatever. But in the present case Bowen's liability under the terms of the guarantee did not arise at all until three months after the date on which Thompson was bound to pay the last instalment and not until 15 months after he was bound to pay the first. That is to say, Thompson could be in default for 15 months in one case and 3 months in the other before Bowen's obligation came into existence. Indeed, if we take into consideration the acceleration clause in the mortgage, which, however, was probably only operative at the option of the mortgagee, Bowen's obligation did not arise for 15 months after the whole of the principal moneys might become due and payable, and, therefore, after default in the whole might arise on the part of the principal debtor. And the period during which an extension was given for payment of the first instalment had expired 3 months before Bowen's obligation arose.

After consideration, I have come to the conclusion that this distinction as to the time at which the defendant's obligation came into existence is much more vital and serious even than was suggested on the argument. In reality, I think Bowen was not a surety at all in the usual sense of that term as understood and used in the cases. Usually a surety guarantees the performance of a certain person's contract and agrees to become liable immediately upon that person's default. But in the present case Bowen did not guarantee the performance of Thompson's contract. By that contract Thompson agreed to pay a certain sum on August 2, 1913, and another sum on August 2, 1914. Bowen

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did not guarantee the performance of that contract. Apparently he was unwilling to do so. All that he was willing to do was to covenant that, if there was a default on the part of Thompson, that default should not be continued after November 2, 1914. But that fell far short of guaranteeing the performance of Thompson's contract according to its terms.

I am, therefore, unable to see what just cause Bowen had to complain of Walker's interference with or change in a contract the performance of which he, Bowen, did not guarantee.

Nor, if we go to another reason after given for the rule as to the discharge of the surety by giving time, do I see any reason why Bowen could, upon Thompson's default, bring a bill in equity joining Walker and Thompson, and ask that Thompson forthwith fulfil his contract, and that the money be realized. What right would Bowen have to insist on the strict performance of a contract, the strict performance of which he had not guaranteed? And what right would he have to complain that, by what had been done, he was deprived of this equitable remedy? If a person expects to have all the rights of a surety, he should become a surety, and guarantee that the principal debtor will fulfil his contract. In my opinion, what we have in this case is not the ordinary contract of suretyship at all, but merely a special contract of a kind still more "collateral" even than the usual contract of suretyship—a covenant that, if the debtor's default lasts beyond a certain time, the covenants will then, but not before nor at the first default, make it good.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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REGINA CARTAGE CO. Ltd. v. CITY OF REGINA.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, and Elwood, JJ. July 14, 1916.

STREET RAILWAYS—(§ III A—20)—OPERATION BY MUNICIPALITY—GROOVED RAIL—NEGLIGENCE—NUISANCE.

The use of a grooved rail at street intersections by a municipal corporation authorized by statute to build and operate a street railway, is not negligence, such a rail being in common use and necessary for its purpose. Neither, in the use of such a rail, can the corporation be deemed to maintain a public nuisance, for the legislature, in authorizing the construction and operation of the railway, must be taken to have authorized the use of such rails as were necessary for its reasonable operation.

Statement.

APPEAL from the judgment of a District Court Judge dismissing an action for negligence. Affirmed.

A. G. MacKinnon, for appellant.

G. F. Blair, for respondent.

The judgment of the Court was delivered by

LAMONT, J.:—This action was brought to recover damages for injuries caused to the plaintiff's horse while crossing the defendants' street railway, through the caulk of his shoe becoming caught in one of the rails. The result of the horse's shoe becoming caught was that his leg was broken and he had to be shot. The horse was valued at $200.

The defendants in constructing their railway employed the grooved rail at the intersection of streets where the track curved from one street to another. In the argument before us it was contended on behalf of the appellants (plaintiffs): (1) that in the use of the grooved rail the defendants were guilty of negligence, and (2) that, whether or not negligence had been shewn, the defendants were liable on the ground that the placing of the grooved rail on the public street constituted a nuisance.

The District Court Judge before whom the matter was tried found that the defendants had not been guilty of any negligence. He found that the defendants had used due care in selecting the wheels for their cars, and, in fact, had selected a standard wheel. He also found that the rail in question had been constructed for the wheel so selected and was suitable for the purpose, and that the use of a grooved rail was necessary to prevent cars leaving the track on the curves.

With the finding of the Judge I fully concur. The evidence warrants the conclusion that, when the defendants constructed their railway system, both wheel and rail adopted by them were the ones which, at that time, were considered most suitable for a city railway by those most competent to judge. That being so, negligence cannot be imputed from the use of this particular rail. There remains only to consider whether or not the laying of the rail on the street constituted a nuisance. If it does, the defendants are liable apart from negligence, unless, indeed, they can shew that under their statutory powers they are protected from liability.

For the plaintiffs, it was admitted that the defendants had statutory authority to construct, maintain and operate a system of street railway upon, across and along the public streets of this

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city. Sask. Stat. (1910-11), ch. 44. But it was contended that this authority was permissive merely, not imperative, and that the case of *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193, and *Canadian Pacific Ry. Co.* v. *Parke*, [1899] A.C. 535, among others, established that where the statutory authority for doing an act was permissive merely and not imperative, that act must be done in such a way as not to become a nuisance to others. Broadly speaking, that is the principle laid down in these cases, but, in order to apply the principle to any given act, or set of acts, it is necessary to inquire when powers or authority granted by statute are "imperative" and when merely "permissive" within the meaning of the rule. A power to be imperative does not import that there is a statutory obligation upon the person obtaining it to use or exercise it at all.

In *London, Brighton and South Coast Railway* v. *Truman*, 11 App. Cas. 45, the railway company were authorized, among other things, to carry cattle, and were also empowered to acquire any lands not exceeding 50 acres in such places as should be deemed eligible for the purpose of providing additional stations, yards and other conveniences for receiving, loading and keeping cattle, etc., intended to be carried on their railway. After the road had been in operation some years, the company bought land adjoining one of their stations and used it as a yard for cattle traffic. The noise of the cattle and the drovers in the yard was a nuisance to the occupiers of houses near-by, who applied for an injunction. The Privy Council held in favour of the company, on the ground that the statute had expressly authorized the purchase of land at such places as should be deemed eligible for the purpose for which the land in question had been acquired. In giving judgment, Lord Halsbury, at p. 50, said:—

> It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which parliament has intrusted them, if the use they make of these functions necessarily involves the creation of what would otherwise be a nuisance at common law.

There was in this case no statutory obligation on the company to purchase the land at all. It was not "imperative" in that sense; but it was imperative in the sense that the purchase was expressly authorized for the very purpose for which it was used.

The same principle was enunciated by Blackburn, J., in his

judgment in *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L.C. 171, at 196, where he said:—

I think it is agreed on all hands that if the legislature authorizes the doing of an act (which, if unauthorized, would be a wrong and a cause of action), no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy unless in so far as the legislature has thought it proper to provide for compensation to him.

In *Vaughan* v. *Taff Vale R. Co.*, 29 L.J.Ex. 247, 5 H. & N. 679, Cockburn, C.J., stated the law as follows:—

When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible.

The general principle applicable to cases of this class is laid down in 21 Hals., p. 519, in the following language:—

Where the legislature has authorized the exercise of the powers under consideration and has expressly or impliedly directed the manner and place in which, and the purpose for which, the powers are to be exercised, or where, without such directions, the inevitable or natural result of the proper exercise by the undertakers of such powers is the creation or causing of a nuisance, no liability arises in respect of it.

It therefore seems to be established that any result which necessarily follows from the doing of an act authorized by the legislature must be taken to be protected by statute, for the legislature must be presumed to have had it in contemplation. See Garrett's Law of Nuisances, 3rd ed., p. 204.

The principle laid down by the above authorities in no way conflicts with the decision of the Privy Council in *C.P.R. Co.* v. *Parke, supra*, relied upon by counsel for the plaintiffs. In that case Parke had legislative authority to divert water onto his land for the purpose of irrigation, and by means of ditches, flumes or drains to run the surplus or waste water through adjacent lands to any creek or channel. Parke ran water on his land from the Thompson river for irrigation purposes. The soil irrigated proved to be of a very porous quality; it consisted of a slight deposit of sandy loam on top, then a bed of gravel and below the gravel a large bed of what is called "silt," a mineral which absorbs water rapidly, and when its saturation reaches 78 degrees it is converted into liquid mud. Parke ran the water onto his land in large quantities, and allowed the water to percolate

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through the gravel to the silt which became liquid mud and slid down the grade, causing great damage to the company's track. The company brought an action to restrain Parke from so using the water. The Appellant Court of British Columbia held that the damage to the company's track was the necessary consequence of Parke's exercising his statutory right, and dismissed the action. The Privy Council reversed this decision, [1899] A.C. 535, saying, at p. 548:—

> In the present case the irrigator is at liberty . . . to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which the surplus or waste water is to be discharged. When the water has been conveyed to his land he is authorized to use it for purposes of irrigation, but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.

The difference between the principle here enumerated and that embodied in the *Truman* case appears to me to be this: In the *Truman* case it was a necessary consequence of the use of the land for the purposes sanctioned by the legislature, that a nuisance would result to the occupiers of adjacent properties, and therefore that such a nuisance would be created must be taken to have been in the contemplation of the legislature, while in the latter case the damage which resulted was not such a necessary consequence of the reasonable exercise of the irrigation privileges granted by statute that it must be taken to have been in the contemplation of the legislature.

The question in the case at bar, then, comes down to this: was the use of the grooved rail, in the manner in which the defendants used it, so necessary to the operation of their railway that the legislature must be taken to have been aware that it would be used and to have sanctioned its employment? I think it was. The evidence shews that a grooved rail is not only the rail commonly used but that, up to the present time, no other contrivance has been invented for preventing cars leaving the track on going round a curve; in fact, the evidence goes further, and shews that the edge of the groove on the rail in question could not be rolled back, as suggested by one of the witnesses, without incurring the danger of having the car leave the track. When the legislature authorized the defendants to construct and operate a system

of railway, and for that purpose to place rails upon the streets, it must be taken to have authorized the use of such rails as were necessary for the reasonable operation of the railway, and since for that purpose the grooved rail is necessary, it must be taken to have contemplated and authorized its use, for an authority to do a specific act includes all things reasonably necessary for the performance of that act. 21 Hals., par. 877.

The case of *Joyce* v. *Halifax Street R. Co.*, 22 Can S.C.R. 258, which, in its main facts, is identical with the case at bar, turned upon the statutory provision which required the railway company to keep a road level with their rails, which they did not do. That case does not help us, excepting in so far as it holds that the company had a right to use the grooved rail. The use of the grooved rail by the defendants being, as I hold it is, necessary to the reasonable exercise of the power granted by the legislature, does not, therefore, apart from negligence, give the plaintiffs a right of action, for the injuries sustained. The legislature must be taken to have decided that, although some damage might result from the use of this rail, yet, notwithstanding that danger, the defendants were to be at liberty to use it.

Negligence being negatived, the plaintiffs cannot succeed and the appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

VANHOLT v. NEWTON.

MAN.

K. B.

Manitoba King's Bench, Galt, J. February 12, 1916.

1. CHATTEL MORTGAGE (§ II D—29)—WRONGFUL SEIZURE—CONSENT—UNDUE INFLUENCE.
   The assent of a mortgagor to the seizure and sale of his property is null and void for undue influence when the mortgagor is of but moderate intelligence and little education and the mortgagee intelligent and shrewd, and the assent is procured by the misrepresentations and threats of the mortgagee.
2. CHATTEL MORTGAGE (§ IV A—40)—RIGHT OF MORTGAGEE DISCHARGING DEBTS—CONSENT.
   A mortgagee cannot recover from a mortgagor for amounts paid in discharge of debts due by the latter without his privity or consent.
3. CHATTEL MORTGAGE (§ II D—25)—DEGREE OF CARE IN EXERCISING SALE—LIABILITY.
   A mortgagee in possession who does not exercise care and discretion in the sale of mortgaged goods is liable in damages for the difference between the real value of the goods and their sale price.

Statement.

ACTION for wrongful seizure and sale.

W. H. Trueman, and *T. W. Robinson*, for plaintiff.

A. J. Andrews, K.C., and *F. M. Burbidge*, for defendant.

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GALT, J.:—In this action the plaintiff claims damages for the wrongful seizure and sale of 11 horses, a waggon and harness, and asks for $3,000 damages, and that certain documents be declared void, etc. The defendant denies the seizure and alleges that the goods and chattels in question were sold in accordance with authority given by the plaintiff. The defendant further alleges that he was authorized to sell the goods and chattels under the provisions of 3 chattel mortgages given to him by the plaintiff.

It appears that the plaintiff came to Manitoba about 8 years ago and took a farm at or near Zorra in Saskatchewan, about a mile from the boundary of Saskatchewan and Manitoba. The defendant resides at Roblin, Manitoba, about an hour's drive from Zorra, and carries on business in lumber, insurance, loans and financial transactions and is a notary public.

In or about the year 1908 the plaintiff had occasion to utilize the defendant's services and incurred indebtedness to him and others in the vicinity.

During the next few years the plaintiff executed the following chattel mortgages in favour of the defendant: (1) February 1, 1909, for the sum of $208.70, the mortgaged goods consisting of certain colts and cows and two sets of harness. (2) August 5, 1909, for $271, the mortgaged goods consisting of three mares, one waggon and one set of harness. (3) April 25, 1911, for $916.60 the mortgaged goods being described as one brown mare, one sorrel mare, one brown registered Clyde mare, one sorrel filly, two red cows and one farm waggon.

These mortgages were all drawn by the defendant apparently upon the same form, and the mortgagor granted in each case the goods and chattels described

together with all the natural increase of the said goods and chattels until the whole of the said indebtedness be fully paid and satisfied, and also all the goods and chattels of a like nature and similar description, and all the horses cattle and farm implements which shall at any time during the continuance of this mortgage or renewal or renewals of this mortgage be brought in or upon the said premises as part of the said stock and implements of the mortgagor as a farmer.

This latter mortgage was payable on or before November 1, 1911, with interest after maturity at 12 per cent. per annum. The mortgagor covenanted that in case default should be made in payment of the said sum of money or any part thereof or the interest thereon or any part thereof, it might be lawful for the

mortgagee to enter into and upon any lands, tenements, houses and premises wheresoever for the purpose of taking possession of and removing the said goods and chattels, and upon, from and after the taking possession of such goods and chattels as aforesaid, it should and might be lawful, and the mortgagee was thereby authorized and empowered to sell the said goods and chattels or any of them or any part thereof at public auction or private sale as to him might seem meet and from and out of the proceeds of such sale in the first place to pay and reimburse himself all such sum and sums of money thereby secured, and costs and charges as might then be due by virtue of those presents and all such expenses as might have been incurred by the mortgagee in consequence of said default, and, in the next place, to pay unto the mortgagor all such surplus as might remain after such sale and after payment of all such sum or sums of money and interest thereon as might be due by virtue of said presents at the time of such seizure, etc.

The plaintiff had incurred debts for farm supplies of different kinds, and many of these claims had been entrusted by the claimants to the defendant for collection. From time to time the plaintiff endeavoured to obtain statements of account from the defendant, but there always appeared to be items outstanding which could not be satisfactorily adjusted at the moment. In some instances certainly the plaintiff succeeded in showing the defendant that he had paid off one or more substantial items which had been charged up against him.

However, at or about the date of the mortgage No. 4, for $1,616.90, it is said by the defendant that the sum of $783.71 still remained due under the first three mortgages. The items constituting the last mortgage, dated November 4, 1911, included the balance due under all prior mortgages.

The grain comprised in the last mortgage was duly sold and the proceeds received by Newton. The parties appear to be hopelessly at issue as to the way in which various items of credit and debit should be applied and the material before me is insufficient to arrive at any definite conclusion as to the exact amount owing by the plaintiff to the defendant under the mortgage No. 3, upon which the seizure, if any, was made. The plaintiff does not appear to have kept, or to have been capable of keeping, regular accounts of his transactions.

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On December 23, 1912, the defendant, having found that the grain mortgaged to him under chattel mortgage No. 4 had been appropriated by the prior seed grain mortgagee, determined to obtain immediate payment of everything that was due to him by seizing and selling the plaintiff's property, comprised in mortgage No. 3. By this time the plaintiff had 11 horses at his farm, consisting of 8 mares and 3 colts. For this purpose he prepared a warrant in favour of one J. A. Williamson, the County Court bailiff at Roblin, authorizing said Williamson to seize and take all the said horses, together with the waggon and harness and to sell and dispose of the same, and to obtain possession of the said goods and chattels as the law directs, and the annexed mortgage permits. This warrant was not forthcoming at the trial. It was said to have been forwarded by the defendant to his solicitors in Winnipeg; but it is stated to have been lost.

A question arose as to the amount which was inserted in it for the bailiff to realize. Williamson said the amount was $1,000 or $1,100. The defendant said it was about $800.

The defendant was aware that there might be a difficulty in seizing the horses, etc., in Saskatchewan and bringing them into Manitoba without the consent of the plaintiff. He therefore drew up the following document with a view to securing the signature of the plaintiff:

Roblin, December 23, 1912.

J. A. Williamson, Bailiff of the County Court of Roblin.

Dear Sir:—You are hereby authorized to take, sell and dispose of all my stock and chattels and goods which you now have under seizure into the Province of Manitoba for the purpose of realizing on the said goods to the best advantage. This is your legal warrant for so doing.

On December 24, 1912, Williamson, armed with the warrant and with the document aforesaid, drove out to Zorra. He was accompanied by Allan Kelly and Michael Clark. They caught up to the plaintiff and his two sons on the road in Saskatchewan as they were driving three teams with grain to the station at Calder. Williamson stopped the plaintiff, who was driving the middle team, and told him that he had come out with instructions to seize his horses under Newton's chattel mortgages. The plaintiff's son was some distance ahead on the road so Williamson sent Kelly on to stop the front team, which he did.

The following is a statement of what then took place, as given by Kelly:

We stopped them and told them the horses were to be seized by Williamson. Williamson stated to Van Holt that he had better sign these papers to keep down expenses. Van Holt wanted to take the loads to Calder. Williamson refused and claimed he had a chattel mortgage, and he wanted 11 horses. Williamson said he must seize all the horses. We drove the teams to one side and took the six horses. Williamson instructed Clark and me to bring the 11 horses (all of them mares except a colt) and one Moline waggon and a set of double harness to Roblin. Williamson said: "If you don't sign the papers it will cost you considerable, as we would have to bring them to the Territories." He told Van Holt to sign a paper. Williamson gave Van Holt to understand that if he had given a mortgage on some horses he could take the balance. Van Holt acted as if he was beaten like a whipped dog. Williamson acted with authority. We took all the horses to Roblin; none were left; and put them in Williamson's livery.

Van Holt, the plaintiff, says:—

I knew Williamson was a bailiff. He said he had to do his duty. I begged and pleaded and said I understood the chattel mortgage was paid. He said he did not know about that, but when a man once signs a mortgage, the holder can always take everything you have. I said if the grain was properly figured out the mortgage was paid. He was trying to influence me to give him the horses. I pleaded for mercy's sake not to ruin me, but he said he had to do his duty. He said he had the chattel mortgage, but I did not see it. He said he had a warrant to seize my horses, every hoof I had. He wanted me to sign the paper and said if I did not it would cost me $300 more. I believed what he said, as he said it was the law in Canada even if the mortgage were paid. I signed the writing after pleading and begging (that is, paper dated December 23, 1912, "You are authorized to take my goods", etc.). I identify my signature, but I did not and could not read it. Williamson explained that the horses had to go. I signed it because of Williamson's statements.

Michael Clark, a witness called by the defendant, states, in reference to this interview:—

Williamson told Van Holt it would be more expensive to him if he did not sign the consent. I heard Van Holt ask Williamson to let him take the grain to Calder, but Williamson said no, he must have the horses and move them over to Roblin that night.

The loads of grain were thereupon drawn to one side, the horses unhitched and taken back to the plaintiff's farm. Kelly and Clark then took these and the remaining horses (11 in all) together with the Moline waggon and harness from the plaintiff's stables to Williamson's livery stable in Roblin.

I now come to deal with the private sale of all the goods seized, which took place at Roblin on January 1, 1913. The evidence is conflicting, so I will refer to certain material portions of it.

Van Holt says:—

I then went to Roblin. Kelly saw me at the hotel and said I was wanted

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at the barn. Williamson was there and said he had found a purchaser, a man named Wilson, and he asked me to sign an agreement to sell for the amount I owed to Newton, otherwise he said Newton would send out and seize every hoof I had, which included cows. I objected. I believed he must have the power. My heart was broke. He had a paper ready drawn up. It was dated January 1, 1913. This is my signature. I could not read it. I had a family to protect. Williamson said he had only 3 hours to do the business in. I had no discussion with Wilson for a sale to him. Appel (a chattel mortgagee subsequent to Newton) was satisfied that if I did not consent to sell Newton would send out and seize all the rest of my goods. Made no arrangement with Appel as to his money.

Allan Kelly, one of the plaintiff's witnesses, says:—

The day after the seizure I saw Newton the defendant. I asked him if he could not carry Van Holt a year on account of his wife and five children. He refused. I then asked him to let Van Holt have a team and he refused. Van Holt, who was with me at this interview, claimed to have an equity in the goods. Newton said, "You have equity in nothing, you are down and out." On January 1, the day of sale, Wilson and Van Holt tried to make a deal because very few were in town. Van Holt was reluctant. Mr. Williamson said to Van Holt that if he did not consent to sell to Wilson he would send out and seize all his cows, etc.

The following are extracts from evidence given on behalf of the defendant: Wilson says:—

I first heard about the horses a few days before the sale. As a result I went to Roblin and saw the horses. I placed no valuation on them. I paid all they were worth at the time (*i.e.*, $1,650).

In his cross-examination, Wilson placed a separate value on each of the horses he had bought, with the result that the total was $1,300, and he says the waggon was only worth $50, so that he appears to have been willing to give $300 more than he thought the goods worth.

Charles Traub heard of the intended sale and went to Roblin. He desired to buy two of the horses for a team, but says he did not get a chance to buy. He considered $1,650 a good price for the horses in the condition in which he found them.

William Appel said that he held a mortgage on four of the horses, dated April 2, 1912. He says he came to Roblin on Christmas Day and saw Van Holt. Then he discussed his position with Newton. During the summer of 1912 Appel, by way of precaution, had given a distress warrant to Williamson to make use of in case at any time Appel decided to seize; but no such instructions were given, and his warrant, for some reason which did not appear in the evidence, was returned by Williamson to Appel shortly before the seizure by Newton. Appel says:—

Cannot say why Williamson returned me the warrant before the sale.

Newton agreed to sell the horses so that I would get my money out of it. I did not give Mr. Williamson any instructions in Roblin to seize the horses under the warrant.

Williamson says:—

I saw Van Holt on Christmas Day. I saw Harry Wilson 3 or 4 days before the sale. I was up in his country and told him of the sale coming off. Appel came down and we had a conversation. He shewed me an abstract. I saw I could not legally sell the stock. I had a conversation with Newton and Van Holt. I told Newton we could not sell the stock. I had a talk with Van Holt. I told him we could not go on with it, but there was a man here that could handle it. I then introduced Wilson. I had nothing to do with terms of sale arranged between them. I think I told Van Holt the amounts due to Newton and Appel. We went to Newton's office, Newton then drew up this paper, including a $500 bonus. Harry Wilson told the arrangements to Newton. The value of the whole bunch of horses at that time was not more than $1,650. I had advertised the sale under the chattel mortgage by putting up a notice on my livery stable and in one or two other places.

According to the evidence given by the defendant and Williamson, the plaintiff made no sort of objection to anything that they did. Williamson says that when he went out to seize the horses Van Holt was quite content, without any objection, to sign the written authority and allow all his horses and his waggon and harness to be taken away to Roblin. Both Williamson and the defendant give similar evidence with regard to Van Holt's attitude in agreeing at Roblin to let the horses all be sold to pay off whatever Newton said was due to him and to a number of other creditors whose claims were in his hands for collection. Newton flatly denies having heard of any pleadings or objections raised by Van Holt on the ground that the mortgage debt was in truth all paid up, or any request by Van Holt to be allowed at least one team of horses in order that the plaintiff might continue his farm work for the support of himself, his wife and family, or any objection whatever to signing the consent to sell and the agreement to pay Wilson a bonus of $500 in order that the plaintiff might have a right to redeem the property within one month.

The plaintiff is a man of moderate intelligence, but with very little education, and appears to be unable to read anything that is not printed. His demeanour throughout a lengthy examination and cross-examination was that of an honest man endeavouring to tell the truth, and not at all inclined to exaggerate the treatment he complained of. It so happened that his acquaintance, Allan Kelly, was present throughout most of the transac-

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tions complained of, and his evidence corroborates the plaintiff in all material particulars.

Kelly's principal occupation in life appears to be that of a cook. He has also worked to a considerable extent as a farm hand. The defendant endeavoured to discredit Kelly's evidence by shewing that on one occasion the defendant procured a job for Kelly out at Manitou Rapids, beyond Le Pas, and had paid him $25 by way of railway fare, etc., to reach his destination, but Kelly having gone as far as Dauphin, decided to throw up this job and came back to his home near Roblin, and he did not return the $25 to Newton. This incident is explained by Kelly as follows. He says: "Newton offered me a good job if I would go away and take it. I agreed. He got me a position as cook for some contractors at Manitou Rapids. I estimated it would cost $25 to get there. I saw him to get the money. He made out a note and asked me to sign it. I refused and was going away. The trial of this case was coming off shortly on June 29. Newton said, 'You know right well if you are not at the trial they will swear me whether I gave you any money to get you out of here or not.' I said, 'I don't doubt that,' He said, 'A note will be better as it will not be money.' I refused to give a note. Later a clerk of Newton's gave me $25. I took the money and went to Dauphin. Then I changed my mind and came back to Roblin, as I did not like the job. I did not repay the $25 to Newton. Nothing was said by Newton. I felt a bit guilty." Newton says, in reference to this incident: "I don't remember saying I would be sworn as a witness and have to tell about payments. I drew a cheque for $25 and left my clerk to pay it. I was taking an active interest in politics. Kelly was doing a lot of talking around Roblin about the Van Holt matter and this was disagreeable to me. My idea was it would be just as well to have him out of the road."

It appears to me that Kelly's conduct in deciding not to absent himself from the trial where he might be able to assist Van Holt in the assertion of his rights was entirely praiseworthy. He certainly should have returned the $25 to Newton; but, considering his rather lowly condition of life, and his belief that Newton was endeavouring to defeat the ends of justice by keeping him away from the trial, I would not, on account of this single incident,

discredit his evidence, which was given throughout frankly, and, I think, truthfully.

I was not at all favourably impressed with the demeanour and evidence of the defendant or Williamson.

The defendant is an intelligent and shrewd business man, largely engaged in loaning transactions to the needy people of his neighbourhood, and his regular charge for interest is 12 per cent. It was, doubtless, of advantage to the plaintiff to be able at times to procure advances even at a high rate of interest, but the defendant did not limit himself to that, for he tells us that in making up the items which comprised the third mortgage for $916.60 he included in it a bonus for himself of $125, and a charge of $10 for drawing the chattel mortgage.

Having once decided to realise immediate payment of everything he considered due to himself, including a number of claims against Van Holt which were not secured by chattel mortgage at all, the defendant appears to have cast aside all scruples and to have proceeded solely with a view to his own interests and those who had placed other claims in his hands.

Owing to the failure of the defendant to produce the warrant which he had drawn up and given to Williamson on December 23, 1912, it is impossible to know for what amount the defendant was professing to seize; but he says it must have been between $800 and $900. His counsel subsequently stated that the amount due on all the chattel mortgages was $783.71.

The defendant does not attempt to rely upon the alleged seizure at all. I find, however, as a fact that the defendant, by Williamson, his bailiff, did seize the defendant's horses, waggon and harness as alleged by the plaintiff. That the defendant intended to seize them and in fact subsequently affirmed the seizure is shewn by the document prepared by him on December 23, 1912, to be signed by the plaintiff, which contains the following words:—

> You are hereby authorized to take, sell and dispose of all my stock and chattels and goods *which you now have under seizure* into the Province of Manitoba, etc.

I accept the evidence given by the plaintiff and Kelly in respect to the seizure and subsequent sale in preference to the denials and modifications of it given by the defendant and Williamson. In at least one important particular, namely, the expense which would

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fall on plaintiff if he did not give the horses up to Williamson, the plaintiff is corroborated by the defendant's witness, Michael Clark.

I think the seizure was carried out in a harsh and unjustifiable manner. Then the goods seized were taken to Roblin and advertised by two or three notices for sale there at 1 p.m. on January 1, 1913. The reason given for thus taking the goods out of Saskatchewan where they might have been conveniently sold at Calder was that Roblin was a somewhat larger community and there would be a better opportunity of effecting a sale. Instead of acting upon this view, the defendant, with the assistance of Williamson, carried out a private sale early in the morning of January 1, 1913, to a friend of Williamson's named Wilson, for the sum of $1,650, an amount sufficient to cover Newton's debt of $783, Appel's chattel mortgage for $425, and several outstanding accounts which were in Newton's hands for collection but not secured by any mortgage.

In my opinion the plaintiff at the date of the seizure and sale was completely in the hands of and dominated by the defendant. He executed the chattel mortgages from time to time with such slight information as to their contents as the defendants chose to give him. He never knew accurately how he stood with the defendant, but, except in respect of a very few items which he knew were erroneous, he accepted as correct the statements made to him from time to time by the defendant. I am satisfied, for instance, that he was not aware that the defendant had charged him a bonus of $125 in the mortgage for $916.60 nor the charge of $10 for drawing the mortgage. He was further entirely ignorant of his legal rights under the documents which he signed from time to time. He felt himself to be so in the power of the defendant that he could not legally or otherwise complain of the treatment he was receiving. He quite believed the statements made to him by the defendant's emissary Williamson, to the effect that unless he signed the document authorizing the taking and sale of all his stock he would be put to a further expense of perhaps $300. Similarly at Roblin, on January 1, 1913, he was led by Newton and Williamson to believe that the only way he could save his few remaining cows at home was by signing the consent to the private sale to Wilson. In the words used by a Judge in

England in a similar case of overreaching:—"His poverty, not his will, consented."

In my opinion the plaintiff's signature to both of the documents signed by him respectively on December 24, 1912, and January 1, 1913, were obtained by the defendant by undue influence, and they should be set aside:

In Hals. Laws of England, vol. 7, sec. 736, it is said:—

A contract may be avoided or set aside at the instance of one of the parties to it on the ground that his consent thereto was obtained by undue influence. Undue influence may be defined, for this purpose, as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract. Courts of equity have always granted relief in the case not only of contracts, but of transactions, of whatever nature, which are shewn to be of an unconscionable character, that is to say, wherever an unfair advantage has been taken of a person who was, for whatever cause, in the power of another or subject to his influence. The grant of relief on this ground has most commonly been made in the case of unfair dealings with expectant heirs or persons in pecuniary distress, but the power to grant relief is not limited to such cases, and may be exercised in any case in which an unfair use has been made of influence possessed by one person over another. . . .

Sec. 737. The existence of any such relationship between the parties to a contract raises a presumption that undue influence has been exercised, and where the transaction is impeached the burden rests on the party possessing the influence to prove that the other party not only had full knowledge of the facts at the time when the contract was made, but that he acted under competent independent advice. Where no such relationship exists between the parties, the burden of proving the exercise of undue influence rests upon the party who seeks to avoid the contract on this ground.

In *Smith* v. *Kay*, 7 H.L.Cas. 750, at 770, Lord Cranworth says:

In my opinion, although this bill is framed upon the ground of this supposed fraud, the circumstances of the case as now proved make it abundantly clear that this fraud was totally immaterial in order to entitle the plaintiff to set aside this bond, upon the ordinary principle of the Court, which protects an infant, or any other person, who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My Lords, there is, I take it, no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances. The principle is not confined to those cases, as was well stated by Lord Eldon, in the case of *Gibson* v. *Jeyes*, 6 Ves. 266, at 278, in which he says it is the great rule applying to trustees, attorneys, or any one else.

The defendant not having attempted to rely upon the seizure, and not having asked for any amendment of his pleadings, but basing his whole defence upon the documents just referrred to,

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and those documents being in my opinion void, the plaintiff is clearly entitled to succeed, and the only remaining question is the amount of damages to which he is entitled.

I have already found that the two written documents signed by the plaintiff on December 24 and January 1 were obtained by undue influence and must be set aside. For the same reason I am of opinion that any legal authority or consent by the plaintiff as to the distribution of his moneys is subject to the same infirmity. These moneys were paid voluntarily by the defendant in discharge of the plaintiff's unsecured debts.

In *Exall* v. *Partridge*, 8 T.R. 308, Lord Kenyon, C.J., says, at 310:

> Some propositions have been stated on the part of the plaintiff, to which I cannot assent. It has been said that where one person is benefitted by the payment of money by another, the law raises an assumpsit against the former; but that I deny; if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, *nolens volens*.

In *Leigh* v. *Dickeson*, 15 Q.B.D. 60, at p. 64, Brett, M.R., says:

> But it has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit. In this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact, that he is bound to accept it; in that case he has no opportunity of exercising any option, and he will be under no liability.

In the present case the plaintiff was in this latter position. He was given no choice.

The defendant took upon himself to pay off not only his own debt of $783.71, which he had a right to pay; but a number of other debts against the plaintiff which had been placed in his hands for collection. It is true that Appel held a mortgage for $425 upon the property in question, but no seizure was made under this mortgage, and it was simply dealt with by the defendant like the various other unsecured claims.

In Mayne on Damages, 6th ed. p. 432, it is said:—

> And so the defendant may shew that the plaintiff has not an interest in the goods to their full value and that the residue of the interest was in himself. In such a case the plaintiff can only recover to the extent of his own interest. But this will be no defence, even in mitigation of damages, when the residue of interest was not in the defendant but some third person.

At p. 433:—

In trespass no doubt an additional element enters into the verdict. It ought to comprise damages for the manner of the taking, for the value of the thing taken, and for the loss incurred by its being taken.

Under the facts as I find them here, the defendant held the goods at Roblin as a mortgagee in possession. In selling he was bound to exercise proper care and discretion and adopt such means as would be adopted by a prudent man to get the best price to be obtained, and to use every exertion to get the best price. See *Orme* v. *Wright*, 3 Jur. 19; *Kennedy* v. *De Trafford*, [1897] A.C. 180 at 185. A mortgagee's power of sale must be exercised with due regard for the purpose for which it is given. A mortgagee with such a power stands in a fiduciary character and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property inasmuch as he is a trustee for the mortgagor for any surplus: See *Jenkins* v. *Jones*, 2 Giff. 99. This duty is to bring the estate to the hammer under every possible advantage to his *cestui que trust*. *Downes* v. *Grazebrook*, 3 Mer. 205, at 208. It is a misuse of the power to sell that which one has a right to sell along with that which one has no right to sell. See *National Bank of Australasia* v. *United Hand in Hand Co.*, L.R. 4 App. Cas. 391, at p. 412.

The principles above mentioned have been adopted and applied by the Supreme Court of Canada in *Rennie* v. *Block*, 26 Can. S.C.R. 356.

I find upon the evidence that the defendant acted unjustifiably when, after advertising a sale, he sold the whole property to the first man that came along before the hour of sale had arrived.

The evidence as to the value of the goods seized was conflicting. The plaintiff says the 11 horses were worth $3,100, the waggon $75, and the harness $40, or $3,215 in all. Kelly, who appears to have had considerable experience with horses, values them at $2,100, or $2,200 and specifies the value of each horse. The defendant's witnesses content themselves with stating that $1,650 was a good price for all the chattels sold. The horses were in rather poor condition at the time and this fact is specially mentioned by defendant's witnesses.

Upon the evidence given I would fix $2,100, as a very moderate price for all the property at a properly conducted sale. But I think that if the defendant had taken reasonable pains to sell the

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horses singly or in pairs instead of by wholesale as he did, the property should have realized considerably more.

The fixing of the damages to which the plaintiff is entitled is a somewhat perplexing question. Owing to the diversity of views presented by counsel and the complications involved in the accounts it is impossible to adjust the figures with perfect accuracy, but in the view I take of the plaintiff's rights, such an exact adjustment is, perhaps, not necessary.

There was evidence to shew that from time to time advances in cash were made by the defendant to the plaintiff, one substantial advance being made out of moneys realized by sale of the grain included in chattel mortgage No. 4. In so far as the moneys were in fact given to the plaintiff or paid to creditors with his consent, I think he cannot complain of any such payment.

Towards the close of the trial it was admitted by counsel for the plaintiff that items amounting in all to about $1,500 had been paid by the defendant out of the proceeds of the grain comprised in mortgage No. 4, and that plaintiff did not dispute the validity of these payments. But they formed no part of the items which formed the consideration for mortgage No. 3.

When mortgaged property is sold the proceeds should be applied rigourously to the items secured by the mortgage, otherwise a fraud upon the Bills of Sale Act could readily be perpetrated. However, that question was not discussed before me, and on the complicated and conflicting evidence put in by both parties, I think it safer to assume that the accounts made up by Stevenson, the defendant's accountant, should be accepted as correct, and that $783.71 still remained due on mortgage No. 3.

The defendant must have known on December 24, 1912, that the property he was seizing far exceeded in value the amount of his claim. He used no discretion whatever but seized everything except the cows, and he did so in an unnecessarily harsh and unjustifiable manner. Yet, after removing the goods to Roblin, he abandoned his seizure and dealt with the goods as a mortgagee in possession.

I would fix the plaintiff's damages in respect of the defendant's conduct in seizing the property in the way he did and in spite of the plaintiff's protestations at the sum of $200. The value of the property seized I fix at the sum of $2,100. The value of the

property sold over and above the defendant's claim is $1,316.29. The defendant had no right to apply the purchase money in the manner he did in paying off other claims. Consequently, I find the plaintiff entitled by way of damages to the above two sums of $200 and $1,316.29, making in all the sum of $1,516.29.

This case has proved to be one of great difficulty, and I think the plaintiff is entitled to his costs of action without regard to the statutory limit. *Judgment for plaintiff.*

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Quebec Court of Review, Sir F. X. Lemieux, C.J., Pouliot and Dorion, JJ. February 29, 1916.

BANKS (§ IV A 2—51)—APPLICATION OF PAYMENT—CHEQUE IN PAYMENT OF NOTE—DISCHARGE OF LIABILITY.

Where the maker of a promissory note pays the endorsee, and the latter gives his own cheque to a bank for the payment of the note, which cheque the bank accepts and charges to the overdrawn account of the endorsee, and the overdraft is extinguished by subsequent deposits in the current account, the note is paid, and the maker is entitled to its possession.

REVIEW of the judgment of Belleau, J., Superior Court of the District of Quebec, in an action in warranty, November 8, 1915, which is reversed. Statement.

Armand Lavergne, for plaintiff.

Gelly & Dion, for defendant.

SIR F. X. LEMIEUX, C.J. (dissenting on the petition in warranty):—The principal plaintiff Crète endorsed in favour of Gagnon and Garant a note payable to order amounting to $212.60 due on March 3, 1915. Gagnon and Garant discounted this note at the Imperial Bank, where they had a current account. Lemieux, C.J.

On February 26 Crète paid to Gagnon and Garant the amount of the note without receiving back the note. This excess of confidence brought him inconvenience and was the starting point of the present action. In effect, since the maturity of the note in question, Crète, after having vainly asked Gagnon and Garant and the liquidator of their bankrupt estate to remit him the note, had to recourse to judicial proceedings against the liquidator to become possessor of the note or to have the amount reimbursed.

The liquidator, Gagnon, has not contested the action of Crète; but he has exercised against the Imperial Bank a recourse in warranty, by which he pretends that Gagnon and Garant have paid the note of Crète at its maturity and that the bank refuses

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to remit the note. The bank contests the action in warranty alleging that the note was not paid to it.

The Superior Court declared well founded the demand of Crète against the liquidator and rejected the action in warranty of the latter against the bank. It declared that Gagnon and Garant had not paid the note of Crète to the Imperial Bank either at its maturity or since.

The question to be determined is whether or not the Imperial Bank has been paid by Gagnon and Garant the amount of the note in question or if it ought or ought not to be condemned to remit this note or pay the amount of it.

We say that this is the only serious question submitted for our consideration, for the judgment maintaining the action of Crète against the curator, is in all regards in conformity with the justice of the case and must be confirmed.

The evidence and the contestation linked together have established without doubt that Crète has paid his note of $212.60 to Gagnon and Garant on February 26.

Let us pass immediately to the revision of the judgment on the action in warranty. When the note of Crète was due, Gagnon and Garant did not bother about it and had not seen that the necessary funds were available for its payment. In the afternoon of March 3, the date of the maturity, their manager went to the bank for different matters in connection with their business. His notebook did not even make mention of the Crète note. The manager of the bank talked to him about the maturity of this note. Gagnon answered that Crète had not yet paid the note. Upon this, Love, the manager of the bank, suggested that he give him the cheque of Gagnon and Garant for the amount of the Crète note, in order to avoid this note being classed among the bills not paid. Love asked that cheque from Gagnon and Garant although the latter had no available funds and their account was overdrawn of many hundred dollars. This cheque, according to the bookkeeping system of the bank was marked by the perforating machine *paid*, and carried to the account of Gagnon and Garant with the note annexed to it.

The following day and subsequently, Gagnon and Garant by means of discount, deposited in the bank certain funds, which by law and the agreement between Gagnon and Garant and

the bank, the latter had a right to deduct the necessary sum to reimburse itself for the advances made to Gagnon and Garant or for commercial effects in suspense made or endorsed by that firm.

From these facts and circumstances, the liquidator has come to the conclusion that the note has been paid by the cheque and also by the imputation of payment, that is to say, from the funds deposited subsequently and which ought to have been, according to law, imputed to the payment of the cheque.

The Court of first instance has rejected this pretension, and we believe that its decision is in all respects in conformity not only to equity but to the agreement of the parties, which eliminates in this matter all legal imputation of payment.

The imputation of payment made by consent cannot be attacked. The legislator intervenes in matters of convention only when the parties have kept silent, and when his intervention is necessary. In order that the law may make imputation we must suppose that the parties have not made it, because there may be conventional imputation. In other terms, the law in matters of imputation of payment, follows its course when the parties have kept silent; but the parties have always the right to stop the course of the law by agreement.

What precedes, follows from the teaching of the authors and particularly from Laurent (17 Laurent, Nos. 613, 714, etc.)

In our case, the parties have by convention which we will explain in a moment, derogated from the law, as they had the right to do as to the question of imputation of payment; and, secondly, it has been understood between them, that is to say, between the bank and Gagnon and Garant, that the note of Crete was not paid, and has never been paid by the deposits made by Gagnon and Garant after the 3rd of March.

The first reason for saying that the note was not paid, is, that contrary to a most elementary rule of prudence the note was not withdrawn by Gagnon and Garant, on March 3, when the cheque was given. The latter had more reason and interest for withdrawing this note from the bank if this note had been previously paid and only to keep the confidence of their client Crète, they should have taken back this note which they pretended having paid and remitted it to him. No, they leave the note with the bank, thus exposing Crète to inconveniences which have not failed to arise.

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This unique fact of not having withdrawn this note from the bank established if not a legal presumption, at least a sure presumption and one of the strongest of the non-payment of the note.

Second reason. Gagnon and Garant at the maturity of the note misled the bank in saying that Crète had not paid the note. If they had admitted that Crète had paid and that, after such a declaration, the manager of the bank had accepted the cheque in question, we could perhaps, under those circumstances, conclude that the bank has made a special agreement with Gagnon and Garant by which it freed Crète and reserved its recourse only against Gagnon and Garant. But is it reasonable to think that the bank would have made remittance of a commercial effect, of which the subscriber offered all the guarantees of solvency, to keep only its recourse against the endorsers, the business of which seemed already to decline, since their account was then overdrawn and has always been so since, up to their bankruptcy?

Third reason. From March 3 until the action it does not appear that Gagnon and Garant ever claimed from the bank the remittance of the note. It seems to us, that if the note had been paid, Gagnon and Garant, acting like business men, would not have failed to make such a demand.

The following morning, March 4, Gagnon and Garant go to the bank to discount a certain number of commercial effects, among which is a draft made by them on Crète for the amount of $306.26 payable on April 7 to the order of the Imperial Bank. To the manager, who inquires about this draft, Gagnon and Garant declare that it is to obtain from Crète the amount of the note not paid, and that the balance, namely, $93.65, was for additional merchandise sold to Crète. It was, as we see, joining untruth to bad faith, but this declaration nevertheless showed that the note was not paid, since Gagnon and Garant were drawing on Crète to obtain from him the necessary money to meet his note. The bank discounts the draft and places the amount to the credit of Gagnon and Garant. Then the bank sends the draft for acceptance to a branch of the Banque Nationale in the neighbouring parish where Crète resides. To the draft is attached the note unpaid of $212.60. Crète of course refuses to accept the draft which comes back unpaid.

The bank in asking from Crète the payment of the note by

way of the draft, shows clearly that the note was not paid and that it had not freed Crete of it.

The matter does not stop there. Later on, on April 7, when this first draft became due, Gagnon and Garant again draw on Crète, this time for the sum of $268.10 always with the aim as they declared to the bank to obtain from Crète the amount of the note, namely, $212.60. And these people, Gagnon and Garant, now dare come and pretend that they have paid to the bank the amount of the note. We do not conceive that such a pretension can be accepted.

If the note was paid, as Gagnon and Garant or the curator affirm, why did Gagnon and Garant give themselves so much trouble in order to pay it, twice in succession, have recourse to unjust and dishonest proceedings even to procure for themselves the necessary funds?

And what bank, desirous of keeping its clientele, would refuse to remit notes when they are paid?

If the cheque establishes a certain presumption of payment, is not such presumption destroyed by the positive facts above mentioned, especially in face of the formal declaration of Gagnon and Garant that the note was not paid? This cheque seems to form part of a system of bookkeeping, with which we are not very familiar, but we cannot help finding in the facts related above a formidable proof showing that the note was not paid.

Fourth reason. Gagnon and Garant attempting to explain this inexplicable circumstance that they did not withdraw the note from the bank, say that it was customary to withdraw from the bank their cheques only at the end of the month. This custom is well known and generally followed. But every month Gagnon and Garant have withdrawn their cheques whilst they have never withdrawn the Crète note.

This shows that the note has remained in the hands of the bank because it had not been paid, a fact admitted and recognized by Gagnon and Garant.

However that may be, is it not true, from the facts related above, that the bank has always reserved its recourse against Crète, notwithstanding the fact that the note and the cheque have been placed to the account of Gagnon and Garant?

We are facing a rather peculiar situation: that of a debtor who, in spite of his pretension of having paid his debt, leaves,

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however, the title of credit, a note, in the hands of his creditor and who, bearer of a false receipt, in our case a bank book showing a cheque apparently given by him in payment of the debt, recognizes and admits nevertheless, in the strongest way, of not having paid, and also of having tried by all means to obtain the necessary money to pay his debt.

The bookkeeping system of the bank can be understood by a few, but which was not and will not be explained, is that a business man advised, notwithstanding this acquittance, would have formally recognized himself debtor of a debt acquitted and paid. I would confirm.

Pouliot, J.

POULIOT, J.:—Gagnon and Garant having accepted from Crète the amount of his note before its maturity, notwithstanding the fact that they were no longer possessors of the note at the date of payment by Crète, have thus assumed the obligation to pay this bill of exchange to the regular holder. Crète has then against them a right of action to obtain the note or the remittance of the amount left in their hands. On this point the Court is unanimous.

On the ground of the action in warranty there is divergence of opinion between the members of this tribunal.

The Chief Justice has set out the reasons which in his opinion should influence the setting aside of the action in warranty, especially the fact that Gagnon and Garant and the bank admit that the cheque representing the note, given by Gagnon and Garant on March 3, 1915, was given by express agreement, solely for bookkeeping purposes and to avoid the note in question appearing in the category of notes not paid at maturity. The note not being paid at its maturity, the bank had the right and was authorized to charge it to the account of Gagnon and Garant.

Gagnon and Garant having that day remitted their cheque for $212.60 to the bank, the latter placed to the debit of their account the amount of the cheque representing the note. Following the entry of the cheque another sum of $66 is debited to Gagnon and Garant, viz.: $212.60, $66, in all $278.60. On the same day, the last transaction entered in the pass-book is a discount amounting to $3,609.06 placed to the credit, giving a balance of $224.50 to the debit.

The conclusion is clear that the difference between $278.60

and $224.50, namely $54.10, has truly been paid on account of the note of $212.60.

The following day, March 4, two deposits, the first of $307.25, the second of $2,934.69 are brought to the credit column of Gagnon and Garant, and in the evening a balance of $611.86 to the debit closes in the books the business of the day.

Supposing there was reason to eliminate the first deposit of $307.25, because it is the product of a draft drawn by Gagnon and Garant on Crète and contained the $212.60 of the cheque, which draft was not paid, the second discount was necessarily used to pay previous debts, charged to Gagnon and Garant to their current account, since on a total of $3,429.25 placed during the day to his debit, there remained due at the closing of the bank that day only $611.82.

Being given that all that appeared remaining due to the bank on March 3 was $224.50 (viz., $158.50 on the cheque of March 3); we must therefore say that this first balance was paid by the deposits of $307.25 and $2,934.69 made on March 3. The cheque thus being reimbursed to the bank, the note of Crète was paid.

Supposing that this first reason does not constitute an absolute answer to the claim of the bank, another would exist in my opinion of equal value. The current account of Gagnon and Garant was closed on May 3, 1915. If, at that date, the accounts of debit and credit would have balanced so as not to leave any amount whatever to the debit or to the credit, we ought to admit that the note of Crète paid by the cheque asked for on March 3 was acquitted. Now, at that date the bank book shows a deficit of $4,747.50. To balance the accounts, we have only to strike off a certain number of items to the debit, the last ones coming up to April 28, the date on which the deficit is covered.

From which it follows that we must consider all the amounts previously debited as paid by the credits and deposits accumulated up to the date of the closing of the account. The Crète note, debited 2 months before, on March 3, is therefore paid.

The bank considered that it had really paid the amounts placed to the debit, since it debits to Gagnon and Garant the interest on amounts of the overdrawn account.

A third reason, in my opinion, against the maintenance of the action in warranty, is that by mere balancing of its accounts,

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done every day, the compensation cannot operate against this note of Crète.

It is that the bank has itself expressly consented to make and has made imputation of payment, by the acceptance of the cheque of Gagnon and Garant amounting to $212.60.

Gagnon and Garant go to the bank on the 3rd of March. The manager of the bank points out to them that the note becomes due on that date, and that they have no funds to their credit. He offers to Gagnon and Garant to accept their cheque for the amount, initials it, and the cheque is deposited with the cash and debited to Gagnon and Garant. On the cheque the name of Crète appears. By consent of the bank, this cheque was paid and debited. It is, therefore, the bank that consented to lend the amount to Gagnon and Garant, with the intention that it would be reimbursed when Gagnon and Garant would have sufficient funds to their credit. Now, on the next day, the reimbursement was made by the deposit and the discount credited to the account, and Crète thus was free of the obligation to pay to the bank the note which he had before maturity paid to Gagnon and Garant.

In the action of the bank against Crète for the recovery of the amount of the note, the latter could have opposed the cheque of Gagnon and Garant showing payment, without the bank being allowed to pretend that this cheque had been paid at its bank for mere accommodation to Gagnon and Garant or for mere reasons of accounting and bookkeeping.

The petitioner in warranty, having invoked this cheque against the bank on the personal behalf of the warrantor, the defendant in warranty cannot, in my opinion, reject as no answer this ground which it could at all events invoke only against the plaintiff in warranty personally.

These are the reasons which prevent me from agreeing with my learned colleague and oblige me to reverse the judgment of the Court of first instance and to maintain, with costs, the action of the plaintiff in warranty. *Judgment reversed.*

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MARWICK & MITCHELL v. KERR.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. February 1, 1916.

PARTNERSHIP (§ V—21)—MONEY REALIZED FROM ADMITTING NEW MEMBERS —DUTY OF ACCOUNTING.

Moneys received by the members of a firm possessing a majority interest therein, in pursuance of an arrangement whereby third parties are admitted into the firm, cannot be retained by them as a considera-

tion for their individual interests therein, but is in effect a realization for a share in the assets or goodwill of the partnership itself, and must be accounted for to the other partners.

[*Marwick v. Kerr*, 25 D.L.R. 250, 24 Que. K.B. 321, affirmed.]

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MARWICK & MITCHELL v. KERR.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 25 D.L.R. 250, 24 Que. K.B. 321, affirming the judgment of Panneton, J., in the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

R. C. Smith, K.C., and *F. H. Markey*, K.C., for appellants.

Gordon MacDougall, K.C., and *Adrian K. Hugessun*, for respondent.

FITZPATRICK, C.J.:—I can find no grounds for holding that the large sums paid to the defendants Marwick and Mitchell on what was practically the admission of fresh partners to the firm of Marwick, Mitchell & Co., of which they were the senior partners, were moneys to which they were entitled to the exclusion of the other partners in the firm. The presumption, it seems to me, is that these moneys were paid for an interest in the business and not in so much of the business as would be represented by the proportion of the interests of these two partners, large though that was. Indeed, I think, it was this largeness of their interest that must have led these two partners into the mistaken belief that the business was really their own and that they could make such dispositions as they pleased without being accountable to the junior partners in the concern.

Fitzpatrick, C.J.

The unfortunate secrecy which the two defendants preserved as to the moneys received by them prevented any possible acquiescence of the other partners in the arrangements made.

I think the appeal should be dismissed.

IDINGTON, J.:—The respondent sued appellants for an account of moneys received by them under circumstances which it is claimed rendered the moneys so received the property of the partnership of which they were all members.

Idington, J.

The Courts below have maintained a judgment for $6,950.73 in default of the accounting claimed.

The appellants carried on business at New York as chartered accountants, and prospered therein so much that they needed numerous assistants. Some of these assistants were encouraged to be zealous in their work by being called partners in the business and receiving a percentage of the profits and occasionally a handsome bonus in prosperous years.

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In this way many were induced to join them not only in New York, but in many other places. The respondent acted in Montreal, for example, as a member of the firm.

Yet it is said there never was, until the events I am about to refer to, any written agreement evidencing the terms of what constituted the partnership.

Considering the magnitude of the business, this single fact is a tribute to the trustworthy character of the mode in which they dealt with each other and also a significant measure of the trust reposed in the appellants by those they thus came in contact with.

This state of things with increasing prosperity continued until August, 1911.

But for the single fact that all concerned seemed agreed to call this arrangement a partnership and, throughout the transactions we have to consider, did so in a manner that renders it impossible herein to hold the business otherwise than as one of a partnership, I should have been disposed to hold that there never was, in fact, a partnership between the appellants and the respondent and those others like him allied with them.

It was quite competent for the appellants to have carried on their business in the firm name they adopted and, as between themselves and junior partners, to have engaged such juniors on salary, or salary plus a percentage of the profits, and even to have added thereto encouraging grants by way of bonuses and yet not to have given rise to the claim that in law there was any partnership or any right to any such accounting as claimed herein.

The business originally was that of appellants and they may have felt it always remained so.

Indeed, but for the terms of the documentary evidence I am about to refer to, it might have been arguable that it had continued as a business owned by appellants up to and including the months of August, September, and early part of October, which, in point of time, cover the events that must determine the right of the parties herein.

Had the business at the time first mentioned and in question been that of appellants it would have been quite competent for them to have sold out an interest therein to a third person.

That, however, is not the case.

In August, 1911, the appellants contracted with W. B. Peat

& Co., by a written agreement, not on their own behalf, but on behalf of themselves and those then constituting the firm of Marwick, Mitchell & Co., to arrange a partnership on the terms mentioned therein. One of these was that

W. B. Peat & Co. acquire one-fourth interest in the business and good-will of Marwick, Mitchell & Co.

Another was that the firm should thereafter be known as that of Marwick, Mitchell, Peat & Co., and yet another that W. B. Peat & Co. were to find one-fourth of the capital of Marwick, Mitchell, Peat & Co., which was to be $250,000, of which W. B. Peat & Co. were to provide $62,500.

It transpired that the appellants received from W. B. Peat & Co. £20,000 as the price paid for such share of the goodwill in said business over and above the said sum of $62,500 contributed by W. B. Peat & Co. It is pretended that this sum, clandestinely paid appellants, was in respect of this share in the firm of Marwick, Mitchell & Co.

The conclusive answer to such contention is contained in the first clause of this memorandum of agreement, which reads as follows:——

It is agreed between James Marwick and Simpson Roger Mitchell that those at present constituting the firm of Marwick, Mitchell & Co. on the one part and those for the time being constituting the firm of W. B. Peat & Co. on the other part to arrange a partnership on the following terms.

It is impossible properly to hold that such an express agreement can be cut down by anything Mr. Marwick may have said so as to read as if he and Mitchell were only dealing with and selling their own interest in the business.

It is very suggestive, also, that the price of sale is not mentioned in the memorandum and that every clause thereof proceeds upon the basis of a dealing for and in respect of the entire business and its continuation for a period of 10 years and with the contemplated extension thereof elsewhere, as well as in the United States and Canada where it had been previously carried on and was to be continued.

The agreement, so drawn up as to conceal the fact of appellants being paid anything, was submitted by the appellants to their partners, including the respondent, and made the basis upon which was framed, in October, articles of partnership between all the old partners and the new.

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It is urged on behalf of the appellants that this new partnership agreement so modified the terms of the partnership that had hitherto prevailed as to give respondent and some of the junior partners an increased share in the profits, and diminished correspondingly the shares of appellants in the profits.

And it is further urged, with his usual force and ability, by counsel for appellants, that the new partnership agreement shews that this feature of it had, in effect if not in express terms, provided for the taking, of the quarter interest of the whole which Peat & Co. were to get, out of the 75 per cent. share of the profits which previously appellants had enjoyed.

The argument is, however, on examination of the facts, more plausible than sound.

Experience teaches us that the junior partners, if men of merit, generally deserve and get as the years go on an increasing share of the profits and especially so in the cases of this kind where the prosperity of the business must depend almost entirely upon the mental and moral qualities and energy of the members of the firm, and is not much dependent upon the financial capital they possess.

In partnerships of the kind where the accumulations of capital held by the senior or other members are of necessity the dominant power or force in relation to which the division of profits is likely to take place the feature of experience I have just alluded to may not be so much in evidence.

Even there, however, the lessening vitality or deterioration of the older men, and growing power and influence of the younger men, often accounts for the changes found in the relative share of profits.

Again, this new term of partnership was to last for ten years and some of the elements that had entered into the division of profits enuring to the juniors were cut out.

It is impossible for us to say what the respondent and others might have done had they been dealt with frankly.

The respondent, and others in their position, were in law, and according to the principles of fidelity that must ever obtain between partners, entitled to a full disclosure of the bargain appellants made ostensibly on behalf of all the members of the old firm and to share in the profits thereof.

There was another transaction of a similar nature in respect

of which we did not hear much in argument, but which seems to require the same sort of relief for respondent as is applied by the judgment to both causes of action.

Some argument was made as to the basis upon which the sum named in the judgment was founded.

It seems this sum is only a maximum sum liable to be reduced upon a taking of accounts with which we have at present no concern. I think, therefore, we should not express any opinion at the present time in regard thereto. Idington, J.

The case as presented is not ripe for any such expression of opinion.

The appeal should be dismissed with costs.

DUFF, J.:—The appellants' contention is that the moneys received from Peat were received in payment of the purchase price of the fraction of their own interest in the partnership business, moneys consequently for which they would not be accountable to their partners, and the real question of substance on the appeal is whether, on the evidence before us, the proper conclusion is that the appellants are entitled, as against the respondent, to say that the arrangement between themselves and Peat was that Peat should purchase from them a share of their interest and that Peat, in fact, entered the firm and became a partner as the holder of the share so purchased and that no part of the interests of any of the junior partners contributed to make up the interest acquired by Peat. I have come to the conclusion which is adverse to the appellants upon this question. My reason is this. The arrangement between the appellants and Peat was followed by the execution of the document which, on the face of it, professed to be a record of an agreement between Marwick, Mitchell & Co. and Peat & Co., for a partnership. The document declares among other things that Peat & Co. acquire a one-fourth share in the business of Marwick, Mitchell & Co. The agreement was necessarily provisional in the sense that it was a transaction of a kind in respect of which Marwick and Mitchell would have no authority to bind the other members of their firm and before becoming legally effectual it required legal ratification by these other members. This document was, however, placed before the other members of the firm shortly after its execution and a fresh arrangement was made among the partners of Marwick, Duff, J.

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Mitchell & Co., embodied in the document, dated October 1, in which the residue of the business, after allowing for the one-quarter interest acquired by Peat & Co. was dealt with, and the shares of the various partners in that residue declared.

Now, I do not think anybody would dispute—I did not understand Mr. Smith to dispute it—and, indeed, I think it would be hopeless to do so, that, on the natural reading of these documents, they provide, first, that Peat & Co. acquire a one-fourth interest in the business of Marwick, Mitchell & Co., not from Marwick and Mitchell but from the firm, and that the residue, the remaining 75 per cent., is held by the partners of the old firm of Marwick, Mitchell & Co., in the proportion stated. In other words, the agreement which Marwick and Mitchell professed to make with Peat on behalf of the firm is ratified by the firm by the transaction entered into on their behalf and that transaction, so ratified, is by the instruments in fact declared to be a vesting in Peat & Co. of a one-fourth interest in the business of Marwick, Mitchell & Co.

It seems to me that as the new agreement, embodied in the document of October, was an agreement made on the footing of the transaction with Peat being such as I have described, that transaction must be conclusively taken, as between the parties to this litigation, to have been of that character. It does not appear to me to be necessary to resort to the doctrine of common law lawyers know by the name of estoppel. In fact, by the document of August, Peat did acquire from the partnership a one-fourth interest in the partnership business subject to ratification by the partners. The transaction ratified by them was the transaction embodied in the document and it seems to be hopeless now to suggest that, apart from that transaction, there was another and a different transaction by which Peat acquired a one-fourth interest not from the firm but from Marwick and Mitchell.

Anglin, J.

ANGLIN, J.:—The sole question in this case, at its present stage, is whether it should be held that the one-fourth interest which Peat & Co. acquired in the business of Marwick, Mitchell & Co. was taken wholly from the individual interests in that firm of Messrs. Mitchell and Marwick, as they contend, or was contributed to by all the partners in the firm of Marwick, Mitchell & Co. as the plaintiff maintains.

I say, "it should be held" advisedly, because owing to the secretive conduct of the defendants—admittedly a mistake if nothing worse—it is now extremely difficult, if not impossible, to learn with certainty the fact itself. For that the defendants are to blame and they have themselves to thank for having created a situation in which all presumptions must be made against them. The trial Judge held that the proper conclusion from all the evidence was that the purchase of Peat & Co. was in fact from the firm and not from Messrs. Marwick & Mitchell as individual members of it. The documents submitted to and accepted by the plaintiff and the other junior partners as containing the basis upon which Peat & Co. entered into the new partnership and on which they themselves assented to the redistribution of shares then made certainly give the impression that it was a share in the business of the firm, its assets and goodwill, and not in Messrs. Marwick & Mitchell's individual interests therein that Messrs. Marwick & Mitchell had agreed that Peat & Co. should acquire, and that it was from the firm, that is, from all the partners, that they should acquire that share. It is impossible now to say that the junior partners would have accepted the new partnership arrangement on any other basis.

The fact that under the new arrangement the proportionate share of the junior partners in the profits was increased and that of Messrs. Marwick & Mitchell was decreased by an amount sufficient to cover the interest acquired by Peat & Co. might, at first blush, be taken to shew that Messrs. Marwick and Mitchell were the sole contributors to the 25 per cent. assigned to Peat & Co. But any such inference is unwarranted. It is impossible now to say what would have been the future interest of the junior partners in the firm had Peat & Co. not been taken in. It is equally impossible to say what would have been the attitude of the junior partners to the proposal actually carried out had they been made aware of the payment of £20,000 by Peat & Co. to Messrs. Marwick and Mitchell. Under these circumstances, notwithstanding the explicit evidence of Mr. Marwick as to the true nature of the consideration for which he received the £20,000 from Peat & Co. (which may be strictly true) I am not prepared to hold that the conclusion reached by the provincial Courts, that that sum should now be regarded as money received by

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Messrs. Marwick & Mitchell for a share of a business, assets and goodwill in which the plaintiff and the other junior partners were interested, is erroneous. The same considerations apply to the payment of £1,000 made by Percy Garratt.

All questions as to what should be the *quantum* of the plaintiff's recovery remain open upon the accounting directed by the judgment appealed from. It is only in default of such accounting by the defendants that the sum claimed by the plaintiff has been awarded to him. The order for an accounting fully protects the defendants and they are not, in my opinion, entitled to have the Court now enter upon the accounting which would be the only method of ascertaining whether the sum claimed by the plaintiff is or is not too large.

I would, for these reasons, dismiss this appeal.

Brodeur, J.

BRODEUR, J.:—The appellants, the respondent and the *mis en cause* were carrying on business in co-partnership as accountants in Canada and the United States. The appellants, Marwick and Mitchell, had started that business several years ago and acquired a large clientèle. The respondent was at first in their employ, but he was given, in 1905, outside of his salary an interest in the business to the extent of 2½ per cent on the profits.

In the summer of 1911, the profits of that business were then divided on the basis of 77½ per cent to Marwick and Mitchell, the senior partners, and 22½ per cent. to their former employees and now called junior partners. As may be very easily understood, the affairs of the partnership were carried on under the management and control of the senior partners.

On going over to England, in the summer of 1911, Mr. Marwick met Sir William Peat, the head of the firm of W. P. Peat & Co., who were carrying on, in England, in the United States, and in Canada, a similar and competitive business of chartered accountants.

They agreed to amalgamate their American business and a new partnership was to be formed comprising all the members of the two firms of Marwick, Mitchell & Co. and of W. B. Peat & Co.

The goodwill of Marwick, Mitchell & Co. was evidently more extensive since W. B. Peat & Co. agreed to pay, outside of their *mise de fonds*, a sum of £20,000. That sum of money was handed over to Marwick and Mitchell, the appellants. They failed to

disclose that payment to their junior partners and now the respondent claims a share of that sum, and also of a sum of £1,000 that was paid by a junior partner, by the name of Percy Garratt, under almost similar circumstances.

The appellants plead that that money was given to them as a consideration for a part of the individual interest owned by Marwick and Mitchell.

The written evidence, however, and the new contract of partnership disclose on the contrary that what was acquired by W. B. Peat & Co. was

one-fourth interest in the business and goodwill of Marwick, Mitchell & Co.

It is admitted by the appellants that Kerr, the respondent, was a member of the firm of Marwick, Mitchell & Co. As such he was entitled to his share in the goodwill of that firm.

The appellants having disposed of a part of that goodwill for a sum of £21,000, they were bound not only to disclose that agreement to their co.-partners, but to account to them for their share in that sum.

The action *en reddition de compte* is well founded and the judgment *a quo* having maintained it should be confirmed.

The appellants are ordered to render an account within a certain time and in default of doing it they are condemned to pay the respondent the sum of $6,980.73. The latter figure is evidently based upon a calculation made by the respondent of his share in the business of Marwick, Mitchell & Co.

I have not considered at all the question whether this calculation is correct. That matter will have to be disposed of on the account itself when it is rendered. *Appeal dismissed.*

CALGARY BREWING AND MALTING CO. v. McMANUS.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June, 1916.

MORATORIUM (§ I—1)—VOLUNTEERS AND RESERVISTS RELIEF ACT—STAY OF PROCEEDINGS.

Any person who joins one of the ordinary Canadian Militia regiments organized under the provisions of the Militia Act (R.S.C. 1906, ch. 41), whether in the active militia or in the reserve militia, comes within the purview of the Volunteers and Reservists Relief Act (Alta. Stats. 1916, ch. 6) and is entitled to the benefit of the provisions of sec. 3, sub-sec. 2, of the Act, entitling him to a "stay of any action or proceeding begun . . . after the passing of this Act . . . until the expiration of a period of one year after the termination of the said state of war."

Statement.

APPLICATION by the defendant under the Volunteers and Reservists Relief Act for a stay of proceedings, referred to the Court by Hyndman, J.

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A. McLeod Sinclair, for plaintiff, appellant.

M. B. Peacock, K.C., for defendant, respondent.

The judgment of the Court was delivered by

STUART, J.:—It is admitted that the defendant is a member of the 103rd Regiment, which is a regiment of Canadian Militia organized under the provisions of the Militia Act, ch. 41 R.S.C. 1906.

Sec. 3, sub-sec. 2, of the Act (ch. 6 Alberta Stats. 1916) says that

> any such action or proceeding begun . . . after the passing of this Act shall upon such person becoming a volunteer or reservist be stayed until the expiration of a period of one year after the termination of the said state of war, etc.

The question is whether the defendant comes within the meaning of the words "volunteer or reservist." These words are defined in sec. 2, sub-sec. 3, of the Act as follows:

> "Volunteer or reservist" means any person male or female resident in the Province of Alberta on the 1st day of August, 1914, or at any time thereafter, who has, before the passing of this Act, enlisted as a volunteer in the active military or naval forces raised by the Government of Canada for service in the said war, or who shall after the passing of this Act so enlist, and any person resident as aforesaid who has before the passing of this Act joined either as a volunteer or a reservist the military or naval forces of His Majesty or any of His allies, or who shall after the passing of this Act so join.

It was admitted that the members of the 103rd Regiment do not come within the meaning of the words "enlisted as a volunteer in the active military or naval forces raised by the Government of Canada for service in the said war," that is, that the regiment still stood in the same position as ordinary Canadian militia regiments with which we have always been acquainted in times of peace. The real question to be decided is whether they come within the meaning of the words of the latter part of the clause, viz.:

> who has joined either as a volunteer or a reservist the military or naval forces of His Majesty or any of His allies.

It is peculiar that in giving an interpretation of the words "volunteer or reservist" the legislature should have used in the interpretation, the very words which were being interpreted. This would seem to be a violation of the rules of logical definition. But the present is not an isolated instance for the peculiarity is frequently to be noticed in the interpretation clauses.

A principal point in the matter is what we are to understand by the term "His Majesty's forces." The argument upon behalf

of the plaintiff proceeded upon the ground that reasons were discoverable from the wording of the section why those words "His Majesty's forces" should be confined in the present instance to forces raised under the authority of the statutes of the United Kingdom. It was suggested that the words "volunteer" and "reservist" had special application to the latter forces in view of the use of the word "joins" in place of the word "enlists" which had been used in the foregoing part of the clause.

I think the only rule of interpretation to apply is to take the words in their ordinary meaning if that meaning will give good sense and not violate the evident purpose of the statute. The only law in force in Canada in regard to land forces is the Canadian Militia Act. I can find no statute and have been referred to none under which what are known as the overseas battalions have a special law applicable to them. It is true that sec. 177 of the Army Act of the United Kingdom brings secs. 175 and 176 of that Act into force with respect to troops raised in a colony and serving with any of the regular forces of the United Kingdom beyond the boundaries of the colony and sec. 74 of the Canadian Militia Act makes the Army Act applicable where not inconsistent with the Militia Act just as if the Army Act had not been enacted by the Parliament of Canada. So that, while they are in Canada, there is absolutely no distinction between the law applicable to the overseas battalions and that applicable to the ordinary militia except that to be found in sec. 73 which says:—

> In time of war no man shall be required to serve in the field continuously for a longer period than one year, provided that
>
> (*a*) any man who volunteers to serve for the war, or for any longer period than one year, should be compelled to fulfil his engagement.

But even the ordinary militia regiments come under the provisions of sec. 69, which says:—

> The Governor-in-Council may place the militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

I can find no statutory authority for sending what are called the overseas battalions out of Canada which would not apply equally to the ordinary militia regiments. They seem to stand on the same footing except that the ordinary militia regiments could be forced under sec. 73 to serve in actual war for only one year while those who enlist, as the members of the overseas battalions no doubt did, for the period of the war, can be forced

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to fulfil their engagement; but as to being forced to go beyond Canada, it would appear that they both stand on the same footing and that sec. 69, above quoted, is the only statutory authority for sending any troops out of Canada. I observe, for instance, in the *Canadian Gazette* of March 25, 1916, that under the heading "General Orders" and "calling out troops on active service" the organization of certain units (therein specified as "Overseas Battalions") as "temporary corps of the Active Militia of Canada," is authorized and each of the units "is placed on Active Service." See *Canada Gazette*, vol. 48, pp. 626, 774, and vol. 49, p. 3121, from which it will appear that it was by virtue of an Order in Council under sec. 69 of the Militia Act that this was done. One of these pages shews that the 19th Alberta Dragoons now at the front and the 103rd Regiment were placed on active service on the same day.

It follows that the 103rd Regiment could at any moment be placed on active service and could be called upon to serve in the war for the period of one year. The overseas battalions no doubt enlist to serve for the war under sec. 73 and have been placed on active service, but these circumstances constitute the only difference in their present legal position. It may be that when enlisting they make a special contract, but there is no other statutory sanction for such a contract than what I have mentioned, and if the engagement goes beyond that made enforceable by the statute it remains a mere contract, the breach of which would not be punished as a desertion, at least in Canada. In the one case as in the other the crucial phrase is "for the defence of Canada" contained in sec. 69 and unless the struggle on the fields of France and Flanders can be said to be "in the defence of Canada" there is no legal basis for the organization and despatch of even the overseas battalions. We are all strongly inclined to believe that what those boys are doing is "in the defence of Canada." But the point is that if that is so, then the 103rd Regiment is just as liable legally to be put on active service and sent over there to fight as any other battalion except, of course, that it could only be asked to serve for one year and not "for the war."

This is enough to shew that there is, after all, no such extremely serious reason why the application of the Act in question to the ordinary militia regiments should be looked upon with

suspicion. Granted that the war is really "in defence of Canada" the men are liable to be sent to it, if needed, at any time.

I think there can be no doubt that the Canadian Militia is part of "His Majesty's forces." By sec. 4 of the Dominion Militia Act the command is vested in the King. Even without that provision it is obvious that any public military force in Canada which is made available for the use of the executive must be part of "His Majesty's forces" because His Majesty is the head of the Canadian Government just as he is of the Government of the United Kingdom, though he must act through a representative.

Now, it is true that the words "volunteer" and "reservist," as substantives, do not appear in the Militia Act, but I can find nothing in the Act under consideration which would involve the necessity of attributing any purely technical meaning to those words. Indeed, the word "volunteer" is expressly used in the first part of the clause to describe persons who have joined or enlisted in the overseas battalions. And yet, as I have shewn, the members of those battalions are under exactly the same law as the ordinary militia. There was no more reason for speaking of them as "volunteers" than there was for so describing the members of the ordinary militia.

I think little aid is to be derived from, and nothing can be made out of, the change in phraseology from the word "enlist" to the word "join." If any attempt is to be made to explain the change I think the reason is to be found more probably in popular than in technical usage. We all know that men who go on the expeditionary force are spoken of as having "enlisted." We do not use the word "enlist" when we speak of a man becoming a member of the 101st or of the 103rd Regiment. We say he has "joined the 103rd or the 101st."

Nor can I see any source of help in the attempt to restrict the words "volunteer and reservist" to some technical meaning under statutes of the United Kingdom which are not in force in Canada and with which the general public here are quite unacquainted. Besides, if a man who enlists in an overseas battalion is a "volunteer" why is not one who joins the 103rd? The word "volunteer" does not, indeed, occur in the Militia Act, yet in the Act before us it is evidently applied to one body of troops raised

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under that Act. Then why not to another body raised under exactly the same Act?

Then there is another reason for not confining the words "volunteer and reservist" to their technical meaning under statutes of the United Kingdom. The Act speaks of a man joining as a "volunteer or reservist," not merely the forces of His Majesty but also "*of any of his allies.*" Perhaps we may know something judicially about military organizations in the United Kingdom, but we certainly know nothing about military law in France, Russia, Italy, Serbia, Montenegro or Portugal. How do the words, "volunteer and reservist" work out in their application to the forces of those countries? Have they volunteers? We do not know. We have, perhaps, heard of their having "reservists." All this confirms the view, I think, that the words are to be interpreted in a general and popular sense. Our Militia Act speaks of men "volunteering." It also speaks of the "Reserve Militia." Recently, we know that some regiments of reserve militia are being organized and it may be that at the last session of parliament some new legislation was passed in regard to the Reserve Militia. I have been told that there was, but, so far, have not been furnished with copies of the statutes recently passed.

For these reasons, I think, any person who joins one of the ordinary militia regiments, whether in the active militia or in the reserve militia, comes within the purview of the Act. When we remember that by Order in Council he may be sent to fight for a year in Flanders it, perhaps, is not so unreasonable an extension of the protection as might otherwise be thought.

The application for a stay should be granted, or rather, inasmuch as the statute itself enacts the stay, the better form of order would be to make it declaratory. There should be no costs of the application. *Application granted.*

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SECURITY LUMBER CO. v. DUPLAT et al.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and Elwood, JJ. July 14, 1916.

MECHANICS' LIENS (§ III—13) — PRIORITY OVER MORTGAGE—INCREASE IN VALUE—HOW COMPUTED.

A lien-holder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials supplied by him exclusively bears to the whole cost of the building, and not for any part of the increase brought

about otherwise. In computing this proportionate amount, no regard should be taken to amounts paid the lien-holder on account before the action was brought.

[Sub-sec. 3 of sec. 7 (repealed by 4 Geo. V. (1913), ch. 38, sec. 1) of the Mechanics' Lien Act, R.S.S. (1909), ch. 150, considered.]

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Statement.

APPEAL from a judgment in an action under the Mechanics' Lien Act (R.S.S. 1909, ch. 150). Reversed.

H. J. Schull, for appellant.

P. H. Gordon, for respondents.

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiff company supplied lumber to the defendant Marguerite Duplat, which was used in the construction of a building on the land in question in this case. Lumber to the value of $972.50 was supplied, and of that amount the plaintiff received $316.60 on account before bringing this action. The plaintiff filed a mechanic's lien against the land in question for the balance of the account.

The defendant La Compagnie Foncier de Manitoba, Ltd., is mortgagee of the land prior to the lien.

It is admitted that the total cost of the material and work on the building was $1,300, and it is further admitted that the selling value of the land has been increased by virtue of the work and material to the extent of $500. The plaintiff is the only lien-holder who is entitled to rank upon the increased value in priority to the mortgage.

This action was brought by the plaintiff to enforce its lien, and the District Court Judge who tried the case held that the plaintiff was only entitled to priority over the defendant company to the extent of nine-thirteenths of the increased value of $500, less the sum of $316.60, which had been paid to the plaintiff before the action was brought.

The plaintiff appeals from this decision, and contends that it is entitled to priority over the mortgage of the defendant to the extent of $500, the amount by which the selling value of the land in question was increased by all the work done and materials supplied in and about the premises.

I do not think that a proper construction of sub-sec. (3) of sec. 7 of the Mechanics' Lien Act (R.S.S. 1909, ch. 150) will support this contention. The "work," or "service," or "materials," referred to in the Act must surely refer exclusively to the work, service or materials performed or furnished by the

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lien-holder who is claiming priority, and the increased value upon which he claims priority must, in my opinion, mean the increased value brought about by that work or service or those materials.

It appears to me that each lien under the Act must stand on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of his work and materials. *Bank of Montreal* v. *Haffner* (1883), 3 O.R. 183, per Ferguson, J., p. 185.

The statute does not appear to intend to give any one mechanic a right to priority in respect to another mechanic's work. *Broughton* v. *Smallpiece* (1878), 25 Gr. 290, per Proudfoot, V.C., at 293.

The lien-holders did their work, or furnished their materials, with full notice of the mortgage, and it would be manifestly unfair to the mortgagee to allow a lien-holder to rank in priority on the increased value to a greater extent than his proportionate contribution to that increased value. In my opinion, therefore, the plaintiff is only entitled to priority in the proportion that the value of its materials bears to the whole cost of the building. I am further of opinion that, in calculating that proportion, *all* of the materials supplied by the lien-holder should be taken into consideration. I do not agree with the contention of Mr. Gordon that the amounts paid on account by the owner before action were paid for the benefit of the mortgagee, although that contention is supported by the case of *Broughton* v. *Smallpiece* cited above. Every bit of the material supplied by the plaintiff went into the building and contributed proportionately to the increased value. I would hold, therefore, that the plaintiff is entitled to rank in priority to the mortgage to the extent of $373.84, and the judgment appealed from should be varied accordingly.

The plaintiff should have its costs of the action, except costs of the issue as to increased value, and the defendant should have its costs of action exclusively applicable to that issue.

Appeal allowed with costs.

Lamont, J.

LAMONT, J.:—The question to be determined in this appeal is the amount in respect of which the lien-holder is entitled to priority over the mortgage company, whose mortgage was registered against the property in question before the plaintiff's lien arose.

It is admitted that the new building increased the selling value of the property by $500, and that the total cost of the building was $1,300. Of this total cost, the plaintiffs furnished materials to the value of $972.50. On this they were paid $316.60. For

the balance, being $655.90, together with $10, the cost of the lien, they registered a mechanic's lien against the land in question, and in respect of that lien they now claim priority over the mortgage to the extent of the full increased value, they being the only lien-holders.

The District Court Judge held that the plaintiffs were only entitled to rank on the increased selling value in proportion to the amount which the materials supplied by them contributed to that increased value; that is, as $1,300 of work and materials increased the selling value by $500, the $972.50 worth of materials supplied by the plaintiffs would represent $366 of this increase. From this amount, however, he held that there must be deducted the $316 which had been paid on account.

I agree with the trial Judge that, as against the mortgagee, a lien-holder's right to rank in priority on the increased selling value can only be to the extent to which that value has been increased by the work done, or materials supplied, by him. This, I think is clearly established by the cases of *Broughton* v. *Smallpiece*, 25 Gr. 290; *Bank of Montreal* v. *Haffner*, 3 O.R. 183; and *Cook* v. *Koldoffsky*, 28 D.L.R. 346, 35 O.L.R. 555.

In the latter case Hodgins, J.A., in giving the judgment of the Ontario Court of Appeal on the provision of the statute practically identical with ours, at p. 349, said:—

> The lien given as against the prior mortgagee or chargee is not, however, given upon the land, but upon the value which has been produced by way of increase over that which the land itself previously had, by the subsequent doing of the work or the placing of the materials; and this value is not that which represents the actual value or cost of the work, etc., in itself, but the amount which it adds to the selling value.

I am of opinion, however, that the statement in the *Broughton* case, which was followed by the trial Judge, cannot be supported, namely, that from the amount of the increased selling value to which each lien-holder would be entitled, there must be deducted any amount paid on account.

As I have said, each lien-holder is entitled in priority to the mortgagee in the amount by which the selling value was increased by the labour or materials supplied by him, but such labour or materials must be those represented by his lien. If a lien-holder did work or supplied materials which are not included in his lien, he is not, in my opinion, entitled under his lien to make any claim in respect of such work or materials.

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The same principle, it seems to me, applies where he has furnished materials and has received a payment on account thereof. The materials represented by that payment, having been paid for, cannot be included in the lien, and the lien-holder is no more entitled to rank on the increased selling value for the price of such materials than he would be if they had been supplied by someone else.

Therefore, instead of awarding to the lien-holder the proportion of the increased selling value created by all the materials supplied by him, and from that deducting the payments made on account, the proper course, in my opinion, is to allow him the proportion of the increased selling value produced by the labour or materials for the price of which he is found to have a valid lien.

In this case, $1,300 of labour and materials produced an increased selling value of $500. The plaintiffs are found to have a valid lien for $665.90; they are, therefore, entitled to that portion of the $500 which was created by $665.90 worth of their materials. On computation I find this to amount to $256.11. For that amount the plaintiffs are entitled to rank in priority to the mortgagee.

The appeal will, therefore, be allowed, and the judgment of the Court below increased to $256.11.

The appellant is entitled to the costs of the appeal.

Elwood, J.

ELWOOD, J. concurred with HAULTAIN, C.J. *Appeal allowed.*

MAN.

K. B.

Re WINNIPEG CHARTER; BAIRD'S CASE; Re ORDE (3 cases).

Manitoba King's Bench, Mathers, C.J.K.B. June 22, 1916.

TAXES (§ III D—138)—APPEALS FROM BOARD OF REVISION—QUESTIONS OF LAW.

An application to a Judge under sec. 349, Winnipeg Charter, 9 Edw. VII., ch. 78, by a person affected by a decision of the Board of Valuation and Revision, should not be in the nature of an appeal upon questions of fact as well as law, but should be confined to obtaining his opinion upon questions of law only; otherwise he has no authority to deal with it.

Statement.

APPLICATION under sec. 349 of the Winnipeg Charter, 9 Edw. VII., ch. 78.

F. Heap, for Orde.

John Baird, in person.

J. P. Foley, K.C., for the Standard Trust Co.

Theo. A. Hunt, K.C., corporation counsel, for the City of Winnipeg.

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RE WINNIPEG CHARTER.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is a case submitted at the request of John Baird by the Board of Valuation and Revision for the opinion of a Judge of this Court pursuant to sec. 349 added to the Winnipeg Charter by 9 Edw. VII., ch. 78.

The case stated sets out that John Baird is owner of certain land on the north side of Market St., on which is situate an hotel known as the Seymour House; that in the general assessment roll for the year 1916 the land was assessed at $148,000 and the building at $40,000; that John Baird appealed to the Board of Valuation and Revision against this assessment, and that upon such appeal the Board reduced the assessment of the land to $133,000 and of the building to $35,000, that thereafter John Baird by notice required the Board to submit a case for the opinion of a Judge of the Court of King's Bench.

The question submitted is whether said John Baird is entitled to have the assessment of the said lots and building reduced below the amount fixed by the Board of Valuation and Revision, and if so at what amount or amounts such lots and building should be assessed.

Sec. 349, pursuant to which this case is submitted, is as follows:

> The City (acting by resolution of Board of Control), or any person affected by the decision of the Board in any appeal, may, within 7 days after such decision, require the Board to submit a case for the opinion of a Judge of the Court of King's Bench, and the Board shall thereupon set forth the facts of the case and the questions involved in writing.

This section does not provide for an appeal to a Judge against the decision of the Board. It merely provides a method by which a Judge's opinion may be obtained upon a certain statement of facts submitted to him for that purpose.

By it the Board is required to set out the facts in the form of a stated case, and upon the facts so stated the Judge is to give his opinion. The Judge is not to find the facts or inferences from facts. These are to be embodied in the stated case. Then, upon what is the Judge to give his opinion? Clearly upon some question of law arising upon the facts submitted. By sec. 350 when a case is stated it shall be filed with the prothonotary "with a certified copy of the evidence taken in the matter." It is then to be entered for "argument" before a Judge who "shall hear and determine the question" and remit the matter to the Board with his "opinion" thereon. It is not clear why a certified copy

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of the evidence is furnished. I can conceive of no other purpose it can serve than for the Judge to say whether or not there may not be additional facts which should be set out in the stated case. By sec. 351 the Judge is given power to send the case back for amendment. That is, he may require additional facts to be stated if those before him are not sufficient to enable him to arrive at an opinion upon the question asked. A consideration of sec. 333 *et seq.* under which an appeal may be taken to the Board of Valuation and Revision confirms the view that the application to a Judge under sec. 349 should not be in the nature of an appeal upon questions of fact as well as law, but should be confined to obtaining his opinion upon a question or questions of law only.

The question submitted in the case stated is a pure matter of fact, and therefore a matter with which a Judge has under these provisions of the charter no authority to deal. I must decline to answer the question.

For the reasons stated in *Baird* case, I decline to answer the question submitted in each of these three stated cases.

These three cases were similar to the *Baird* appeal, it being contended by the owner that the assessments of both lands and buildings were very considerably beyond their real value.

The Standard Trust Co. also appealed against the assessment of their office building and property on Main Street, Winnipeg, on the same grounds as above, but withdrew their appeal after the judgment had been given in the other cases.

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S. C.

QUEBEC, MONTREAL AND SOUTHERN R. CO. v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. May 2, 1916.

RAILWAYS (§ I—7) — SUBSIDIES—RIGHTS OF TRANSFEREE COMPLETING WORK.

A statute authorizing the payment of a subsidy for completing the construction of a line of railway, entitles a company, as the successor of another company who had commenced the work, to receive subsidy in respect of that portion of the road forming part of the subsidized line which had been constructed by the other company.

[*Quebec, Montreal & South. R. Co.* v. *The King*, 15 Can. Ex. 237, reversed.]

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 15 Can. Ex. 237, dismissing the suppliants' petition of right with costs. Reversed.

Béique, K.C., and *Aimé Geoffrion*, K.C., for appellants.

F. J. Laverty, K.C., for respondent.

FITZPATRICK, C.J.:—I am of opinion that this appeal ought to be allowed.

The appellant had the usual subsidy contract with the Crown for the construction of a line of railway 70 miles in length. It utilized for the purpose of this line 6½ miles of the South Shore Railway, which it had previously purchased. If the purchase of these 6½ miles had been made subsequent to the contract and for the express purpose of forming part of the subsidized line I do not understand how any question could have arisen as to the right of the appellant to the proportion of the subsidy attributable to the 6½ miles so purchased; I cannot see what difference it makes that the purchase was made before the subsidy contract was entered into. It seems to me that the undertaking to construct a railway is equally satisfied whether the company actually construct the whole line or purchase a portion of it ready made. The Government itself in satisfaction of its statutory and contracted liability to construct the National Transcontinental Railway has recently purchased a short line of railway to form part of that line.

The Government is not being asked to pay any subsidy twice over. Parliament was willing to grant a subsidy for a particular 70 miles of railroad and that is all the Government is being asked to pay. No doubt, the subsidy to the South Shore Railway having lapsed, advantage might have been taken to obtain for the country the 6½ miles of road that that company had constructed, without giving any subsidy in respect of this length. Parliament might have offered, in 1908, a subsidy for only 63½ miles, the portion left uncompleted by the South Shore R. Co. That, however, is not what was done by the legislature or the Government. Provision was made for a subsidy for the whole 70 miles of railroad and the Crown entered into the usual subsidy contract with the appellant for this line. The appellants had already purchased 6½ miles of road which they could utilize as part of the line and they duly constructed the remainder so as to form a complete line of 70 miles in length as called for by the statute and the contract. I can see no valid reason under these circumstances why the Courts should interfere and insist that the appellant is not to be paid the subsidy which parliament provided and the Crown agreed to grant them.

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For the debts of the South Shore R. Co. it is not contended that the appellant is liable. The Intercolonial Railway had properly proved its claim in the liquidation of the South Shore R. Co. and been collocated for its dividend. With that claim the appellant is in no way concerned.

IDINGTON, J. (dissenting):—The appellant was incorporated in 1906, by 6 Edw. VII., ch. 150, wherein it was recited that the franchises, railway and property of the Quebec Southern Railway, as comprising the railways theretofore known as the South Shore Railway, the United Counties Railway and East Richelieu Valley Railway, had been sold pursuant to the provisions of ch. 158 of the statutes of 1905 and had been purchased by the Hon. Frederic L. Béique and that the purchaser bought and became vested with the said franchiess, railway and property for the purposes of holding, maintaining and operating the said railway, its property and appurtenances, and that it was expedient to incorporate a company with all the powers and privileges necessary for the said purposes.

Sec. 7 of said Act is as follows:—

7. The company may acquire the railway mentioned in the preamble, and upon and after such acquisition the franchises rights and privileges heretofore possessed by the South Shore Railway Company and the Quebec Southern Railway Company shall vest in and may be exercised and enjoyed by the company, and the company may thereupon hold, maintain and operate the said railway.

The railway property bought at the sale referred to in the recital was transferred to the company thus incorporated, pursuant to said sec. 7.

Sec. 8 of said Act is as follows:—

8. The company may complete the railway which, by the statutes relating to the South Shore Railway Company, the latter was authorized to construct, or any portion thereof, within five years from the date of the passing of this Act; Provided that as to so much thereof as is not completed within that period the power to complete the said railway will cease and determine.

This section, let it be observed, authorizes the completion of the work begun by the South Shore R. Co. but says nothing of the subsidies by which in part it had been built. The said company had reaped some subsidies but failed to earn others and all it might have in that regard.

All possible claims in law which that company could conceivably have were thus put aside long before the Act I am about to refer to was enacted.

By 7 & 8 Edw. VII., ch. 63, intituled an Act to authorize the granting of subsidies in aid of the construction of the lines of railway therein mentioned,

it was enacted, by sec. 1, as follows:—

1. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway, not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

There were 72 different enterprises subsidized by that section, and of these the appellant claims to recover, under item 14, which is as follows:—

14. For a line of railway from Yamaska to a point in the County of Lotbinière, in lieu of the subsidy granted by chapter 57 of 1903, section 2, item 12, not exceeding 70 miles; and for a line of railway from Mount Johnson to St. Grégoire station, in lieu of the subsidy granted to the United Counties Railway Company by chapter 7 of 1899, section 2, item 16, for 1 mile, not exceeding 1½ miles; and not exceeding in all 71½ miles.

The first part of the foregoing is what I think appellant bases its rights upon.

The subsidy granted by ch. 57 of the statute of 1903, sec. 2, item 12, is as follows:—

2. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

12. For a line of railway from Yamaska to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of section 2 of chapter 7 of 1899.

Item 27 just referred to of sec. 2, ch. 7, statute of 1899, had been granted, as follows:—

2. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than

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$15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

Then follow 51 items, covered thereby, of which No. 27 is as follows:—

27. To the South Shore Railway Company, from Sorel Junction along the south shore to Lotbinière, Quebec, a distance not exceeding 82 miles.

Such are the terms of the statutory authority upon which appellant's claim rests. They cannot be enlarged by any order-in-council or agreement professing to execute the purpose expressed in such enactments.

These subsidies granted to the South Shore R. Co. had failed to be as productive to it, as they might have been, by reason of its failure to earn same by the formal compliance with the language of the statute. There was nothing in law owing that company when appellant acquired its assets and nothing due it by virtue of equity or any equitable considerations which could in law or common sense be assumed to have passed to appellant.

By virtue of such acquisition under and by virtue of the purchase of the assets of a bankrupt company, the appellant neither by express terms nor any implication involved in that transaction could pretend it had any moral or legal right to pose as the builder of that part of the road in fact built by the company whose assets it bought.

The terms of the enactment expressed in the grant clearly mean what they say and that is

a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway.

If, using the very illustration put forward in argument by Mr. Béique, the appellant had for any good reason discarded the 6½ miles now in question herein, and then already constructed by the bankrupt company, and constructed 70 miles of railway, it would have been competent for the Governor-in-Council to have recognized such a claim. Or if, for any valid reason, it had been found necessary to diverge from the straight line and construct 70 miles of railway between the termination of that already constructed and an agreed point in the County of Lotbinière, it might also be competent for the Governor-in-Council to have recognized such a claim.

These suggestions or surmises cannot go far in helping us to

interpret and construe this statute, but we must recognize the world in which we live and what is apt to transpire therein or we will never correctly interpret anything, not even a statute.

One is reminded, in considering this class of legislation, of the language of Lord Cairns when speaking of a somewhat analogous sort of legislation, he said in *Directors of East London R. Co.* v. *Whitechurch*, L.R. 7 H.L. 81, at 89:—

> We all know how these clauses are inserted in an Act of Parliament of this kind. They are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties have made. They are not put in by the legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause such as that which I have read to your Lordships.

I think we must realize that each item following each of these clauses we are concerned with herein may have been the result of much bargaining. And the curious features I have adverted to render some things therein ambiguous. I think in principle these ambiguities must be resolved against the appellant.

For such or other like reasons it is quite conceivable seventy miles of railway might have been agreed upon as within the phrase "towards the construction" of a railway, but it is not within the purview of the Act to give a subsidy for anything that had been already constructed, by someone else who is not to obtain directly or indirectly the benefit, or any part of the benefit, of such a grant.

The words "in lieu of the subsidy granted by ch. 57 of 1903" etc., cannot override the obvious purpose of the legislation (which was to secure the construction of 70 miles of railway) and thereby make a pure gift to appellant for something it had no claim to either in law or equity. The moral or equitable obligations to and claims of the bankrupt company or its creditors for that granted by said Act of 1903, in regard to the construction of 6½ miles of railway, could not be thus compounded or compensated for by juggling of words in this fashion. No one can properly impute to parliament the crass stupidity of imagining it was thus compensating the bankrupt company or its creditors of whom respondent was one by granting to appellant which had not fallen heir to, or done anything entitling it to reap such compensation.

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It is to be observed also that the language is materially changed from that used in the two previous grants. In the first it was "from Sorel . . . to Lotbinière." In this it is "from Yamaska to *a point in the County of Lotbinière.*" Why was the change made? At whose instance? The enacting clause in each statute quoted above uses identical language, yet when it comes to the description of what the appellant urges is identically the same thing the language is changed. Why again I ask? Had someone knowing the facts pointed out that absolute identity would produce a wrong (in short an imposition on the country) by applying the subsidy to those 6½ miles, and was the language then adroitly or stupidly, or both, amended as we see?

Again, it clearly could not have been intended to be under the facts literally "in lieu of the subsidy granted by ch. 57 of 1903, etc." for the obvious reason that the donee, evidently intended to be aided thereunder, had by virtue of the Act of Parliament passed in 1905 been put out of existence. And the variation of the language I have just referred to could hardly have been so changed merely through inadvertence. Yet the change, if convenient to resort to now, surely was not designedly intended.

Reliance is, however, placed upon the two agreements made between the respondent and the appellant. The second I will not trouble with, for it is but a modification and adoption of the first.

The first of these is dated February 25, 1909, and begins its recitals by the following:—

> Whereas the company was authorized to build the railway hereinafter mentioned by the Act or Acts following, namely:—Canada, 1906, ch. 150.

There follow this recital of alleged facts I have already dealt with and the last recital is as follows:—

> AND WHEREAS the company has established to the satisfaction of the Governor-in-Council its ability to construct and complete the said railway; and the granting of the said subsidy to the company has been approved by the Governor-in-Council as will appear by reference to the order-in-council above referred to.

The first of these clearly contemplated a building of a railway and the last the construction and completion of a railway.

This language is strangely inapt for the purpose of expressing a bargain or agreement for the subsidizing in favour of the appellant which was a company that had no existence when the 6½

miles of railway now in question had been constructed, if in fact that 6½ miles was within the contemplation of the parties.

Again, the first clause of the agreement is as follows:—

1. That the company shall well, truly and faithfully make, build, construct and complete the line of railway mentioned and described in paragraph 14 of the first section of the Subsidy Act, as above set forth and recited, and all bridges, culverts, works and structures appertaining thereto, in all respects in accordance with the specifications hereto annexed marked "A," or with such amendments thereof as may from time to time during the progress of the said work be approved by the Governor-in-Council.

The 6½ miles for which the subsidy is now claimed and this suit is brought had been built long before appellant had any existence.

How can it pretend to recover under a contract, so framed, for a subsidy that it had never earned yet so expressly given only for building 70 miles of railway and claim as part of it 6½ miles of railway it never built and never in fact intended to build?

I cannot understand how this contract helps appellant. Nor can I understand why or how if the building of 6½ miles done by the predecessor in title was honestly believed to be a righteous foundation for an agreement for the payment of a railway subsidy in respect of the said 6½ miles, there was found so much difficulty in expressing the fact both in the recitals and in the operative clause I have quoted from. They seem to coincide with the interpretation I have put upon the Act. The resorting to such language as used is quite inconsistent with the interpretation now set up as a foundation for the claim herein.

It reduces the meaning of the ambiguous language used in item 14 of the Subsidy Act to the obvious purport of it when read in the light of the surrounding facts and circumstances as intended to cover so much of the part of the line indicated as in fact needed to be built by the appellant but in no event to exceed seventy miles so built.

There was a claim set up by the respondent's servants that if there was any grant due in respect of these 6½ miles it was to the railway company which had built same and in that case the respondent was entitled to receive the benefit thereof as a creditor of that railway company.

On the facts before us that suggestion may not be in law maintainable but it expresses a thought which might well have been given expression to as in line with if not exactly in accord with what has been acted upon.

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Parliament, no doubt, has revived and re-voted subsidies many times to the company building a railway and failing to complete it within the time specified, and possibly has considered or should have considered creditors of an embarrassed company in such a case. If this had been expressed as its purpose herein perhaps no one would have complained. But what right had appellant to claim to reap that which might righteously have been given for such a purpose but could not, without doing an exceptionally unrighteous thing, be given to the appellant?

It is to be observed that though appellant made its claim on May 17, 1909, unsuccessfully and the position of the Crown officers was reiterated in another form in February, 1910, yet it was only after 3 years' deliberation and consideration it summoned courage to assert the claim herein by the petition of right herein and then boldly claimed therein that it had in fact built that which it never built. I am unable to hold that buying and building are identical and convertibly equivalent terms.

I think it matters not what the orders-in-council disclose if my interpretation and construction of the statute and agreement or of either, is maintainable. Therefore, I shall not confuse what I have tried to make plain by an analysis of what seems to me to have been results of inadvertence and could not in my view bind respondent.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—The statute of 1906, ch. 150, which incorporated the suppliant company, recited the sale by the Exchequer Court of the franchises, railway and property of the Quebec Southern Railway, comprising *inter alia* the South Shore Railway, to the Hon. Frederic L. Béique, and authorized the suppliant company to acquire and complete the said railway. At that time about 18¼ miles of the 82 miles of railway from Sorel Junction to Lotbinière, which the South Shore R. Co. had been authorized to construct, had been completed—12 miles from Sorel to Yamaska and about 6¼ miles from Yamaska to the St. Francis River. The South Shore R. Co. had received the subsidy for the 12 miles section, but no subsidy had been paid for the 6¼ miles. On January 20, 1902, the Government inspecting-engineer reported the completion of the 6¼ miles from Yamaska to St.

Francis River by the Quebec Southern R. Co. In a report of January 31, 1908, he repeated that statement adding:—

No subsidy was paid, however, the completed section being less than (10) ten miles in length.

(62 & 63 Vict., ch. 7, sec. 7.) It is only reasonable to suppose that parliament was cognizant of these facts when, during the session of 1908 (7 & 8 Edw. VII., ch. 63, sec. 1, item 14), it authorized the grant of a subsidy for 70 miles of railway "from Yamaska to a point in the County of Lotbinière"—the balance of the 82 miles which were to have been built by the South Shore R. Co. (for which a subsidy had been first authorized in 1899 by item 27 of sec. 2 of ch. 7), excluding the 12 miles from Sorel Junction to Yamaska for which the subsidy had been paid to the South Shore R. Co., but including the 6¼ miles from Yamaska to the St. Francis River built by the South Shore R. Co. for which no subsidy had been paid. The subsidy of 1908 is expressly granted

in lieu of the subsidy granted by ch. 57 of 1903, sec. 2, item 12,

which, in turn, had been granted,

in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899.

Under the authority of this legislation a subsidy contract (Feb. 25, 1909), and a supplementary contract (Dec. 17, 1909), fixing the amount of the subsidy under sec. 10 (7 & 8 Edw. VII., ch. 63), for 70 miles from Yamaska to a point in the County of Lotbinière, were duly entered into between the suppliant company and His Majesty the King, represented by the Minister of Railways.

The Government officials, however, withheld payment of $26,765.45 of the subsidy payable to the suppliant company on the ground that that sum was due to the Crown in respect of traffic balances between the Intercolonial Railway and the South Shore Railway prior to the sale of the latter by the Exchequer Court. In answer to the petition of right claiming this balance of $26,765.45 the Crown, by its statement of defence, also takes the position that the petitioner is not entitled to any subsidy in respect of the 6¼ miles of railway built by the South Shore R. Co.

The assistant-Judge of the Exchequer Court held that the Crown was not entitled to set-off or compensation in respect of the traffic balance due the Intercolonial Railway because the sale to the Quebec Southern Railway had been made free of all charges, liens and encumbrances, and the subsidy in question is

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claimed by the suppliant not as assignee of the rights of that company—its rights thereto having in fact lapsed, under the terms of its subsidy contract, owing to the non-completion of the undertaking within the time stipulated—but by virtue of the statute of 1908 and the contracts of 1909 above mentioned. Neither in their factum nor at bar in this Court did counsel for the Crown controvert this holding of the trial Judge. They rest their case in support of the judgment dismissing the petition of right on the ground, held in their favour in the Exchequer Court, that the suppliant company is not entitled to any subsidy in respect of the 6¼ miles from Yamaska to the St. Francis River because, it did not actually construct that part of the railway, and also on an alleged estoppel arising out of the fact that the company had retained and cashed a cheque for $43,414.55 tendered it by the Crown as a balance due after deducting the Intercolonial Railway claim of $26,761.45.

As to the latter point the evidence shews that the cheque was cashed only after the company had protested against the deduction and had received some assurance from the Railway Department that the cashing of it would not prejudice its rights in regard to payment of the sum withheld. Under these circumstances the retention and cashing of the cheque affords no evidence of intent on the part of the company to abandon any right it might have to payment of the sum withheld. It does not raise an estoppel. *Day* v. *McLea*, 22 Q.B.D. 610.

It is quite within the power of parliament, if it should see fit to do so, to authorize the grant of a subsidy for a portion of a railway already constructed by others to a company which assumes the burden of completing the undertaking. There is no reason to suppose that when the statute of 1908 was passed authorizing the payment of a subsidy in respect of a line of railway 70 miles long from Yamaska to a point in the County of Lotbinière, in lieu of a subsidy previously granted which had lapsed, parliament was not fully aware that the Quebec Southern R. Co. had before 1902, actually constructed 6¼ miles of the 70 miles from Yamaska to a point in the County of Lotbinière and that that 6¼ miles sold by the Exchequer Court had been acquired by the Quebec, Montreal and Southern R. Co. under the express authority conferred by its Act of incorporation and formed part of the 70

miles in respect of which parliament was then asked to authorize the payment of a subsidy. On the contrary, from the evidence afforded by its own statutes there is reason to believe that parliament knew these facts and that, with that knowledge, it meant to authorize the payment to the Quebec, Montreal and Southern R. Co. of a subsidy in respect of the 6¼ miles now in question. The contract and supplementary contract converted that authorization into a contractual obligation on the part of the Crown, and, in my opinion, gave to the suppliant company, on completion of its undertaking, a right to payment according to the terms of those contracts which it is entitled to enforce by petition of right in the Exchequer Court.

I would, for these reasons, allow this appeal. The appellant should have its costs throughout.

Brodeur, J.

BRODEUR, J.:—This is a petition of right by which the suppliant (now the appellant) seeks to enforce the payment of a railway subsidy authorized by statute and provided for in the subsidy agreement between the Crown and the appellant.

It had been considered of public interest that a railway should be built on the south shore of the St. Lawrence from Sorel Junction to Lotbinière, a distance of 82 miles.

In 1899 a subsidy of $3,200 per mile had been granted by parliament for the construction of that railway to the South Shore R. Co The latter company started to build from Sorel Junction to the Yamaska River, a distance of 12 miles, and then from Yamaska to St. Francis River, a distance of 6½ miles.

The Government paid, in 1902, for the 12 miles covering the distance between Sorel and Yamaska but, as the section of the road from Yamaska to St. Francis was less than 10 miles, no subsidy was paid for the 6½ miles built.

One of the conditions of the grant was that the railway should be completed before September 1, 1903, and, as that condition had not been fulfilled, parliament in 1903 renewed the subsidy in the following terms:—

for a line of railway from Yamaska to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899.

The Minister of Railways, who introduced that legislation, knew that a part of the railway subsidized in 1899 had been built, namely from Sorel to St. Francis River, but as the payment of the subsidy had been made only for the ection between Sorel and

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Yamaska he had parliament to renew the subsidy from Yamaska to Lotbinière, a distance of 70 miles.

It is to be noticed, also, that this subsidy is not payable to the South Shore R. Co., as provided by the Act of 1899, but to any company. That is likely due to the fact that changes were being made with regard to the ownership of the railway.

By an Act passed in 1900 by the provincial legislature a new company called the Quebec Southern R. Co. had been incorporated with power to acquire the railways of the United Counties R. Co. and the East Richelieu Valley R. Co. and with power to amalgamate the latter railways with the South Shore Railway.

The amalgamation took place; but on account of difficulties, mostly financial, a receiver was appointed and, in 1905, parliament authorized the sale of the railway.

The sale took place, through the Exchequer Court, and the registrar sold to the new company which was formed, which is now the appellant company, on January 4, 1907, the property of the South Shore R. Co., together with all and singular rights-of-way, improvements, franchises and property of every kind of the said company including

subsidies and privileges in connection with said railways, excepting, however, the subsidy granted by the Quebec Government in connection with the Yamaska and the St. Francis bridges.

In 1908, parliament renewed the subsidy which had been voted in 1903 in the following words:—

for a line of railway from Yamaska to a point in the County of Lotbinière in lieu of the subsidy granted by chapter 57, 1903, section 2, item 12, not exceeding 70 miles.

It is pretty evident, by this new legislation, that parliament intended to give a subsidy not only from St. Francis River but also from the Yamaska River in order to cover the part which had been built for some years. The Governor-in-Council was empowered by the Subsidy Act to make a subsidy agreement with any company which would build the railway between Yamaska and Lotbinière and, as the appellant company was the only one authorized at the time to build a railway in that locality, a subsidy agreement was passed between the appellant company and the Government, by which a subsidy would be paid them from Yamaska to Lotbinière.

The Government paid from time to time subsidies which covered the 6 miles built by the South Shore Railway Co. The

Government then considered the contract and the Subsidy Act as covering that section which had been built by the South Shore R. Co.

It is claimed now by the Government that the Subsidy Act contemplated a railway to be built and not one already built.

It seems to me that such a construction could not be put on the Act and on the agreement. It was well known at the time by the Department, it was in evidence in 1903 and 1908 that the section of the railway between Yamaska and St. Francis had been built. However, the Minister of Railways asked parliament that a subsidy should be paid for not from St. Francis River but from Yamaska.

When the matter was before parliament, there was also some discussion as to subsidized railways being partially built (p. 13482 Debates, 1907-8). So it seems to me very clear from the language of the statute and from the language of the subsidy agreement that parliament intended to vote a subsidy not only for the section to be built but for the part which had already been constructed.

It is claimed, further, by the respondent that the authority to grant a subsidy under the statute is not mandatory but purely discretionary; and the cases of *Hereford R. Co.* v. *The Queen*, 24 Can. S.C.R. 1, *De Galindez* v. *The King*, 39 Can. S.C.R. 682; *Canadian Pacific R. Co.* v. *The King*, 38 Can. S.C.R. 137, are quoted in support of that contention.

It is to be noticed that in those cases the action was based on the statute and not on the contract and subsidy agreement passed between the Government and a railway company.

I fully recognize that the Governor-in-Council would be absolutely within its discretion in refusing to pass any contract with the appellant company; but when they decide to pass such a contract, when they have exercised their discretion, then the contract and the statute become binding on the Crown and the Crown is obliged to carry out the obligation which it contains, the same way as the railway company is obliged, also, to carry out the obligation therein contained; otherwise, it would be rather serious that the company would undertake under such agreement to construct a railway and, when the time would come to make the payment, that the Government could say: Well, we are not bound to pay you.

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I may say, further, that that question was raised in the case of the *Grand Trunk Pacific R. Co.* v. *The King* before the Privy Council, [1912] A.C. 204, and the counsel for the Government claimed in his factum that it is open to the Government to evade their liability by refusing to come to an agreement or abstaining from coming to an agreement; but those representing the Government did not think it advisable to argue it before the Privy Council and Lord Macnaghten, at p. 210, suggests that the point did not commend itself very much to him.

For these reasons, I think the Government must pay the railway subsidy which the company appellant seeks to recover from the Government and that the judgment of the Exchequer Court dismissing the petition should be reversed.

It is recommended that the Crown should pay the costs of this Court and the Court below. *Appeal allowed.*

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WHITE v. HEGLER.

Alberta Supreme Court, Appellate Division, Scott, Stuart and McCarthy, JJ. June 30, 1916.

AUTOMOBILES (§ III B—215)—LIABILITY FOR INJURIES TO PEDESTRIANS —FAILURE TO LOOK.

Sec. 33 of the Motor Vehicle Act (Alta. Stats. 1911-12, ch. 6) throws upon the driver of the vehicle, in all cases of accident, the burden of proof that the injury did not arise through his negligence. Even where the plaintiff admits his own negligence in crossing a highway without looking, the driver of the vehicle must prove that he could not by the use of ordinary and reasonable care have avoided the accident which resulted.

[*Springett* v. *Ball*, 4 F. & F. 472, followed.]

Statement.

APPEAL by the plaintiff from a judgment of Crawford, J., dismissing an action for damages for personal injuries alleged to have been caused by the negligence of the defendant in knocking down and dragging the plaintiff with an automobile. Reversed.

S. B. Woods, K.C., for plaintiff, appellant.

Hector Cowan, for defendant, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The facts are that the plaintiff and a friend named Edwards had met about 8.15 or 8.20 p.m. at a bookstore on the north side of Jasper Ave. in the city of Edmonton, which store is just a few doors east of the corner of that avenue and First St. The night was stormy with snow and sleet and the snow was soft and melting fast as it fell. They decided to go to a picture show which was just across Jasper Ave. on the south side and

a little further east. They therefore walked directly across the street not upon a usual crossing and their course was slightly slanting towards the east. They had just crossed over the southerly street car track when the defendant's automobile coming from the west struck the two of them, knocked them down and dragged them some 30 or 40 ft., according to the plaintiff, according to the defendant not nearly so far, but only 2 or 3 ft. They had been walking side by side and Edwards was on the right, that is, on the side from which the automobile came. A street car had gone west before the two left the sidewalk and a street car going east had just started to move eastward as they left the sidewalk according to the plaintiff's statement. He saw no automobile going west and none coming east until he was struck. He admitted that he did not look westward to see if any vehicles were coming before starting to cross the southerly half of the avenue, though he said they "might have glanced that way." He said he heard none coming and saw no lights. The usual street lights were lit, there being two nearby. Their light would be to some slight extent perhaps obscured by the falling snow, but it is doubtful if this interfered appreciably with the view. Edwards said that he had looked before leaving the sidewalk on the north side, but would not say that he had looked west just as he was crossing the southerly street car track. Edwards was much more seriously injured than the plaintiff.

The defendant's account of the affair is that he was going east on Jasper Ave. and had had to stop at the west side of First St. as there was a street car there going east, that there was another automobile ahead of him, that when the street car moved eastward across First St. this automobile passed it, but that he the defendant had not passed the street car before it stopped again on the east side of First St., that he, therefore, had to pull up and wait again, and that the street car stopped about 50 ft. east of First St., that he stood behind it waiting with his engine running but the clutch off, that when the street car started he also started but that the street car had gained on him and was about 10 or 15 ft. ahead of him when he suddenly struck the plaintiff and Edwards, that they were facing south when he struck them, that he did not see them till he struck them, that he was following the street car which he expected would stop at the next corner and he was running his automobile close to the south rail of the street car track,

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that he was going 5 or 6 miles an hour, that from the time he started till the accident happened he had travelled 50 or 60 ft.; that he was "watching ahead expecting the street car to stop at Howard," that the cause of the accident was that "they (the plaintiff and Edwards) came up behind this car I was following"; that there was another car going west at the time, that he did not see them; "they came from the back of the car," *i.e.*, presumably the street car going east; that as soon as he struck the men he put on the brakes and the car stopped at once or might have gone two or three feet, but that was all. He said also that his windshield was up and driving sleet and snow were coming against it from the east or north-east, and that he did not actually see the men come from behind the street car because he did not see them until they were struck.

There is a serious discrepancy between the evidence of the plaintiff and his friend and that of the defendant upon a point as to which the trial Judge made no finding, but which seems to me to be exceedingly important. If it be true, as the defendant asserts, that the street car was only 10 or 12 ft. ahead of the defendant's automobile when the plaintiff was struck, then it would necessarily follow that the plaintiff must have had to stand beside the street car and wait for it to pass; and even then he would have had to move with great swiftness to move the width of the street car and something more while the street car was going 10 or 12 ft. for it was gaining on the automobile which was going 5 or 6 miles an hour. He certainly would not stand very close to the street car in any case and if this account be true there is no doubt that the defendant's opportunity of seeing the plaintiff must, for a time at least, have ceased. But the strange thing is that neither the plaintiff nor Edwards say anything about having to stop in the middle of the street to let the east bound street car go by. Edwards said he didn't remember seeing any street cars at all, that they went straight across from Young and Kennedy's to the picture gallery. The plaintiff said that a car on the south track, *i.e.*, going east, had just unloaded and was starting to move and they stepped off the sidewalk in front of Young and Kennedy's and that by the time they got to the point of the accident it was between Howard and Macdougall, *i.e.*, down in the next block. He also spoke of one proceeding west just before they left the sidewalk, that this car had "cleared" before they left the sidewalk

and that the people alighting from it had also cleared from the street.

There is, therefore, presented to us a case the facts of which are neither all decided by the trial Judge nor perhaps capable of a satisfactory decision by this Court owing to the inconsistency in the evidence just referred to.

The trial Judge in dismissing the action took a view which he expressed in the following words:—

It seems to me that the defendant should not be under any responsibility where, as here, he (*i.e.* the plaintiff) was crossing the avenue not at a street crossing, but upon the portion upon which vehicles travelled under high motive power and in a part of the city where vehicular traffic was heaviest. The roadway at that point was lighted up very brightly; it was a time of night when traffic was not likely to be at a standstill, and weather conditions were such as to obscure the prospect of the defendant by reason of the action of the wet snow on his windshield. Of all these facts the plaintiff was well aware. It is greatly to the plaintiff's credit that he frankly and freely admits that he did not look up the avenue in the direction in which motorists would be approaching and that his view of the avenue was not interrupted. The defendant denies that he saw the plaintiff until the moment of impact. He also states that he was proceeding at a rate of only 5 or 6 miles an hour. While I find it hard to accept this statement by reason of the fact that the car did not sooner stop I must at the same time have regard to the slippery state of the pavement and also to the fact that the wheels of the car did not pass over the men, two facts which seem to me clearly indicate that the car was not going at an excessive rate of speed and the defendant was not driving recklessly. It does not seem to me that the defendant would have been negligent under the circumstances had he been driving at 10 or even 15 miles an hour. Surely the plaintiff could have avoided the accident by the exercise of the reasonable precaution of looking up the avenue before leaving the car tracks, particularly when there was no street car approaching at the time.

In effect the Judge held that the defendant had not been guilty of negligence but that the plaintiff himself had been so guilty. Now I should have been more satisfied with the Judge's conclusion if it had appeared from his words that he had given full consideration to the circumstances that the defendant himself admitted that he had not looked otherwise than straight ahead.

It does not seem to me to be advisable that any strength should be added by the decisions of the Courts to the impression, an erroneous one I think, which apparently prevails in some quarters, that a pedestrian who chooses to exercise his undoubted right to cross a highway not at a regular crossing for foot passengers and does not look out for vehicles can with impunity be knocked down by automobile drivers. There are cases in which a pedestrian

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even so acting negligently can recover damages from the driver of a vehicle who injures him.

The subject is dealt with by Cockburn, C.J., in his charge to the jury in *Springett* v. *Ball* (1865), 4 F. & F. 472. In that case on a dark evening when the streets were greasy and slippery the deceased started with some hop-sacks on his back to cross a highway not at a regular crossing. The driver of the defendant's omnibus was coming down the roadway from a bridge and there was an incline. The onmibus had no "skid" or brake on and it was for this reason, so the driver said, that he kept looking at his horses. A witness who was near by said he saw the deceased six yards off. The deceased had said in the hospital that it was his own fault because there was no crossing where he attempted to cross. Cockburn said to the jury:—

> If he had *not* been looking at his horses he might have seen him at a distance of 6 yards when he might have been able to pull up. There is evidence of negligence on the part of the driver conducing to the occurrence, then secondly, was there negligence on the part of the deceased? He admitted that there was in this respect—that he was crossing where there was no regular crossing; but that is only legally material in this respect that the driver might not have expected to see anyone crossing elsewhere than at the regular crossing and might therefore not have been so much on his guard. The deceased however had of course a *right* to pass where he pleased. Did he do so carelessly and without due caution? Thirdly, even if so, the defendant nevertheless is liable if the driver could by the exercise of reasonable care *have seen the plaintiff* and avoided the accident. Men are not to be recklessly or carelessly run over because they are themselves careless. The driver was bound to use due and reasonable care and caution to avoid running over anybody, no matter how careless they might be. No one can doubt that, if he had seen the deceased in time to pull up, it would have been his bounden duty to do so; and he says (in effect) that he should have seen him, but for his having been looking at his horses owing to the absence of a "skid." Then if he could have seen the plaintiff—but for that—in time to pull up, he would be the cause of the accident, even though the deceased was in some degre careless in crossing as he did.

The result of that case of course is immaterial, as the decision lay with the jury and cannot be quoted as a precedent.

I think it is the law that a pedestrian crossing not at a crossing and not looking and therefore being very careless would be entitled to damage from an automobile driver who with no obstructed view could have seen the pedestrian at a sufficient distance to avoid him, but who for instance for *no* justifiable purpose kept his eyes either on his feet, on the car or on a window at the side of a street and so did not see the pedestrian and ran over

him, who, in other words, did not keep a lookout to see that he did not run into anyone. Also an automobile driver, who does keep a good lookout and does see a pedestrian apparently going to cross his path without looking, is not entitled to go on and leave the responsibility upon the pedestrian. He must use reasonable care, when he sees the danger, to avoid him. This last proposition no doubt would be assented to by everyone. Their respective legal rights in the case where they each, seeing the other coming, deliberately go on would depend perhaps not upon the law of negligence but the law of trespass and then the strict right of way would possibly have to be decided. (See *Cotterill* v. *Starkey*, 8 Car. & P. 691.) But to my first proposition above, that where neither is looking out as he should and a collision and injury occur the automobilist is liable, I imagine there would not be so ready an assent.

In Hals., vol. 21, at p. 416, it is said:—

> The duty of a driver of a vehicle is not satisfied by creating a warning noise, and in an emergency, where either the vehicle or the foot passenger must alter his course to avoid collision, the driver of the vehicle does not escape liability if he cannot shew that he has tried to pull up or to one side,

and in a note to this it is added:—

> The duty may be based on either of two grounds, the fact that a vehicle is capable of moving at a greater pace than a foot passenger, or that, in the event of an accident it is capable of doing so much more damage.

A foot passenger cannot hurt anyone or anything unless it be a mere child by a collision while walking. The driver of an automobile is in charge of a dangerous machine. On a city street there would seem to me to be no reason why an automobile driver should ever run into anyone except in the one case, which sometimes occurs, where a pedestrian suddenly steps from the kerb or from behind another vehicle and gets in front of the automobile before its driver has any opportunity of seeing what he is about to do. The more crowded the street the more slowly the driver should go with his vehicle and whenever he runs into a pedestrian, whether that pedestrian is careless or not, whom he could and should have seen in time to avoid the collision, I think the driver is liable. Of course, each case must depend on its own facts, and what is reasonable is to be decided according to circumstances. But what should be declared, I think, is that the negligence of the pedestrian in not looking and the fact that the driver was

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not going at an excessive rate of speed do not necessarily decide the case in favour of the driver, as seems to have been the view of the trial Judge in the present instance.

It is to be remembered that in the present case the burden of proof is upon the defendant, contrary to the general rule. Sec. 33 of the Motor Vehicle Act, statutes of 1911-12, ch. 6, says:—

> When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

We have here a statutory recognition of the higher obligation as to carefulness which rests upon a driver of a vehicle driven by mechanical power. If his vehicle causes damage he must prove that it was not through his negligence or improper conduct. In the present case it is true the plaintiff did not look and was in that respect negligent, but that does not settle the matter. The defendant must prove that it was not his own negligence that caused the accident, to do which he must shew that he himself could not by any exercise of reasonable care have avoided the consequence of the plaintiff's negligence.

Now in the present case the defendant either could have seen the plaintiff, if he had looked, in time to avoid the accident or he could not. It is admitted that he didn't look otherwise than straight ahead. If he could have seen the plaintiff, by looking at one side to see if any person was approaching his path, in time to avoid the accident, he was certainly negligent in not doing so because it was clearly his duty to do so and he cannot be said to have satisfied the onus of proving that the accident did not arise through his negligence. Again, if he could not have seen him it could only have been owing to one of two or perhaps three reasons. First, because of his windshield being up in front of his face and covered with sleet and snow his view was obscured. If that was the fact then he was negligent in going ahead practically in the dark at a rate which would injure any person if there was a collision. A driver of an automobile is not entitled to go ahead at a speed which will injure anyone or anything if he cannot see ahead of him. The same principle will apply if his inability to see the plaintiff was due to the darkness of the street. This, however, is a suggestion quite contrary to the facts proven.

The only other possible excuse for not seeing the plaintiff is that he may have stepped suddenly from a place where he could not be seen right in front of the automobile before the defendant could have time to stop. If this were the fact it would no doubt excuse the defendant. But the defendant only made a very faint attempt to suggest that the plaintiff had done something of that kind. Even if the plaintiff passed immediately behind the east bound car he would have had at least ten feet to go in full view of the defendant before he reached the point of collision. Yet the defendant says he did not see him until the actual collision. No doubt if it were clearly proven that the plaintiff and his companion did allow the east bound car to pass right in front of their faces while they stood waiting on the devil strip for it to go by and then stepped promptly forward something might be said, indeed perhaps a good deal might be said, in exoneration of the defendant. But this theory is quite inconsistent with the account of the matter given by the plaintiff and by Edwards while the defendant cannot say positively that this was what happened. He did not see the men until he hit them. There is no finding of the trial Judge in the defendant's favour on this point.

In the result, therefore, I think the defendant has failed to prove that he could not by the exercise of reasonable care have avoided the accident, that is, he has failed to prove that the accident was not due to his negligence and under the statute he is therefore liable in damages.

There does not seem to have been any permanent injury to the plaintiff. His doctor's bill was only $10 and the hospital bill $28. No doubt he suffered considerable pain and was suffering some still at the time, but there was nothing but external bruises and abrasions of the skin according to the doctor's evidence. There was indeed considerable jar or shock which caused a pain at times but it is plain from the doctor's evidence that there was no permanent injury. I should think $280 would be a reasonable amount to allow for damages.

The appeal will be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for $280 and costs of the action.

Appeal allowed.

MAN.

K. B.

Re COLONIAL ASSURANCE Co. Ltd.

Manitoba King's Bench, Galt, J. April 25, 1916.

CORPORATIONS AND COMPANIES (§ V F 1—238) — WINDING-UP — PAID SHAREHOLDERS AS CONTRIBUTORIES.

A fully paid-up shareholder—not liable to contribute—may be placed on the list of contributories, so called, under the provisions of the Dominion Winding-up Act (R.S.C. 1906, ch. 144, secs. 34, 93), so as to share in any surplus of assets over liabilities.

Statement.

APPLICATION to be placed on the list of contributories.

W. L. McLaws, for liquidator.

F. M. Burbidge, for creditors.

W. C. Hamilton, for other parties interested.

Galt, J.

GALT, J.:—This is a motion on behalf of the Colonial Investment Co., of Winnipeg, asking that they be placed on the list of contributories for 250 shares of fully paid-up stock of the Colonial Assurance Co. Ltd. The applicants have no intention of contributing anything to the assets of the company in liquidation, but they claim contribution from the holders of unpaid shares when the Court proceeds to adjust the rights of the contributories among themselves.

The motion is opposed by counsel representing several of the shareholders already settled on the list in respect of unpaid shares. The liquidator neither supports nor opposes the motion.

The Dominion Winding-up Act is largely taken from the winding-up provisions of the English Companies Act 1862, but with many variations. Under the English Act the list of contributories is divided into two parts, A. and B., the shareholders in list A. comprising holders of shares which have not been fully paid up, and who are liable to be forthwith called upon for payment, while list B. consists mainly of persons who were holders of unpaid shares during the year prior to the winding-up, but who had parted with their shares prior to the winding-up. Under the English law persons on list B. cannot be called upon to pay until payment by persons on list A. has been exhausted. In Canada we have but one list of contributories and no liability attaches to persons who have parted with their shares prior to the winding-up. The applicants in the present case desire to be placed on the list of contributories in order that, in the adjustment of the rights of the contributories among themselves, they may have an equitable share of the surplus assets (if any) to be realized.

The applicants file an affidavit of Charles Y. Stanier, secretary of the National Trust Co., Ltd., shewing that he has reason to believe and does believe that when the unpaid shareholders have paid the balances due upon their shares, there will be a large surplus available.

The question is, are the applicants "contributories" within the meaning of the Dominion Winding-up Act. Under our Act (ch. 205 R.S.M.) the word "contributory" is interpreted to mean, unless the context otherwise requires

every person liable to contribute to the assets of a company under this Act in the event of the same being wound up and also in all proceedings prior to the final determination of such persons, includes any person alleged to be a contributory.

The Colonial Assurance Co., Ltd., was originally incorporated in the Manitoba Statutes of 1889, ch. 53, under the name of "The Manitoba Insurance Association." The name has since been changed. Under sec. 9 of the incorporation Act,

the shareholders of a company shall not as such be held as responsible or liable for any debts, liabilities or engagements of the company beyond the amount of the balance remaining unpaid upon their respective shares in the capital stock, etc.

The decisions in England under the Companies Act 1862, present anomalies which are very difficult to explain satisfactorily. For instance, the definition of a contributory under that Act, as well as under ours, is expressly limited to a "person liable to contribute to the assets of a company under this Act." Under sec. 38, sub-sec. (4) of the English Act,

In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

Yet it has been held in England that a holder of fully paid-up shares in a limited liability company is a contributory within the meaning of the Companies Act 1862: see *Re Anglesea Colliery Co.*, L.R. 2 Eq. 379, affirmed in appeal, L.R. 1 Ch. App. 555. See also *Re National Savings Bank Association*, L.R. 1 Ch. App. 547.

The Courts of England laid great stress upon sec. 102, which authorizes the Court to make calls on any of the contributories for the time being settled on the list of contributories to the extent of their liability for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for

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the adjustment of the rights of the contributories amongst themselves, and it may, in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

It was reasoned from this and other portions of the Act that a fully paid-up shareholder should have a right to share in any surplus assets of the company and that such right could not be recognized unless he were placed upon the list of contributories. The provisions of our Winding-up Act are similar in this respect to the English Act. In both cases if the words "or members" had been inserted after the word "contributories," in the clauses authorizing the adjustment of the rights of contributories amongst themselves, there would not have been the same necessity for judicially construing the word "contributories" to mean exactly the reverse of what its definition expresses.

In the *Anglesea* case a call had been made by liquidators upon certain contributories, holders of partly paid stock, in order to place them on the same footing as the fully paid shareholders. As a matter of fact, the fully paid shareholders were not on the list of contributories at all, and, so far as the reports show, never asked to be placed upon such list, yet their rights as contributories were recognized.

The next anomaly I would point out is this, that although the holder of fully paid shares has been decided to be a contributory, yet it has also been decided that he is not liable to be settled on the list. See *Re Marlborough Club Co.*, L.R. 5 Eq. 365, and *Anderson's* case, 7 Ch. D. 75.

The legal result of these decisions which is expressed in Palmer on Company Precedents (1912), part 2, p. 565, is this:

> A holder of fully paid shares was held to be a "contributory" within the meaning of the Act of 1862, and entitled to be placed on the list if he sees a chance of a surplus: See *Anglesea Colliery Co., supra*, but he cannot be placed on the list of contributories, against his wish: See *Marlborough Club Co., supra.*

One would infer from the decision in the *Anglesea* case that every existing member of the company ought to be placed on the list; the unpaid shareholders because of their liability to contribute to the assets of the company (pursuant to the definition) and the fully paid shareholders because of their right to have a

call made for their benefit upon the unpaid shareholders (under sec. 102 of the English Act).

It sometimes happens in England that shareholders bind themselves in their articles of association to certain contributions over and above the amounts due upon their shares. In such cases one can readily see why a fully-paid shareholder may be subject to further liability and thereby fulfil the requirements of the definition. An instance of this may be seen in *Maxwell's* case, L.R. 20 Eq. 585. Such a liability in Canada would be rare owing to the absence in most provinces of any necessity for articles of association. No such liability, however, appeared in the *Anglesea* case.

Under sec. 93 of our Act (R.S.C. 1906 ch. 144),

> the Court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debt and liabilities of the company, and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

This would seem to eliminate any necessity for treating a fully paid shareholder as a contributory.

The amount unpaid on the shares of a company is certainly part of its assets, and under sec. 34 (*h*) of the Dominion Act the liquidator may "do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets."

But the English Act, sec. 133, contains the following very similar provision:

> Sub-sec. (1): The property of the company shall be applied in satisfaction of its liabilities, *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the company's members according to their rights and interests in the company.

Tested by the definition both in the English Act and in our Dominion Act, a fully-paid shareholder with no further liability cannot, without an abuse of language, be said to be a contributory. Tested by the decisions in England, based upon the intention of the legislature, as inferred by the Judges from other portions of the Act, a fully paid shareholder is a contributory.

These decisions have been in force for a great many years and have been accepted as a correct interpretation of the English Act. The Dominion Winding-up Act contains variations of more or less importance, but quite insufficient, in my opinion, to

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warrant me in applying to it a different construction from that placed upon the English Companies Act by the English judiciary.

I must, therefore, hold that the Colonial Investment Co., of Winnipeg, as fully paid shareholders in the Colonial Assurance Co., Ltd., are contributories and, therefore, entitled to be placed upon the list as they request.

The costs of all parties will be paid out of the assets of the company. *Application granted.*

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S. C.

Re COLE.

Ontario Supreme Court, Falconbridge, C.J.K.B. March 6, 1916.

1. INSURANCE (§ IV B—171)—CHANGE OF BENEFICIARIES—WHEN EXCLUSIVE PROPERTY OF WIFE—STATUTORY PREFERRED CLASS—POWER TO CHARGE FOR INCUMBRANCES.

Insurance policies effected by a wife upon the life of her husband, or by the husband for the benefit of his wife, wherein the wife is designated as the "assured" are contracts with the wife, and therefore her absolute property, which cannot be affected by the declaration or will of the husband; but policies effected by the husband for the benefit of his wife create a trust in favour of the wife, though the husband may by his will alter the trust, by cutting her interest down to a life estate and may direct the insurance in favour of any of the class of preferred beneficiaries mentioned in the Insurance Act (Ont), sec. 178 (1). He cannot, however, charge the insurance funds with the payment of incumbrances on his real estate.

[R.S.O. 1914, ch. 183, secs. 169, 171, 178, applied.]

2. INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARIES BY WILL—SUFFICIENCY.

A bequest of "all the life insurance due me" is a sufficient declaration under sec. 171 (5) of the Insurance Act (R.S.O. 1914, ch. 183) to change the beneficiary designated in the policy.

[Judgment of Riddell, J., in *Re Baeder and Canadian Order of Foresters*, 28 D.L.R. 424, at 431, followed.]

Statement.

MOTION by William H. Dingle, executor of Wilmot H. Cole, deceased, and by Cordelia E. Dingle, daughter of the deceased and administratrix of the estate of her mother, also deceased, upon originating notice, for an order determining certain questions arising upon the will and codicil of Wilmot H. Cole, in regard to certain policies of life insurance.

The testator died on the 13th December, 1915; his wife predeceased him, dying on the 9th October, 1915. The daughter, Cordelia E. Dingle, a son, George M. Cole, and a son of a deceased son, survived.

There were six policies of life insurance; particulars with regard to them are given in the judgment below.

The questions for determination were: whether the will and codicil amounted to a declaration within the meaning of the

Ontario Insurance Act, R.S.O. 1914, ch. 183*; and, if not, to whom the moneys due under the policies should be paid.

M. M. Brown, for applicants.

J. A. Hutcheson, K.C., for the son and grandson of testator.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C. J. K. B.:— The late Wilmot H. Cole died on the 13th December, 1915; his wife, Jane Adelaide Cole, predeceased him, dying on the 9th October, 1915. They had three children: (1) Eugene M. Cole, who died leaving a sole child; (2) George M. Cole; and (3) Cordelia E., wife of William H. Dingle—illustrated as follows:—

*The following provisions of the Act bear on the questions raised upon the motion.

Sec. 169.—(1) It shall be necessary for the validity of a contract of insurance that the beneficiary under it, if he is not the person on whose life the insurance is effected, or the parent, or *bonâ fide* donee, grantee or assignee, or a person entitled under the will of such person, or by operation of law, shall have at the date of the contract a pecuniary interest in the duration of the life or other subject insured, but any otherwise lawful contract of annuity upon life shall not require for its validity that the annuitant has or at any time had an insurable interest in the life of the nominee.

Sec. 171.—(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or partly to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself or to his estate.

Sec. 171.—(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

Sec. 178.—(1) Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries.

Sec. 178.—(2) Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

Sec. 178.—(7) If one or more or all of the designated preferred beneficiaries, whether an apportionment has been made or not, die in the lifetime of the assured or if a sole preferred designated beneficiary dies in his lifetime, he may by a declaration provide that the share or shares of the person or persons so dying shall be for the benefit of the assured or of his estate or of any other person, whether or not such person belongs to the preferred class; . . .

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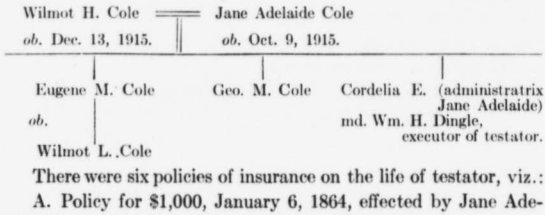

There were six policies of insurance on the life of testator, viz.:

A. Policy for $1,000, January 6, 1864, effected by Jane Adelaide Cole on the life of her husband, the testator.

B. Policy for $2,000, February 21, 1871, by testator on his own life "for the benefit of his wife, Jane Adelaide Cole."

C. Policy for $5,000, September 15, 1874, by testator on his own life "for the benefit of his wife, Jane Adelaide Cole."

D. Policy for $2,000, December 31, 1868, by testator "for the benefit of Jane A. Cole," but the company "promise and agree to and with the said assured, her executors . . . to pay to the said assured, her executors . . . the sum insured."

E. Policy for $500, December 23, 1883, the O.F.R.A. of Canada "agrees to pay to Jane A. Cole, wife, or her heirs or assigns," but it is clear that the agreement is not made with the wife, but with the husband, "the member herein insured."

F. Policy for $1,000, December 21, 1883, in similar terms to those of E. By a will made on the 17th October, 1914, the testator made the following provisions:—

"I give and devise all my real and personal estate . . .

"1. To my executor in trust for the use of my wife, Jane Adelaide Cole, during her natural life, all my estate, real and personal, my said executor to collect all the life insurance, rents, interest and accounts due me at my death and with this money first pay off the incumbrances, if any, on my real estate except balance of monthly payment mortgage to the Brockville Loan and Savings Company on west part of lot No. 18 in block 44 in the town of Brockville, which balance is to be paid from the rents from the property as the monthly payments become due. My executor must keep the different buildings in a good state of repair and insured, and pay, out of the balance of rents and interest, all or any portion thereof to my said wife for her own use or maintenance, she to reside where she may see fit or choose to make her home, her comfort and welfare to be a first charge on my estate."

2. Devise of certain land after death of wife.
3. " " other " " "
4. " " " " " "
5. Bequest of promissory notes. 6. Specific bequest.
7. Specific bequest. 8. Specific bequest.

And the residuary clause, "All the rest residue and remainder of my property real and personal I give and devise to my daughter Cordelia E. Dingle."

After the death of his wife, he made a codicil, of which the important parts are as follows: "As my beloved wife Jane Adelaide Cole departed this life on October 9, 1915, the portion of my said will referring to her will no longer be operative."

William H. Dingle is the executor of the will of the testator, and his wife, Cordelia E. Dingle, is the administratrix of her mother's estate.

The questions for determination on this application are:—

1. Does the will or the codicil to the will of the said Wilmot H. Cole, deceased, constitute a declaration within the meaning of the Ontario Insurance Act whereby the moneys due and owing under the several insurance policies on the life of the said W. H. Cole, deceased, should be paid to the executor of the said W. H. Cole to be by him applied, firstly, in payment of the incumbrances on the real estate as provided in clause 1 of said will, and, secondly, to pay over the balance, if any, to Cordelia E. Dingle pursuant to the residuary clause of the said will?

2. If the confirmation of the will by the said codicil does not constitute a declaration within the meaning of the Ontario Insurance Act, so that the moneys under the several policies on the life of the said testator belong to his estate to be distributed according to the terms of his will, then to whom are the moneys due and owing on the said several policies payable?

As to policy A., the contract is with Jane Adelaide Cole, and not with her husband—and it was therefore the property of Mrs. Cole absolutely; it is not a policy on the life of the husband under secs. 171 and 178 of the Ontario Insurance Act, R.S.O. 1914, ch. 183—it comes under sec. 169; accordingly, the will and codicil of the husband cannot affect it.

So too, policy D. is a contract "with the said assured, *her* executors," etc., to pay to the said assured, *her* executors, etc. This is, therefore, not a contract with the husband, but with

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the wife, and she it is who is called the "assured;" accordingly, the will and codicil cannot affect this policy.

Policy B. is explicitly an insurance by the husband for the benefit of his wife, Jane Adelaide Cole, and therefore comes under secs. 171, 178.

Policy C. is in the same case.

Policy E. is a contract "to pay to Jane A. Cole, wife, or her legal representatives . . .;" but it is a contract with the husband, not with the wife, and therefore it comes under secs. 171, 178.

Policy F. is in the same case.

The same considerations govern the four policies B., C., E., F.

Section 178 (2) creates in these a trust in favour of the wife, unless and until a declaration is made under sec. 171 (3), and in no case can the policy be diverted from the class of preferred beneficiaries except in cases such as are provided for in sec. 178 (7).

Accordingly, at the time the will was made, the insured could have altered the trusts of these four policies by giving the benefit to those of or one or more of the preferred class mentioned in sec. 178 (1); but, unless and until such alteration should be legally effected, the wife was entitled to the benefit of the policies.

It was argued with great wealth of authority that the words of the will "all the life insurance," etc., were not sufficient under the Act. Probably that is so, had there been no change in the legislation. But a change was made after the decision of the cases cited on the argument, viz., in 1912 by 2 Geo. V. ch. 33, sec. 171 (5), now R.S.O. 1914, ch. 183, sec. 171 (5), which seems to have been overlooked by counsel.

This has been very recently discussed by the Appellate Division in *Re Baeder and Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424. I have procured full copies of the judgments in that case, and find all the previous cases there discussed in the judgment of my brother Riddell, which I adopt and to which I have nothing to add.

The effect of that decision is, that a bequest of "all my insurance that I may have and in force at the time of my death" is a sufficient declaration by will to change the beneficiary of such policies. Here the words are not quite the same, but they are "language of like import" (sec. 171 (5)), and it must be held that, so far as the form goes, the declaration is effective.

The effect of the declaration is to take away from the wife

the corpus of the proceeds of the policies and to give her only a life interest in these proceeds—the corpus is not in terms disposed of.

But the deceased created a fund in part composed of these policies, and, disposing of a life interest in it, he has added "all the rest, etc., I give to my daughter Cordelia E. Dingle."

The case is not unlike that of *Re Edwards* (1910), 22 O.L.R. 367, except that there the corpus was given to persons not in the preferred class—and it was on that ground that it was held that the testator had not the power to change the beneficiaries as he had intended: see pp. 368–9. Had the corpus been given to some one of the preferred class, of course the change would have been held effective.

I am of opinion, on the whole, that the declaration in and by the will was effective to change the beneficiary, so that, had his wife survived him, she would have taken for life, and the corpus would have gone to the daughter.

As to the codicil, there is simply a statement of fact as the testator understood it; at the most there was a revocation of the trust for life of the proceeds of the policies, without affecting or purporting to affect any other disposition or the rights of any other person.

We are not to read such documents too subtly, but to see what the testator meant—and it would be a great stretch to hold that the testator meant by such a clause to take away the corpus of the insurance fund from his daughter without even naming her. The terms of the will do not compel me so to hold; I decline to do so.

The attempt of the testator to charge the insurance fund with the payment of incumbrances is, of course, wholly ineffective.

In the result, the wife's estate is held entitled to the two policies A. and D.—the daughter, Mrs. Dingle, to the other four, without diminution to pay incumbrances.

In the view I take of the law, the case does not come under sec. 178 (7), as the beneficiary who predeceased the testator had only a life estate.

Of the policies belonging to the estate of the wife, the estate of the husband will, of course, be entitled to his proportionate part.

As the case is decided upon the judgement in *Re Baeder and Canadian Order of Chosen Friends*, delivered but a few days ago, costs of all parties may come out of the four policies; no reason exists for saddling the other two with costs.

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SITKOFF v. TORONTO R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, J.J. February 18, 1916.

STREET RAILWAYS (§ III B—33)—*Collision with person crossing street — Signals — Proximate cause.*] — Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial with a jury at Toronto, dismissing an action brought under the Fatal Accidents Act to recover damages for the death of the plaintiff's husband, caused by his being struck by a car of the defendants, the plaintiff alleging negligence on the part of the defendants' servants operating the car. Affirmed.

J. M. Godfrey, for appellant.

D. L. McCarthy, K.C., for defendants, respondents.

MEREDITH, C.J.C.P.:—The single question involved in this appeal is, whether there was any evidence adduced at the trial upon which reasonable men, acting conscientiously, could find that the real cause of the death of the plaintiff's husband was the actionable negligence of the defendants.

The learned Chief Justice, who presided at the trial, ruled that there was not, and accordingly dismissed the action; but ruled also that the jury should assess the damages, upon the understanding or arrangement that, should his ruling be reversed upon appeal, the direction for the dismissal of the action should be set aside, and that, instead, judgment should be entered for the plaintiff with damages in the amount assessed by the jury.

I agree with the learned Judge in his ruling that there was no case to go to the jury; but feel bound to add that the provision for entering judgment for the plaintiff if that ruling had been wrong, whether that provision was made on a voluntary consent or not, was unfair to the defendants. Why should they be deprived of their right to go to the jury; and what difference could it make if, as the case was going to them anyway—on the question of damages—they should pass on the question of liability also? The defendants had an undoubted right to the Judge's ruling; and the price of that ruling should never be the loss of the right to a trial on the facts if the Judge's ruling turned out to be wrong.

No substantial loss of time, and no injustice or even inconvenience, need have arisen from giving the defendants then their right to go to a jury some time before being condemned in heavy

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damages. If it were thought that anything said by the Judge on the motion to dismiss the action might have some effect on the jury, it would be a simple matter to let the jury retire during the discussion, or for the Judge to take care in the discussion of it not to say anything that could by any chance be prejudicial to either party. But in this case the parties are bound by the arrangement made at the trial, and I mention the subject in the interest of the administration of justice generally, only; it seeming to me to be plain that a defendant in such a case should be precluded only from, in any case, demanding a new trial because only of the nonsuit being set aside.

At the trial, the driver of the car which is said to have caused the man's death was called and examined as a witness for the plaintiff. No evidence was given in the defendants' behalf. The driver testified that all the care that was possible, under the circumstances, on his part, was taken; and to reckless or stupid want of care on the part of the man who was killed, want of care which directly caused his death.

No other eye-witness of the accident was called, though there were passengers in the car some of whom must have seen it, and I cannot but think could have been found if diligently sought. Other witnesses were called who proved that the car ran a very considerable distance after the man was struck.

Several witnesses were called who testified that they did not hear any sound of the gong of the car; but not one of them was asked or ventured any opinion on the question whether they would have heard it if it had rung; on the contrary, some of them volunteered a statement of their inattention. The driver testified positively and particularly that he did sound the gong; and lastly one witness, in answer to questions of counsel for the plaintiff, testified that she was one of the passengers on this car, and that another passenger "jumped up and hollered, 'Why don't you look where you are going?'" and that "he stood up and he screeched profane language, and he hollered, 'Why don't you look where you are going?'" immediately before the accident.

It is contended for the plaintiff that there was evidence upon which reasonable men could find that the gong was not sounded; but that is not so, it would not be so if the testimony of the plaintiff's witness, the driver of the car, that it did sound and that that

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he knows because he sounded it himself, had been given for the defendants instead of the plaintiff. If the plaintiff wished to make some reasonable evidence out of the testimony of the inattentive witnesses who did not hear, he might have asked if they would have heard the gong had it been sounded; but that question was not asked; and when counsel, of very considerable experience in this class of cases, abstains from asking such a question in such circumstances, especially when he is also the plaintiff's solicitor in the action, there can be no doubt the asking would not have helped but would have harmed the plaintiff's case.

Then it is said that the jury might believe the testimony of the driver that he could have stopped the car in a distance of about 80 feet, and disbelieve all else to which he testified; and then, having regard to the distance the car ran after the man was struck, might find that he was really not looking out at all, but, going at high speed, blindly ran the man down. But it is equally true that any one could make several other patch-work theories with quite as much—if one can apply the word "much" to them—foundation in fact; losing sight of this fact, among others, that there was no evidence except that of the driver concerning the manner in which the man came to the place of collision, and that evidence is that he came in a grossly negligent manner, a manner which was the true cause of his death. It would not be enough to prove a negligent driving of the car. It must be proved, not taken for granted, that that was the cause of the accident. There was at the trial, and now is, no contention that there can be any recovery on the ground of negligence in the speed of the car. Counsel for the plaintiff put his position in that respect, in answer to a question of the Judge, "Have you any evidence of excessive or dangerous speed?" thus: "No; I do not think 8 or 10 miles an hour was excessive and dangerous." And the distance that the car ran after the accident is not necessarily inconsistent with the driver's testimony; he does not say that the brake was retained at emergency position after the collision, nor is it unlikely that it would be released.

Then the story of the excited passenger's warning is against the plaintiff, indeed strongly corroborates the driver's testimony; and it is hardly reasonable to suggest now that the words might have been meant for the driver, especially after the entire absence

of any effort on the plaintiff's behalf to connect them, through the witness, with him.

It is quite true, and well it is that it is true, that the old-time theory that the party putting a witness in the witness-box to testify in his behalf accredited him, is well worn out; yet it is not to be forgotten that the driver was the plaintiff's witness, and that, admittedly, the plaintiff cannot recover unless some credit is given to his testimony.

If, in all the circumstances of this case, it can be said that reasonable men, acting in good faith, could base a verdict of $1,200, and incidentally find the driver guilty of manslaughter, upon the evidence adduced in this case, I prefer to be classed among the unreasonable. How could, not only any reasonable but indeed any sane man, from the fact that a man was killed by a car that might have been stopped in 80 feet but was not until it had gone twice that distance, upon his oath of office find that the death was not a mere accident, or was not caused by the man's own negligence, but was caused by the negligence of the driver, when excessive speed and failure to sound the gong are not proved; and upon that finding compel the defendants to pay $1,500 or more? And I desire to add again my condemnation of a course too commonly adopted, of giving as little evidence as possible for fear of eliciting something unfavourable, having no faith in the facts, having faith and hope only in winning the sympathy of the jury—instead of, with reasonable fairness to Judge and jury, endeavouring with some degree of sincerity to reveal, not conceal, the truth.

No case of "ultimate negligence" was ever suggested; the running on after the collision was relied upon only as evidence of not looking out and so not seeing the man. There was no evidence that running on, instead of stopping immediately, was improper; it may have been safer for the man on the "fender" than a powerful application of the brakes, which might have dislodged him only to be run over.

Recent cases in the higher Courts of England and in the Supreme Court of Canada are much relied on in this case, as in all other cases in which it is sought to get to a jury without any reasonable evidence upon which they could find in the way desired; and we are impressively told that a jury have a right to draw

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inferences, and that this case or that case is stronger than, or as strong as, or nearly as strong as, some case decided in one of those Courts; forgetful of these two things, that it is as old as the law that a case may be established on circumstantial evidence; and that no case decided on its facts is an authority for a finding of fact one way or other in any other case to be decided on its facts, however helpful the reasoning in it may be; that no two cases can be quite alike in all their facts and circumstances; and that the one question in all such cases as this must be: could reasonable men, upon the evidence adduced in it, find that the proximate cause of the injury done was the defendants' negligence?

There is a well-defined and unmistakable boundary between the province of the Court and that of the jury in all such cases as this; and the interests of justice require to-day, just as much as they did in the days of Erle, C.J.—see *Cotton* v. *Wood*, 8 C.B.N.S. 568—that the right and duty of the Courts to determine whether there is evidence upon which reasonable men could find, before letting any case go to a jury, should be always exercised, that no surrender or invasion of either province should be permitted, however difficult it may occasionally be to tell on which side of the line some exceptional case may be. Reasonableness—whether it is called a question of law or of fact—such as this "belongeth to the knowledge of the law, and is therefore to be decided by the Justices."

I would dismiss the appeal.

RIDDELL, J.:—I agree.

MASTEN, J.:—The facts in this case have been set forth in the reasons for judgment of the Chief Justice (*supra*) and of Mr. Justice Lennox (*infra*), and I do not pause to restate them.

Down to the moment when the car struck the deceased I find no evidence proper to be submitted to a jury. In the course of developing her case, the plaintiff is obliged to call witnesses whose testimony at the least makes it entirely uncertain whether the accident in question was due to the fault of the street railway company or to the fault of the deceased, and in fact makes it look rather as if the deceased walked into the street car.

That appears to bring the case, as regards the original collision,

within the decision of *Wakelin* v. *London and South Western R.W. Co.* (1886), 12 App. Cas. 41. I refer especially to the remarks of Lord Watson at p. 48 and to the remarks of Bowen, L.J., as reported in [1896] 1 Q.B. at p. 193, note.

The plaintiff, having given evidence of a state of facts which is equally consistent with the collision having been caused by (in the sense that it could not have occurred without) her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. But after the collision it seems to me that a new negligence arose on the part of the street railway company, and that in respect of such new negligence the deceased, carried helplessly on the fender, was not guilty of any contributory negligence.

A man is killed; it is proved that the car, travelling at 10 or 12 miles per hour, struck him, that on being struck he fell on the fender in front of the car with his head to the east, that after the collision the car travelled not less than 100 feet and not more than 200 feet before stopping, that the car should have been stopped within 80 feet of the collision, that the deceased was found, when the car stopped, with parts of his person, including his head, under the fender. How far he had been pushed forward in that position does not appear. The car could have been stopped much sooner, and the failure to do so was evidence of negligence. Under these conditions, I think it would (but for the circumstance hereafter to be mentioned) be the duty of the trial Judge to leave it to the jury to say whether the death of the deceased was occasioned by this negligence of the defendants. I think there was evidence from which such negligence might have been inferred. I do not say that, acting as a juryman, I would have inferred it, but another might reasonably have done so.

It seems to me plain that if a jury found such ultimate negligence on the part of the street railway company, and that it occasioned the death of the deceased, the original contributory negligence on the part of the deceased, by walking into the street car, would not prevent a recovery by the plaintiff.

I refer to the recent decision of the Privy Council in the case of *Loach* v. *British Columbia Electric R.W. Co.*, rendered on the 26th July, 1915.* In that case, one Sands drove a cart on to a

*This case is now reported in 23 D.L.R. 4, [1916] A.C. 719.

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level crossing, and neither saw nor heard the approaching car till he was close to the rails and the car was nearly on him. At that time, with a loaded waggon and horses going two or three miles an hour, nothing could possibly have been done to avert the accident. Sands was guilty of negligence in not looking out to see that the road was clear. Sands was killed, and his administrator sued the railway company. In delivering the judgment of the Court, Lord Sumner says:—

"The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. . . .

"Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered. . . .

"If the jury accepted the facts above as stated, certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled

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up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said 'Oh,' then each had the other in view for 50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing. . . .

"The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573, at p. 585, his contributory negligence will not disentitle him to recover 'if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'"

And Lord Sumner then quotes with approval the following passages from the judgment of Anglin, J., in *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423:—

"Again, the duty of the defendants to the plaintiff, breach of which would constitute 'ultimate' negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care, breach of which would constitute actionable negligence. Up to that moment there was no such breach of duty to the plaintiff. In that sense

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the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty" (pp. 437, 438).

"But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine quâ non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff . . ." (pp. 439, 440).

It seems to me that these observations apply in the present case to the occurrences which took place between the time when the deceased fell helpless across the fender, and the time when the car was finally stopped at Queen street.

The difficulty, however, in the plaintiff's way, is that it does not appear when or where the plaintiff's husband received the injury from which he died. That injury might have occurred: (1) when he was struck by the car; (2) during the progress of the car before it could be stopped, that is, within 80 feet of the collision; (3) while the car was still proceeding after it should have been stopped, that is, at a point more than 80 feet past the point of collision.

Only in the last event would the defendants be liable.

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No evidence was given or could be given as to the place on the street where the fatal injury happened. The onus was on the plaintiff to shew that the injury was the result of the defendants' negligence, and of this I think there was no evidence.

The nonsuit was therefore proper.

LENNOX, J.:—At the close of the plaintiff's evidence and after motion for a nonsuit, the jury assessed the plaintiff's damages at $1,200, counsel for the company agreeing that judgment should be entered for the plaintiff for the amount found, in the event of the appellate Court holding that there was evidence proper to be submitted to the jury upon the question of liability.

The action is brought by the widow of Nicolla Sitkoff, a man then of about sixty years of age, alleging that her husband was killed on the 18th March, 1915, by the negligent operation of one of the company's cars, then being driven south upon Parliament street, in the city of Toronto. A plan put in shews Parliament street from Queen street north to Sydenham street. All south-bound cars must stop at Queen street before taking the curve to go west. There is a liquor store on the east side of Parliament street. It is 283 feet north of Queen street and 161 feet south of Sydenham street. The distance from Queen to Sydenham street is 444 feet. The deceased lived at the corner of Duchess and Parliament streets.

His wife gave evidence that he left his house to get a bottle of beer at this liquor store, a little before nine o'clock on the evening in question. He had always been round-shouldered, and walked with his head forward and drawn a little down. She says he was an active, alert man. His hearing was good, and he was in good health when he left the house. He did not return. She found him in St. Michael's Hospital some hours afterwards, and he died before morning.

William Gallagher was talking to an acquaintance at the north-east corner of Queen and Parliament streets at about nine o'clock that evening. He was facing east and heard an unusual sound up Parliament street. He judged it to be caused by the dropping of a car fender. He looked north up Parliament street, saw a car coming on steadily down, heard a constant dragging sound from the time he heard the first noise, and the

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car kept on without stopping until it stopped, as all cars must stop, at Queen street. Among other things he is asked:—

"Q. What did you do when you heard the fender fall? A. I looked up the street, I thought the fender hit a dog or something.

"Q. How far away was the car, how far up? A. I should judge about 100 feet.

"Q. What else did you see or hear as the car came down? A. As the car came down I see a bundle in it, I could not see what it was, I thought something it had picked up, I could not see it was man; it just attracted my attention; I seen something there, I could not say what it was until the car pulled up, and I helped to pull the man out from under the fender. . . . .

"Q. You went over? A. Yes.

"Q. What did you find? A. A man under the fender. I held the fender up and helped to pull him out.

"His Lordship: You say he was under the fender. A. Apparently, yes.

"Mr. Godfrey: What part of his body was under the fender? A. His head. The man was unconscious."

This witness was pretty firmly of opinion, but not positive, that the man's head was to the east. He did not hear a gong, but said it was too far away, and, besides, he was not paying attention. As to the gong, it could not be said that this witness gave any evidence.

Robert Hopkins was on the south-east corner of Parliament and Queen streets when this car was coming down from Sydenham street upon the same trip. His attention was attracted by what he calls "an extraordinary noise" as of something struck. He could see the car 150 feet away. Watched it all the way down to the Queen street Y, the usual stopping-place. Did not stop from the time he first saw it until then. The car came right on in the usual way, except that the fender was bumping all the time and making a lot of noise. He saw the man picked up and laid upon the sidewalk. Beyond this he does not speak of the man's condition. This witness is no better than Gallagher on the gong question. Both these witnesses are out upon their estimate of the distance. Where the collision occurred is clearly fixed by the next witness, Wares, and Miss Beaver; about opposite or perhaps

a little south of the liquor store. Hopkins in a sense comes pretty close to it, as he estimates the 444 feet from Queen to Sydenham streets at 300 feet. Proportionately his 150 feet would mean 222 feet.

George Wares, the company's motorman, was called. He was asked:—

"Q. You are the motorman on the car *that killed this man*, Sitkoff? A. I was, sir.

"Q. And this accident happened on the night of the 18th March, 1915? A. Correct.

"Q. You got the facts, I suppose, and put in a report on the case? A. Yes. . . .

"Q. Taking a car going 8 or 10 miles an hour, stopping in an emergency, what would you do? A. Apply my emergency brake.

"Q. What else? A. Put down some sand.

"Q. What do you mean by applying the emergency brake? A. Apply the quickest brake that can stop the car in.

"Q. What is that? A. That is the reverse.

"Q. Reverse the car, in what distance would the car stop? A. About 80 feet."

Then he tells that he was going 12 or 13 miles an hour after leaving Sydenham street.

"Q. And at the time of the accident? A. From 8 to 10 miles an hour at the time of the accident.

"Q. Did you see this man? A. I seen him, yes.

"Q. When did you first see him? A. Stepping off the kerb.

"Q. Did you not see him before that? A. No, sir."

He is very positive about this. It is immaterial, except as a test.

Counsel reads from examination for discovery: "Q. 260. How far did you observe him walking on the sidewalk? A. Just a few feet." And a lot of other questions and answers to the same effect, to which the witness finally says: "If I thought that I would be a little excited at the time."

"Q. How was he looking? A. He was looking downwards, head down.

"Q. Did he see your car? A. I could not say, sir. He took no notice of it anyway.

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"Q. When did you realise he was in danger? A. As soon as I see he took no attention to my gong.

"Q. You say you sounded the gong? A. Yes.

"Q. When did you sound the gong? A. As soon as I seen there was danger.

"Q. When? A. Just after he stepped off the sidewalk."

Then this witness says that at the time of impact "he" (Sitkoff) "was on the outside rail, and the right front corner of the car hit the left side of his head, and he fell upon the fender, his head going to the east; and that his head was still pointing easterly when the car reached Queen street."

He swears that he sounded the gong, reversed the brakes, and did everything, as already described, for a sudden stoppage of the car, at one and the same time, that is, as the man left the kerb, and this was when the man was opposite or a little north or a little south of the liquor store. If he did what he says he did, he did everything that a motorman could do—at that stage, at all events—and a jury believing him could not find the company negligent. The car did not stop in 80 feet or stop at all. If the case went to the jury it would be open to them to accept his whole story, or part of it, or none of it. If they believed the whole of it, or none of it, the plaintiff would probably fail, *if death was caused by the impact alone.*

With the greatest respect for the opinion of the learned and experienced Chief Justice who heard this case, I am of opinion that, even if there had been no other evidence in the case, the evidence of these four witnesses alone, covering as it does the whole ground of inquiry—it may not be fully or truthfully, that matters not—was sufficient to make out a *primâ facie* case, conclusive or inconclusive, it matters not; and entitled the plaintiff to have a jury consider and determine whether or not as a matter of fact Nicolla Sitkoff's death was caused by actionable negligence of the defendant company; and, if it can with any degree of justice be said that the testimony of these four witnesses afforded some evidence of negligence, *â fortiori* was there evidence of negligence, causing the injury, to go to the jury, when the evidence of three other witnesses had shewn that it was at least improbable that the gong was sounded and practically impossible to believe that the brakes were applied or the car checked. By this I mean, of course, negligence causing the fatality.

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Ella Beaver was a regular patron of the street railway service. Mr. McCarthy elicited this, and that immediately preceding the accident "the car was just travelling at the ordinary pace . . . nothing either of speed or slowness to attract attention." She says the car had a long seat on each side, a closed car. She was sitting on the west, one seat space from the front of the car, and this space was occupied by an unknown man. The motorman was in view of both of them. The unknown man was facing where the motorman stood in the centre of the car. He would be looking south-east. Sitkoff is said by the motorman to have come from the west side of the street and at right angles to the sidewalk. The unknown man suddenly jumped up, and, waving his hand and accompanying it with very bad language, yelled, "Why don't you look where you are going?" They were then about opposite the liquor store. This was the first thing that attracted her attention, and it was the last thing, except that the action of this man caused a hush in the car, every one "quit talking to see what was making this man holler." They did not seem to find out. She did not find out, if at all, until she got off at Queen street. She knew nothing of the accident until then. She was not aware of the application of the emergency brake. Cross-examined by Mr. McCarthy she says:—

"Q. The first thing you heard was this man stand up and make the remark which you have told us? A. Yes.

"Q. What happened then, did that make you look, *did you notice anything different in the action of the car at all?* A. Every person on the street car got excited from the action of this man." (She explains later that by this she means stopped talking to see what it meant.)

"Q. Did you notice any jerking or jolting of the car; did you hear any noise besides the gentleman call out? A. No.

"Q. Nothing at all? A. No."

Earlier she is asked:—

"Q. When did you first know that an accident happened? A. When the car stopped.

"Q. Where did the car stop? A. At the side door of the Rupert Hotel on Parliament street."

The Rupert is on the corner of Queen and Parliament. A fire was in progress when the case was being tried, and by consent

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the evidence of Edward Mooney and Thomas Kennedy, given at the coroner's inquest, was put in. The company were represented at the inquest by Mr. Forest. These men, as members of the fire department, one of them an engineer, were just the class of men to notice everything that happened. They were standing together upon the rear platform.

Edward Mooney swears that he heard the fender drop and drag along the street for 150 or 200 feet. It was dragging all the time from the time he heard it drop until the car stopped at Queen street. He did not know anything unusual except the dropping of the fender until, seeing the crowd gather, he jumped off. He noticed that the car went right on, and wondered that they did not stop to lift the fender. The motorman did nothing about it at all.

"Q. The car did not come to a sudden stop then? A. It stopped at its usual stopping-place; he did not stop in between.

"Q. You could hear the fender distinctly, could you? A. Yes, from the back platform, and it drew those people's attention to it, and we wondered why he didn't stop when the fender was dragging."

The conductor shewed no excitement. When the car stopped, he took names, etc.

The deceased was right under the fender. The car had to be backed and the fender raised to get him out. He was unconscious, and this witness helped to take him to St. Michael's Hospital. "I thought myself it was only a fender dropped."

Kennedy's evidence is to the same effect. .

Before the decision of the Privy Council in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, there were cases in our Supreme Court to the effect that specific negligence causing the injuries complained of must be shewn. This is not now the law. In *Grand Trunk R.W. Co.* v. *Hainer* (1905) 36 S.C.R. 180, it was held that the deceased had a right to cross the track, and, as there was no evidence of want of care upon his part shewn, negligence upon his part could not be presumed. In this case it was also held that, although there was not any precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved.

In *Winnipeg Elec. R. Co.* v. *Schwartz*, 16 D.L.R. 681, 49 S.C.R.

80, referring to the *Dominion Cartridge Co.* case, Davies, J., says (p. 84): "Since that decision, however, this Court has followed the rule or principle there laid down, namely, that where the circumstances are such that positive and direct evidence on specific negligence cannot be given it is open to a jury, if the facts as proved are sufficient, to find such negligence as a fair reasonable inference from those facts." This case establishes that when a street railway company's servants are acting negligently or in ignorance of what is happening at or about the time of the occurrence complained of, it is a circumstance from which the jury may infer that the casualty was occasioned by their want of care.

In *Ramsay* v. *Toronto R. Co.*, 17 D.L.R. 220, 30 O.L.R. 127, it was held that, if the facts are capable of two equally possible views, it is the duty of the Judge to let the jury decide between these conflicting views.

The circumstances in which the deceased was found, and the manner in which the car was then being operated, are in themselves evidence of negligence: *Fleming* v. *Toronto R. Co.* 8 D.L.R. 507, 27 O.L.R. 332; *S.C., sub nom. Toronto R. Co.* v. *Fleming*, 12 D.L.R. 249; 47 S.C.R. 612; *Winnipeg Electric R. Co.* v. *Schwartz*, above; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596.

How did the matter stand at the conclusion of the plaintiff's case? It was in evidence that at about nine o'clock the plaintiff's husband left his home, sober, capable, and in good health, upon an errand involving the crossing and re-crossing of Parliament street, and expecting to be home within a few minutes. Within that few minutes he is struck by the defendant company's car at a distance of more than 200 feet north of Queen street, is dragged down for this distance by the fender of the car, and found under the fender when the car stops at its usual stopping-place, unconscious and practically dead. Four witnesses testify to the collision and the dropping of the fender, which is the same thing; and the uninterrupted grind as the car goes on from the point of impact to Queen street, the ordinary and unavoidable stopping-place; an operation from which in itself a jury would be quite justified in inferring the company's negligence as the cause of death.

It was in evidence that the car was going at a moderate rate of speed, and could be stopped in 80 feet (and, parenthetically

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cally, it would be surprising if there were not men upon that jury who from their knowledge of the operation of the cars in this city would find it difficult to believe that it would require emergency brakes to stop in 80 feet, or that with emergency brakes it would take anything like 80 feet to stop a car running at 8 or 10 miles an hour).

It was in evidence, on the testimony of the company's motorman, that he saw the deceased and struck and killed him, that he apprehended the danger, and reversed the motive power, and did everything necessary to stop in 80 feet, but the car did not stop nor abate its usual speed; and, although every other witness was cross-examined, there was no explanation offered of how it happened that, if this drastic measure was resorted to, neither the men standing on the rear platform nor Ella Beaver nor the conductor, nor anybody so far as appears, was in the slightest degree incommoded or felt the slightest jolt or jar, or knew or knows that it was done; there is no explanation of whom the unknown man was addressing, in a closed car, or whether what he said was addressed to the motorman, or what it meant: no explanation of the motorman's extraordinary and seemingly callous action in continuing his trip on down Parliament street exactly as if nothing had happened, and no explanation of how it was that a man, with protruding head and with his feet upon the rail, was struck on the head by the corner of a car 18 or 20 inches or more west of the rail, or how it happened that a man struck by a force from the north would fall east, or how it came about that a fender, which this witness swears can only be tripped by a frontal obstruction, was tripped in this instance by a weight falling upon it from above: *or which is true*—that the man was on the rail as asserted upon the trial, or in front of this witness and between the rails as previously sworn to by this witness?

These are all matters for the consideration of a jury, and which they are peculiarly qualified to reconcile or reject in arriving at conditions as they really were.

On the other hand, there was in evidence the testimony of the two men on the platform and Miss Beaver, upon which a jury would be perfectly justified in concluding, if they felt that the evidence as a whole demanded it, that Wares' story of the sounding of the gong, the standing on the rail, and the sudden and violent

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application of the emergency brake or any brake, unknown to anybody, was a pure fabrication, an afterthought for the protection of Mr. Wares. What they would have done is not to the point, if what they should have been allowed to deliberate upon is the issue. Was there evidence upon which reasonable men might find actionable negligence causing the accident?

With very great respect for the opinion of the learned Chief Justice who presided at the trial, and for the conclusion reached by members of this Court, much more experienced and capable of judging than I am, I yet hold the opinion that there was evidence which ought to have been submitted to the jury.

I think the appeal should be allowed and the judgment dismissing the action be set aside, and that judgment should be entered for the plaintiff for $1,200, with costs here and below.

Appeal dismissed; LENNOX, J., *dissenting.*

NORTHERN TRUSTS CO. v. BATTELL.

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Saskatchewan Supreme Court, Lamont, J. February 11, 1916.

MECHANICS' LIENS (§ III—13)—*Priority over mortgage—Increase in value.*]—Issue as to priorities in mechanic's lien action.

P. H. Gordon, for plaintiff.

H. J. Schull, for lien holders.

LAMONT, J.:—The issue in this action is whether or not the holders of mechanics' liens, against what was formerly a hotel in Moose Jaw, are entitled to any priority over the plaintiffs' mortgage.

The plaintiffs had their mortgage before the rights of any of the lien holders accrued. At the time they took their mortgage, there was a building on the premises which was used as a boarding house. Being desirous of turning this into a hotel, the owner of the property caused to be erected thereon an addition to the building, so as to provide the number of rooms required in order to obtain a hotel license. The liens arose by virtue of materials supplied in connection with this addition. After the building was completed a license was obtained and the building was used as a hotel for a time. The defendant Battell, who was the owner, testified that prior to the erection of the addition his price for the property was $6,500, but that after the addition was completed, and the license obtained, the selling value of the property was $25,000.

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By reason of the Sales of Liquors Act of 1915, licenses to sell liquors in hotels are not now granted in this province, and the value which accrued to hotel property by virtue of a license to sell liquors therein has disappeared. I, therefore, find that the selling value of the property is not more to-day than it would have been if no addition had been erected thereon. That this was the case was not seriously disputed. The argument on behalf of the lien holders was that the selling value of the property must be determined as of the date of the completion of the addition; that at that date a lien became a security to the holders thereof, and that if a subsequent depreciation in the value of the property took place, that depreciation should be borne *pro rata* by the mortgagees and lien holders alike.

I cannot give effect to this contention. The section of the Mechanics' Lien Act (R.S.S. 1909, ch. 150, sec. 7 (3), repealed by Act 4 Geo. V. 1913, ch. 38, sec. 1) relied upon by the lien holders, in force at the time they first brought their action, reads as follows:—

(3) In case the land upon or in respect of which any work or service is performed or upon or in respect of which materials are placed or furnished to be used is encumbered by a prior mortgage or other charge and the selling value of the land is increased by the work or service or by the furnishing or placing of the materials the lien under this Act shall be entitled to rank upon such increased value in priority to the mortgage or other charge.

This section gives a lien to the mechanic on mortgaged land where the selling value is increased by the work or service or the furnishing of material. This lien attaches upon such increased value in priority to the mortgage or other charge. Unless the selling value of the property has been increased the lien has no priority over the mortgage. Wallace on Mechanics' Liens, 2d. ed., p. 123.

This question came before the Divisional Court in Ontario in the case of *Patrick* v. *Walbourne*, 27 O.R. 221.

See also *Broughton* v. *Smallpiece*, 25 Gr. 290.

As the lienholders have not shewn that the selling value of the property is increased at all by virtue of the addition erected, they have no priority over the plaintiffs' mortgage. The depreciation in value of the property has the effect of wiping out the security of the lienholders before it affects the security of the prior mortgagee. *Judgment for plaintiffs with costs.*

TOWN OF THETFORD MINES v. AMALGAMATED ASBESTOS CO. Ltd.

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. July 24, 1916.

TAXES (§ I C—38) — DOUBLE TAXATION — "SPECIAL TAXES" — MINING OPERATIONS—LAND.

Mining operations are quite distinct from the means by which these operations are carried out; it is the use and purpose to which mining property is put which constitutes mining operations; therefore a tax on the immovable property of a mining company is not a tax upon the company's mining operations.

[*Amalgamated Asbestos Co.* v. *Thetford Mines*, 23 Que. K.B. 198, reversed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, Quebec, Appeal side, 23 Que. K.B. 195. Reversed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—The resolution of the dispute in this case depends upon the true meaning to be given to a short, but equivocal section in a Statute of Quebec (5 Edw. VII., ch. 48), by which the appellants were incorporated.

The question raised is as to the liability of the respondents, who are a mining company, to pay a sum of $1,711.60, the proportion assessed in respect of their buildings, machinery, and fixtures, of a special tax levied by the corporation for the purpose of providing an aqueduct and waterworks for the town. The Court of King's Bench of the Province of Quebec, reversing the judgment of the Superior Court, have declared that the respondents are not liable, and from them this appeal has been brought.

The appellants were formerly the corporation of the village of Kingsville, in the Province of Quebec, but by the statute to which reference has already been made they were incorporated under their present name on May 20, 1905. By sec. 4 of the statute the territory and boundaries of the town were defined, and within that territory the respondent company carries on its business of mining and owns immovable property consisting of land, asbestos mines, buildings, and machinery.

In the statute giving powers to the corporation special provisions are contained for taxation relating to mines, and these are to be found in sec. 21 and its three sub-sections. It is sub-sec. 3 alone which gives rise to the difficulty in this case, but in order to ascertain the true meaning of that sub-section it is necessary to consider the section as a whole. It is in the following words:—

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1. The council may, notwithstanding any law to the contrary, make, amend, or repeal by-laws to compel every person or company owning or occupying lands comprised within each division described in the following article, whether they mine or do not mine on the said land, to pay the municipality a special yearly tax determined in the following manner:— .

(*a.*) A sum of $50 for every person or company not mining on its own land, or paying less than $10,000 in wages to its employees, yearly;

(*b.*) An additional sum of $100 for every $10,000 of wages paid to the employees, provided the total amount of the tax does not exceed $500.

2. The tax above designated can be imposed only during 20 years after the coming into force of the present Act.

3. The persons and companies subject to this special tax shall be exempt from any other special tax in respect to their mining operations.

After their incorporation the appellants duly passed certain by-laws. The first on December 26, 1905, was identical in terms with sec. 21. The second was passed on May 17, 1909, and was adopted on the 9th June, 1909, and it is this by-law by which the power to levy the tax in question was conferred on the appellants. It took the form of authorising the issue of certain debentures to secure a loan of $200,000, the amount to be raised for the purpose of paying debts incurred in the purchase of an aqueduct and the building or improving of a system of waterworks; in order to provide for the interest at 5% upon this money and a sinking fund of 1%, it further provided that the sum of $12,000 should be collected annually for a period of 45 years by a special tax on the immovable property situated within the limits of the town, and such tax was imposed rateably at so much in the dollar on all such property within the district according to the valuation roll then in force. Under this by-law the respondent company was assessed in respect of its immovable property at a total sum of $1,884.60. The assessment was distributed between two mines owned by the respondent, and known as the King's Mine and the Beaver Mine, and made up of various sums appropriated to different descriptions of property, the total special tax on the land being $173.70, and that on various items under the following heads—buildings, mill, storage, etc., mill machinery and installation, hoisting apparatus, rolling-stock and track, office—being $1,711.60 in all, thus making up the total sum of $1,884.60.

This sum the company declined to pay, and these proceedings were instituted for its recovery. The ground of defence to the action depended entirely upon sub-sec. 3 of sec. 21, the company alleging that the tax was a special tax in respect to their mining

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operations within the meaning of that sub-section, and that they were consequently exempt from its payment. The Superior Court found against them for the total sum, but the Court of King's Bench limited the tax to the items representing the lands, namely, $173.70, and held that, in respect of the other items, the company had established their defence.

Their Lordships are unable to agree with this view. In ordinary language, mining operations are something quite distinct from the means by which those operations are carried out. Ownership of property and the use to which that property is put are separate conceptions, and, in their Lordships' opinion, the Court of King's Bench was in error in thinking that in the present instance these two ideas were one.

Considering the whole structure of sec. 21, it, in substance, imposes a tax upon the working of a mine. It is quite true that the section in terms declares that it is a tax on a company owning lands, whether they mine or not, but if they do not mine the tax is a fixed annual payment of $50; while, if they do, the tax is levied according to the wage bill of the company, and proceeds on an *ad valorem* scale, rising with the payment of these wages up to, but not exceeding, $500. If the $50 can be regarded as a fixed tax upon the land, the remainder of the tax is only payable in the event of the mine being worked, and depends for its amount on the extent of the mining operations.

In their Lordships' opinion sub-sec. 3 is intended to exempt the mining company from any similar taxation. It is quite possible that power to impose such taxation is conferred by art. 5735 of the Cities and Towns Act (R.S.Q. 1909), which was expressly incorporated in the statute of 5 Edw. VII., ch. 48, but, even if it were not, the section is intended to protect the company from a double tax on mining operations, however imposed. A tax, if imposed selectively upon mines, would be, in their Lordships' opinion, a special tax, for, in the absence of any definition of a special tax, such a tax would be either a tax levied generally on all property for a special purpose, such as the tax in question, or a tax on a special industry levied either for special or general purposes. It may not be easy to define exactly the line which will separate in all cases a special from a general tax. It is sufficient to say that a tax may be special

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either by reason of the object for which it is levied or the subject out of which it is raised. In the present case there is no doubt that the tax is a special tax by reason of the purpose for which it is imposed, and it is declared to be so by the by-law by which it was authorised. Their Lordships think, however, that the sub-section must be read not as meaning a special tax by reason of the purposes to which it is to be applied, but as a tax specially laid upon mining operations, and this condition the present tax certainly does not fulfil. Apart, however, from this conclusion, their Lordships still think that the respondents would be liable. It is urged on their behalf that the sub-section might be read as though it provided that companies shall, in respect of their mining operations, be exempt from any special tax, under whatever category the special tax might fall. Even conceding this, there would still remain the question as to whether it is in respect of the mining operations that the tax has been levied. In this connection, their Lordships can draw no distinction between the land and the machinery and buildings which stand upon it. They are, taken together, the necessary property that must be owned for the purpose of mining, but there is no reason why a difference should be made between the land, on the one hand, and the buildings and the machinery on the other. They are all equally immovable property, and if one part must be exempt the other must be also. Now the respondents do not challenge the tax upon the real property, apart from the buildings and machinery, nor if they did would their challenge be effectual, for such an argument would result in saying that the mining company in respect to its mining property should be exempted from the special tax. These are not the words used, nor are they their equivalent in meaning. It is the use and purpose to which the property is put which constitutes the mining operations, and it is not this upon which the general tax has been placed.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the judgment of the Court of King's Bench should be set aside with costs and the judgment of the Superior Court restored.

The respondents will pay the costs of this appeal.

Appeal allowed.

HAMILTON, GRIMSBY AND BEAMSVILLE R. CO. v. ATT'Y.-GEN'L FOR ONTARIO.

IMP. P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. July 18, 1916.

1. CONSTITUTIONAL LAW (§ II A 3—200)—DOMINION POWERS—RAILWAYS—"GENERAL ADVANTAGE OF CANADA."

The Parliament of Canada has power by subsequent enactment to properly and effectually modify or repeal a declaration under sec. 92 (10) B.N.A. Act, 1867, whereupon a railway previously declared "to be for the general advantage of Canada or for two or more of the provinces," becomes again subject to the jurisdiction of the province in which it is situate.

[*Re Ross and Hamilton, Grimsby and Beamsville R. Co.*, 25 D.L.R. 613, 34 O.L.R. 599, affirmed.]

Statement.

APPEAL from the judgment of the Supreme Court of Ontario, Appellate Division, 25 D.L.R. 613, 34 O.L.R. 599. Affirmed.

The judgment of the Board was delivered by the

Lord Chancellor

LORD CHANCELLOR:—This is an appeal of the Hamilton, Grimsby, and Beamsville Railway Company against a judgment of the Appellate Division of the Supreme Court of Ontario, affirming an order of the Ontario Railway and Municipal Board, dated May 10, 1915. The order of the Railway Board directed that the appellants should construct certain sanitary conveniences on their railway, and the appeal against that order was brought, not because the appellants objected to the construction of the sanitary conveniences, but because they asserted that the Ontario Railway and Municipal Board had no jurisdiction whatever to make the order, inasmuch as their railway was really a Dominion Railway, and not in any way under the control of the Provincial Board.

The facts of the case are these. The appellant company was incorporated by the Province of Ontario in 1892. The extent of the railway they were formed to construct and work is some 23 miles or thereabouts. It is worked by electric power, and it is wholly situate within the Province of Ontario. In 1895 the appellants proposed to carry their railway across the track of the G.T.R., and an order was made on January 28, 1895, permitting such crossing. The appellants assert that, by virtue of the B.N.A. Act of 1867 and the Railway Act of Canada of 1888, the effect of that order was to take their railway out of the jurisdiction of the Province of Ontario and place it within the category of a Dominion Railway.

The B.N.A. Act of 1867, by sec. 92, provides that in each

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province the legislature may exclusively make laws in relation to matters coming within the classes of subjects that are there enumerated, and among the classes that are enumerated are local works and undertakings, other than

such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

In 1888 the Railway Act of Canada was passed, and this contained certain provisions with regard to railways crossing other railways that were within the legislative authority of the Parliament of Canada. There are many sections in that statute to which reference would be needed if it were necessary to consider exactly the terms of sec. 306 upon which the appellants rely, for it is quite true that if a comparison be made between sec. 306 and some of the other sections, a contrast will be found between the specific railways which are the subject of sec. 306 and the general terms in which all railways are referred to in the other sections. This would become a very important matter if their Lordships thought it was essential to construe sec. 306. But they do not think it is essential, for this reason, that even assuming in favour of the appellants that sec. 306 did effect a declaration within the meaning of sec. 92, sub-sec. 10 (*c*) of the B.N.A. Act, and thus place the railway within the authority of the Dominion and outside the authority of the province, yet none the less that statute has been in terms repealed, and if that repeal is effectual to change the status of the appellant company, then their railway is a Dominion Railway no longer, and the Ontario Railway and Municipal Board had full jurisdiction to make the order which is the subject of the appeal.

The statute which effected this repeal was passed in 1903. The repealing section is sec. 310, and that repealed *in toto* the previous statute, and by sec. 7 a special declaration is made with regard to railways crossing other railways that were subject to the legislative authority of the Parliament of Canada. That section runs in these terms:—

Every railway, steam, or electric street railway or tramway, the construction or operation of which is authorised by a special Act passed by the legislature of any province now or hereafter connecting with or crossing a railway, which, at the time of such connection or crossing, is subject to the legislative authority of the Parliament of Canada is hereby declared to be a work for the general advantage of Canada, in respect only to such con-

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nection or crossing, or to through traffic thereon, or anything appertaining thereto. . . .

This railway in question answers every one of the necessary conditions prescribed in the earlier part of sec. 7. If, therefore, there was power left in the legislative authority of the Dominion of Canada to pass this Act, then, it is obvious that, even assuming the railway had been placed within that authority by sec. 306, it is there no longer, and there is no power within the Dominion to control its affairs. Their Lordships are clearly of opinion that sec. 92, sub-sec. 10, never intended that a declaration once made by the Parliament of Canada should be incapable of modification or repeal. To come to such a conclusion would result in the impossibility of the Dominion ever being able to repair an oversight by which, even with the greatest care, mistakes frequently creep into the clauses of Acts of Parliament. The declaration under sec. 92, sub-sec. 10 (*c*), is a declaration which can be varied by the same authority as that by which it was made. In the present case their Lordships see no reason to doubt that if the statute of 1888 effected such a declaration as to place the whole railway under Dominion control, that declaration has been properly and effectually varied, and the appellant company have ceased to be, even if they ever once were, under the control of the Dominion Board.

Other questions have been raised in the course of the argument, and notably one of great importance, with regard to the power of the Dominion Parliament to pass such a statute as that of 1888, on the hypothesis that sec. 306 bore the meaning for which the appellants contend. This question is of great importance, but, for the reasons that have been given, its decision is unnecessary.

Their Lordships think that this appeal should be dismissed on the simple question which has already been stated.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs. *Appeal dismissed.*

MAN.

K. B.

REX v. GERASSE.

Manitoba King's Bench, Mathers, C.J.K.B. June 29, 1916.

GAMING (§ I—6)—AUTOMATIC GUM VENDING MACHINE—ELEMENT OF CHANCE.

Despite the fact that an automatic gum vending machine, into which coins are placed and from which gum and trading checks are obtained, indicates in advance of each operation precisely what will be obtained, it is a gambling device, because the operator speculates each time he

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works it on the combination for the succeeding operation which will result.

[*Rex* v. *Stubbs*, 21 D.L.R. 541, 25 D.L.R. 424; *Rex* v. *O'Meara*, 25 D.L.R. 503, referred to.]

Statement.

PROSECUTION under sec. 228 of the Crim. Code for keeping and maintaining a common gaming house. Accused convicted.

A. E. Conde, for the Crown.

B. C. Parker, for accused.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The accused is indicted under sec. 228 of the Code for keeping and maintaining a disorderly house, to wit: a common gaming-house, to which persons resorted for the purpose of playing a game of chance.

A common gaming-house is defined by sec. 226, as follows:—

(*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or,

(*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill.

By sec. 986, "if any house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or betting" it shall be *primâ facie* evidence that such house, room or place is a common gaming-house.

The evidence here is that two provincial government constables, or inspectors, visited the accused's place at 958½ Main St. in this city on May 9th last. It consists of a small store in which is vended candy, confectionery, gum, cigars, soft drinks, ice cream, etc.

Conspicuously situate in the store was a machine known as "The Mills O.K. Counter Gum Vendor."

It is admitted that the accused is the owner of the premises, and that this machine was operated for gain and profit. The machine is a device about the shape and size of a cash register, and is set in motion by placing a United States nickel in a slot at the top, and pulling a lever at the side. By this operation three cylinders, visible to the operator, are, by means of internal mechanism, revolved rapidly upon a shaft. They start together, and apparently revolve at the same rate of speed, but are, by a mechanical device, stopped in succession. At equal intervals, upon the face of these cylinders, are certain characters, and the result of the operation depends upon the combinations which these characters make when the machine has come to rest. The value of each combination is stated on a plate on the front of

the machine. An indicator, to which attention is directed by a hand, shews the player each time he plays, and before he plays, what he will receive, as the result of that play. It always shews either the word "gum," or one of the even numbers, 2 to 20, both inclusive. If the indicator shews the word "gum," it means that the player will receive a packet of gum on the next operation. If it indicates any of the even numbers, 2, 4, 8, 12, 16, 20, it means that upon the next operation the player will receive a packet of gum, and also, from another receptacle, a number of brass disks, equal to the number shewn on the indicator. These disks are worth five cents each in trade at the counter, but cannot be exchanged for cash. If the player does not take the gum left for him after each play, it is again absorbed into the machine.

The machine may be operated by depositing in the slot the brass disks, instead of nickels, but in that case no gum is received, only such number of disks, if any, as is shewn on the indicator.

In a frame at the top of the machine there is the following notice printed:—

No element of chance. To advertise the sale of this excellent gum premiums are given of goods in the store. The indicator shews exactly what the purchaser receives. It aids digestion. It perfumes the breath, and keeps the teeth as bright as pearls. Place five cents in the slot. No sales to persons under 16 years of age. The management reserves the right to discontinue use at any time. No assurance of more than one sale to each customer.

Upon the upper glass opening the statement is repeated that

The management reserves the right to discontinue use at any time, no assurance of more than one sale to each customer.

Lower down there is a further notice that "Boys under 16 years of age are not allowed to use this machine."

For every nickel deposited each customer will receive a package of gum and trade checks to the number shown on small window. N.B. If no number shown gum only will be delivered.

On the other side of the opening is the statement, "No blanks. You will receive a five-cent package of gum for every nickel played. Profits shared as per notice shewn below."

The contention of the Crown is that this machine is a "contrivance for unlawful gaming," and is therefore *primâ facie* evidence of the charge laid.

The only evidence given was that of the two constables, who visited the premises on the day in question. They each obtained at the counter from the young woman in charge, a number of United States nickels in exchange for the equivalent of Canadian

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coin. One of them played the machine 4 times, and received four packets of gum, and four brass disks, three of which he exchanged for a drink and a cigar at the counter. The other constable played the machine twice, receiving two sticks of gum. After his last play the indicator shewed the figure 2, and he borrowed a disk from his friend and with it won the two checks, one of which he gave to his friend, and retained the other. It was admitted that the gum cost 1 cent per package, wholesale.

The accused's store was manifestly a place to which persons resorted. The accused having admitted that the machine was kept for gain, or profit, resulting from its being played, there only remains the question of whether or not playing this machine is playing a game of chance. If so, the accused's store comes under or within the definition of a disorderly house, as given in sec. 226, sub-sec. (*a*) of the Code.

It was held in *Fielding* v. *Turner*, [1903] 1 K.B. 867, that the operation of an automatic machine, in which no person but the player and the machine takes part, may constitute playing an unlawful game. In such a case the keeper, or owner of the machine, backs his chances against the person who uses it. The same was held in *New Mexico* v. *Jones*, 20 L.R.A. (N.S.) 239 (1908), 99 Pac. R. 338, 20 Am. & E. Ann. 1128.

It has been held that whether or not such a game is one of skill or of chance is a question of fact: *Thompson* v. *Mason*, 20 T.L.R. 298. With this peculiar result, that in one case playing a machine was held to be a game of skill, and, therefore, lawful; *Pessers* v. *Catt*, 29 T.L.R. 381 (1913); whereas in two other cases playing an identical machine was held to be unlawful —*Donaghy* v. *Walsh*, L.R., [1914] 2 Ir. 261; *Ogilvie* v. *Benigno* (1906), 7 F. 82; *Thompson* v. *Mason*, 20 Cox C.C. 641.

It was not contended by the accused that skill enters into the operation of this machine, but it is argued that the operator, when he approaches the machine, and before depositing his nickel in the slot, can see exactly what he will get as a result of depositing his coin and pulling the lever. If the indicator shows "gum," he will get a packet of gum. If it shews any of the even numbers before mentioned, he will get a packet of gum and also as many brass disks as the indicator shewed. From this premise it is argued that the element of chance does not exist, and, therefore,

that operating the machine is not playing a game of chance. If the play was limited strictly to one operation, or if the player beforehand could tell the result of any number of plays, as in *Yale Wonder Clock* v. *Surman* (*Note*), L.R.A. (N.S.) 74, or if the indicator always indicated that the machine would each time yield the same reward as the result of depositing a nickel in the slot, the element of chance would be entirely absent. The player, however, has no means of knowing in advance what the indicator will next shew as a result of his play. It may be only gum, or it may be gum, plus any of the figures mentioned. Every time a player deposits a nickel and pulls the lever, he has the certainty of getting a packet of gum, and the number of trade checks, if any, shewn on the indicator, but he has also the chance of thereby bringing about a combination which will shew that by the deposit of another nickel he may obtain another packet of gum, and an uncertain number of trade checks.

Machines, identical in their operation, if not actually identical in construction, have recently been before the Courts in Canada, with somewhat varying results. In *Rex* v. *Langlois*, 23 Can. Cr. Cas. 43, the Judge of Sessions of the Peace of Quebec City held that a machine called the "O.K. Gum Machine" is not a gambling device. The Judge seems to have based his judgment upon the fact that the player knows beforehand what the result of each individual play will be, and also upon the fact which he holds the evidence to have established, that the chances were equal between the player and the owner.

The next case, in which a machine in all respects similar to the one in question here came before the Court, is *Rex* v. *Stubbs*, 21 D.L.R. 541, 24 Can. Cr. Cas. 60, and in appeal at 25 D.L.R. 424, 24 Can. Cr. Cas. 303. It came first before Stuart, J., upon a motion to quash a conviction of the police magistrate of Calgary. The Judge, in an elaborate argument, found the charge made out, and affirmed the conviction. On appeal to the Full Court, the decision of Stuart, J., was reversed, Harvey, C.J., dissenting. The judgment of the majority was delivered by Scott, J., who held that each operation of the machine was in itself a game, and the fact that the inducement is held out that in some future game the operator may receive something more than an adequate return for his money, does not introduce the element of chance into any game which may be played upon the machine.

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Both *Rex* v. *Langlois*, and the majority ruling in *Rex* v. *Stubbs*, were disapproved of by the Ontario Court of Appeal in a unanimous judgment of Meredith, C.J., Garrow, Maclaren and Magee, JJ.A., and Kelly, J., in *Rex* v. *O'Meara*, 25 D.L.R. 503, 34 O.L.R. 467. The machine in that case, was, so far as can be gathered from the report, identical in operation with the one in question in the other two cases. Magee, J., by whom the judgment was delivered, says, at p. 505:—

> It needs only to state the transaction to realize that each depositor was taking part in a game of chance. It is true that he need not again pull the lever nor avail himself of good fortune if it offered, but that may be said of the winner of any gaming stake, or lottery prize. It may also be that the proprietor of the machine knows exactly how many blanks there are to the prizes, or how often, or even in what order, the different combinations will or can appear, or it may be that there is a fixed order. But, even if that were shown to be so, the whole operation is still one of pure chance, so far as the depositors are concerned, with no element of skill.

Slot machines, by the operation of which the player was always entitled to gum or a cigar to the value of the coin deposited with every play, but also had the chance of winning much more, have generally been held by the U.S. Courts to be unlawful gambling devices: *Meyers* v. *State*, 51 L.R.A. 496, 37 S.E.R. 96; *Lang* v. *Merwin*, 99 Me. 486, 39 Atl. 1021; *Re Cullinan*, 99 N.Y. S. Apps., 1098, 114 App. Div. 654; *Lytle* v. *State*, 100 S.W.R. 1160, and cases collected 20 Am. & Eng. A.C. 133. The same has been held in England with respect to a machine upon which the player has no chance of winning anything, but stands a chance of losing the coin hazarded. *Roberts* v. *Harrison*, 25 T.L.R. 700 (1909). In this case the accused kept in his shop an automatic machine with a slot in it. A person desirous of working the machine put a half-penny in the slot and pulled a lever, which projected a ball to the top of the machine. If it came back into one cup the half-penny was returned to the player; if it went into another the ball was returned to the player to be played again, and if it went into a third cup the half-penny became the property of the proprietor. In this case the player stood no chance of winning anything. There was a chance that he might get back his half-penny, and there was a chance that he might lose it. It was contended that the machine was played for amusement only. Nevertheless, the keeper of the shop was convicted under a statute against using his shop for unlawful gaming.

After the above United States decisions, and most probably

with a view to evading their consequences, a machine was brought out like the one in question, by which each player was informed before he deposited his nickel the exact reward which he would receive, in kind, for that particular nickel. The first case I have found in which this re-formed machine came under review was *People* v. *Jenkins*, 153 N.Y. App. Div., 512, 138 N.Y. supp. 449, cited in 37 Am. & Eng. Ann. Cas., at 174. The machine described is identical in construction and operation with the one in question here. The Court there said: "Thus in addition to the gum and the trade checks indicated as the certain receipts upon the dropping of the nickel the operator is given an option to obtain a package of gum, and an uncertain number of trade checks upon the dropping of the second nickel. That this uncertain option has in it such an element of chance as constitutes gambling can hardly be questioned."

The Supreme Court of Indiana, in *Ferguson* v. *State*, 99 N.E.R., 806 (1912), 37 Am. & E. Ann. C., 92 L.R.A. (N.S.) 720, arrived at the same conclusion with respect to a like machine. The Court there said:—

> In the present case the fact that the machine would indicate the reward before it was played makes no difference. The inducement for each play was the chance that ultimately he would receive something for nothing.

The last case I have found dealing with this class of machines is a decision by the Supreme Court of Tennessee, *State* v. *McTeer*, 167 S.W.R. 121, and it is in accord with the other cases cited.

The above are all the authorities I have been able to find, in which a device similar to the machine kept by the accused, has been in question. Upon the authority above, the case is a strong one against the accused. Independently of authority it is equally strong. The machine is cunningly devised to lure the player on by the prospect of getting something for nothing. There is always the chance that the player, by the expenditure of 10 cents, may obtain not only two packages of gum, but checks worth, at the counter, anywhere from 10 cents to 100 cents as well. The player is induced to continue by the fact that he is getting 5 cents' worth of gum each time he plays, with always the chance just ahead that the next presentation of the indicator will give him a large profit. If the machine did not afford that chance it would not be used. If there was only the chance of getting gum

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every time, there would be no inducement to operate the machine. It is the hazard, the chance of winning more than the sum ventured, which attracts people to the machine. It is calculated to minister to the gambling humour, and therein lies its vice. The statute is intended to suppress the gambling propensity—a propensity which this machine is designed to stimulate and arouse.

Counsel for the accused sought to differentiate this machine from the one held to be a gambling device in the *Rex* v. *O'Meara* case (25 D.L.R. 503), by the fact that upon it there is a notice to the effect that the proprietor may stop any player at any time. I am much inclined to believe that this notice is a mere subterfuge, never intended to be acted upon, but framed to keep within the letter of the law, while violating its spirit. The fact that the machine is there to be played, whether the proprietor is present or not, would indicate that such was its purpose. But, assuming that the notice was *bonâ fide* placed there with the intention of being acted upon, it does not eliminate the elements of chance, but rather increases the hazard of the player. Without the notice he would be entitled to play the machine, if he chose, until he won 100 cents' worth of trade checks. Now, by the terms of the notice, he is exposed to the hazard of the proprietor stepping in and stopping his further play, just as the indicator shewed that by another play he could make a profit, thus preventing him from getting what, by his previous play, he had earned. This by no means takes away the element of chance, but adds, as another element, the chance of the proprietor interfering.

I find the accused guilty of the offence laid in the indictment.

As I understand this prosecution has been brought to test the right to use these machines I will impose only a nominal fine of $10.00. *Accused convicted.*

CAN.

S. C.

VANDRY v. QUEBEC RAILWAY, LIGHT, HEAT AND POWER CO.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. March 3, 1916.

ELECTRICITY (§ III A—16)—ESCAPE OF CURRENT CAUSING FIRES—DEFECTIVE TRANSFORMER—LIABILITY.

A power company is liable to its consumers for damage caused by the escape of electricity in consequence of an unsafe system of transmission.

[*Quebec, etc., Power Co.* v. *Vandry*, 24 Que. K.B. 214, reversed. Leave to appeal to Privy Council granted.]

APPEALS from the judgments of the Court of King's Bench, appeal side, 24 Que. K.B. 214, reversing the judgments of Dorion, J., in the Superior Court, District of Quebec, and dismissing the actions with costs.

L. A. Taschereau, K.C., and *Cannon*, K.C., for the appellants.

G. G. Stuart, K.C., for the respondents.

DAVIES, J. (dissenting):—Notwithstanding the enormous mass of testimony which appears to have been given in these cases and the great number of points raised by the plaintiffs on which it is contended that the defendants should be held liable, it seems to me that the real substantial questions are reduced to very few,—First, whether there was evidence of negligence on the part of the defendant company in not grounding their transformer secondary wires, or other negligence which was an effective cause of the damages complained of, and next whether the company is liable for these damages irrespective of proof of negligence under the statute 58 & 59 Vict., ch. 13, under which they were carrying on their operations and under arts. 1053 and 1054 of the Civil Code of Quebec.

The case of the plaintiff Vandry and the four other appeals, by insurance companies which are suing as having been subrogated to the rights of the parties whose houses they had insured, depend upon the same facts and are the result of fires which took place on December 19 and 20, 1912, which the appellants contend, as I think rightly, were caused by an electric current supplied by respondents for the lighting of the burnt buildings.

As to the contention that, without proof of fault or negligence, absolute liability of the company is established under art. 1054 C.C. upon its being proved that the damage sued for was caused by a "thing which it had under its care" or because, as contended, the company failed to prove that it was unable to prevent the act which caused the damage, I am in full accord with the judgment of the Court of appeal which, as I understand it, is that fault or negligence causing or contributing to the accident on the part of the defendant company not having been proved, they are not liable for damages.

The question, to my mind, resolves itself into this:—Whether the respondent company can be held responsible for damages resulting from the exercise of its statutory powers where no negligence on its part is proved.

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VANDRY v. QUEBEC RAILWAY, LIGHT ETC. CO.

Davies, J.

In the case of *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220, it was held by the Judicial Committee of the Privy Council that:

A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or, in other words, by the proper execution of the power conferred by the statute.

The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion Railway Act, secs. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers:—

So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

Later, in the case of *Dumphy* v. *Montreal Light, Heat and Power Co.*, [1907] A.C. 454, the Judicial Committee held

that the respondents, being authorized by Quebec Act, 1 Edw. VII. ch. 66, sec. 10, in the alternative, to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.

Each of these decisions was based on the ground that proof of negligence or fault causing the injuries complained of was essential to entitle a person injured to recover damages caused by the exercise by a company of its statutory powers.

The current of decisions in this Court has, I think, been uniform to the same effect and no decision that I am aware of can be found to the contrary, supporting the proposition now contended for under article 1054 of the Civil Code.

There must be evidence proving the existence of fault on the part of the defendant, or, at any rate, since the decision of the Privy Council in the case *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, from which the tribunal may reasonably and fairly infer both the existence of the fault and its connection with the injury complained of.

Then, as to the contention that sub-sec. (*e*) of sec. 13 of the Dominion Act incorporating the company and under which it was operating declared the company should be

responsible for all damages which its agents, servants or workmen caused to individuals or property in carrying out or maintaining any of its said works,

I would apply the language used by The Lord Chancellor in delivering the judgment of the Privy Council in the case of *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220 at 231.

Sec. 288 (of the Railway Act of 1888) is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at . . . the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what is made an actionable wrong in another. *It would reduce the legislation to an absurdity*, and their Lordships are of opinion that it cannot be so construed.

But whatever may be the meaning of the language of this clause (*e*) it cannot, in my opinion, be construed so as to embrace or cover such an accident as we have proved in this case, one caused by *force majeure* and without negligence on the part of the respondent company.

The substantial, if not the only ground on which the plaintiffs could hope to establish negligence on the part of the company was the non-grounding of the transformer secondary wires.

The company, in erecting its poles along the roadside and supplying electricity to light the houses whose owners or occupants desired to have it, was admittedly doing so in the exercise of a statutory power authorizing it to carry electricity on wires attached to poles on any public road in the vicinity of Quebec.

In the operation which it was so carrying on, it was doing that which the statute authorized.

The trial Judge distinctly found that, with the above exception of this non-grounding, none of the complaints made against the condition of the line were well founded.

The company's contention was, and it seems to me to be proved, that its wires were strung along poles placed on the St. Foy Road, on the highway, and were in good order and condition, that on the night on which appellant's house was destroyed a large branch of a tree growing on the property of Victor Chateauvert, one of the parties insured and whose rights became subrogated to the Queen Insurance Co., one of the plaintiffs, was, as the result of a great wind and sleet storm, blown off the tree and carried out to the highway upon the respondent's wires bringing the primary wire, with its high-tension current, into contact with the secondary. The tree was approximately 90 ft. high and the branch which broke was at a measured distance of 63 ft. from the ground. It was a branch growing upwards in a westerly direction and at the time it broke was covered with a thick coating of ice and driven by a wind which attained a speed of 38 miles

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an hour. The respondent defendants further contended that if the wiring of the house had been properly done and efficiently maintained, instead of being as it was most defective, no injury probably would have resulted, even if the high-tension current had been introduced into the house.

It was also proved that the defendants (respondents), were in no way responsible for the house wiring. That was a matter entirely within the duty of the plaintiffs (appellants).

The primary wires, three in number, were strung from pole to pole upon cross-bars, and the secondary wires, two in number, were strung some distance beneath them on other cross-bars.

The tree on Chateauvert's property from which the branch broke off was in a field at a distance of 22 ft. 6 ins. from the road-fence and a few feet further from the centre of the pole line. To reach the primary wires it was contended the branch must have been carried a distance of 33 ft. 6 ins. and this could only be done by an extremely violent wind and by the broken branch sliding along the lower branches of the tree, all of which were heavily coated with ice. The tree and the branch were shewn to have been sound, without any visible weakness and defect, and the branch, some 9 ft. in length, was one of the exhibits in the case produced before this Court.

The majority of the Court of Appeal was of the opinion that nothing was shewn to have existed which should have caused any one to anticipate the occurrence of such an accident as happened, that it was one for which respondent defendants were in no way responsible and that, in view of the proved defective condition of the interior wiring of the burnt buildings, for which the respondents were not responsible, the grounding of the transformer would, instead of being a protection, have been rather an added danger.

After hearing the argument at bar and reading the evidence of the different experts and engineers on the point of this grounding and the correspondence between the defendants' manager, and Mr. Bennett, in December, 1911, on the same question, I have reached the same conclusion as the Court of Appeal, namely, that while electrical expert opinion is strongly in favour of the grounding of the transformer secondary wires as a protection and safeguard against accidents happening from the possible contact of

the primary wire with the secondary wires in cases where the inside wiring of the houses is good, such grounding would not be a safeguard or protection with respect to houses the inside wiring of which was as bad and defective as it was shewn to have been in this case.

Being of the opinion, therefore, that the respondents, in the exercise of their statutory powers, were not responsible in damages for injuries not caused by negligence on their part; that no such negligence was or could be found on the facts of this case; that the accident which happened and brought the primary and secondary wires into contact and carried the high-tension current of the former into the houses was caused by the branch of a tree being blown off and carried, by force of a high wind in a sleet storm, some distance out to the highway and on to the wires and was an accident which they could not have anticipated and for which they should not be held responsible, and against which no precaution has been suggested which they could or ought to have taken; and that the injuries caused to the plaintiff might have been avoided if the inside wiring of his house had not been bad and defective, a condition for which he alone is responsible, I would dismiss this and the other appeals with costs.

Idington, J.

IDINGTON, J.:—Notwithstanding the voluminous material of law and fact presented for consideration herein, and over two days of argument spent in enlightening us as to the bearing thereof, I think that to be decided in the case is within a very narrow compass, when we accept as proven that which every fair-minded person seems to have assumed, and eliminate that which is either irrelevant or immaterial.

Yet, as will presently appear, from my point of view there are some things relevant to what has to be decided which one should have desired to know more about than is presented in evidence or has been dealt with in argument.

Passing, meantime, these considerations it seems abundantly clear that the property in question was destroyed by the force of an electric current of 2,200 volts passing into the premises in question which no one could ever have imagined had been prepared to receive and resist the ill effects of more than a current of 108 to 150 volts of electric current.

It is equally clear that this was produced by reason of a large

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branch of a tree breaking and being blown by the wind upon the wire of respondent. The danger of such a thing happening was so well recognized by those engaged in the business that experts, including respondent's witness, Mr. Herdt, hereinafter quoted on other points, tell us without hesitation or contradiction that those so engaged out of necessity for safety seek to have the trees near to their wires removed or so trimmed as to avert or ameliorate such damages.

Everything, therefore, urged in law or in fact as an impediment to the application of such means of safety rendered it the more incumbent upon the respondent to secure, by other means, the protection of life and property where it carried on its operations.

The freezing of rain falling upon the trees at certain seasons in Canada and consequent destruction of their branches by force of wind operating upon them when so laden is too frequent an occurrence to escape the attention of any intelligent person.

The possibility of the branches being in such circumstances carried from tall trees a much greater distance than anything involved herein should be so obvious to any Canadian, keeping his eyes open, that it is hardly necessary to dilate upon that incidental feature appearing in this case and becoming a subject of grave argument. In short, the case is reduced to the consideration of a few facts and the law bearing thereon.

The respondent is engaged in the business of lighting by means of electricity. It produces electric current for distribution. In order to divide the current generated therefor it uses transformers whereby the main electric force is reduced to such fractions thereof as may be conducted with safety into houses or other places to be lighted by means of lamps it supplies for the purpose. These fractional currents, if I may so speak, are conducted by one wire, or set of wires, whilst the main or primary current is carried upon another wire. Both wires are carried overhead by means of same set of poles and cross-arms and should be so far apart as to avoid the dangers of induction of current from one to the other.

It is alleged, and, I incline to think, supported by some evidence, that the respondent's primary and secondary wires were strung too close together. In my view of the case I have not found it necessary to reach a definite opinion upon that disputed

fact. I therefore eliminate it from what is necessary to be considered.

The naked facts are that the branch of a tree (which might, under the circumstances I have adverted to, be so expected to fall and, hence, had to be guarded against) falling upon these wires, caused in the absence of the use of grounding at the transformer, the current of 2,200 volts to be carried in the primary wire to pass into the secondary wire and thereby to the houses only prepared or supposed to be only prepared to resist, or rather receive with safety, a current of one hundred and eight volts.

The result in each house in question herein was a fire and destruction of property.

The appellant Vandry was indemnified for part of his loss by the insurance companies which, in turn, were subrogated for him in respect of so much thereof as so paid, and they sue by virtue of such subrogations.

Other companies claim in subrogation of the other sufferers.

Nothing turns upon the question of subrogation beyond one or two points of procedure and costs to be referred to hereafter.

The trial Judge held the respondent liable mainly, if not entirely, upon the ground that there was a means well known to the respondent which it ought to have adopted, but did not adopt, to provide for just such probable contingencies as happened, and, for the reasons I have already given, were likely to happen.

That means was the grounding at the transformer of the secondary wire whereby the augmented current therein caused by the accident would have been conducted to earth instead of into the houses in question.

The means of insuring safety by grounding secondary wires at the transformer is thus referred to by Mr. Herdt, one of the respondent's scientific expert witnesses, as follows:—

Q. You also add that this practice has been carried into effect very generally by most large operating companies? A. Yes, sir. Q. That was to your personal knowledge? A. Yes, to my personal knowledge. Q. For how many years prior to this letter, had this practice been carried into effect by the large operating companies, as stated by you in your letter? A. Some of the large operating companies have started grounding transformer secondaries early in 1900, 1902 or 1903, but it has taken them years to carry that out. Q. But the grounding of transformers was being put into effect by large operating companies 10 years prior to your letter? A. 10 years; hardly 10 years. Q. That is what you have said. You have said 12 years even? A. It was started. Q. It was started in or about 1900? A. In 1902 or 1903.

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Q. So, for 10 years that had been going on? A. For 10 years that had been going on.

The results are testified to by same witness as follows:—

A. Do I personally know of any case where the inside wiring is good and the transformer grounded? Q. Yes? A. No, I do not know of any case. Q. So in all the cases that you are aware of, or that come to your knowledge, when the transformer was grounded and the inside wiring being good, no fire started? A. No. If I know of any case? Q. Yes? A. No, I do not.

The only answer made thereto which seems worth a moment's consideration is that in the case of a defectively wired house there would be a possibility of increasing thereby the danger to life and property therein.

It was further alleged that the houses in question were of the defectively wired class. But how is that an answer? Had the respondent any right to venture to supply light to such a house? Where in its charter or in law can it find justification for doing so? The means for determining whether or not a house is of that character is referred to by Mr. Herdt, its own witness, as follows:

Q. I am very sorry to say that all that happened. Now I understand that there are some special instruments to test the wiring in a private dwelling? A. Yes. Q. Are they expensive instruments? Counsel for defendant objects to this question. A. No. Q. These tests may be easily made by the electrical company? A. Very easily. Q. Easily made? A. Easily made. Q. And it is a perfectly safe test? A. Perfectly safe test. Q. If the wiring will hold that test, then the transformer can be grounded without any trouble? A. Well, the different companies may have different methods of testing, different requirements of testing; but generally speaking the insulation resistance test is not a difficult one to make. Q. So as an electrical engineer, you know of not only one method of testing, but of several good methods of testing? A. Yes. Q. And if the wiring will pass that test, why, you can recommend the grounding of the transformer? A. Yes, sir. Q. As a safety device for life and fire? A. Yes, sir.

And Mr. Wilson, another of its witnesses, says:—

Q. It is quite easy for the electrical company to test the wiring of the houses as you do in Montreal? A. Yes, they can test to find out if there is ground, easy enough. Q. And your practice in Montreal is to refuse current to any house that will not stand the test? A. Well, we have to cut them off. Q. So that good wiring won't suffer for the bad? A. We exact now a certificate from the fire underwriters to connect the thing.

And this condition of things had prevailed in Montreal, he tells us, since 1909, about 4 years before this accident.

Surely the distance between Montreal and Quebec is not so great as to have prevented the intelligence of what was known at the former place to have reached the understanding of those in the latter place conducting a business wherein it became their bounden duty in law to recognize the advancement of scientific

knowledge and the results of experience in order that they might exercise due care and have some regard to the protection of the lives and property of others.

Mr. Wilson tells us that previous to 1905 they had been so unfortunate as to have had two or three people killed by primaries and secondaries coming into contact.

Suppose there had been someone killed instead of only a fire occasioned by the neglect of duty on the part of the respondent's management, and the manager had been placed on trial for manslaughter and the evidence herein, especially of his perversity, spread out in his correspondence with Mr. Bennett appealing to him for a change of methods and practice, had been adduced, I am puzzled to know what answer he could have made to such a charge. Yet, substantially the question here involved and that in the case I put are the same. The only difference is that one depends on the interpretation to be put upon two articles of the Code designed to secure a remedy for those suffering from the neglect of others and in the Criminal Code is expressed in secs. 247 and 262 combined in slightly different language.

I can understand the case of a man in the situation of Vandry having contracted himself out of any recourse against the respondent. That, however, is not pretended here. All we can infer from what appears is that there must have been a contractual relation between the respondent and someone to light, by means of electricity, the premises in question in each case.

It was the duty of respondent to have seen to it when applied to for such a service that it could perform the service with something like reasonable safety for life and property.

Was this appellant Vandry or his tenant the Hunt Club the applicant for the service herein? So far as the printed case goes I am unable to discover. He had bought the property from the club in February, 1912, and agreed to lease it to the club. He had, apparently, been a member of the club when, in 1909, the work was done of installing electrical appliances therein, and I gather had been on a committee having to do with letting that contract.

If the relations between the parties had been more accurately and definitely put in evidence it would have been more satisfactory.

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In many cases of negligence the legal relationship between the parties concerned must be examined with care. The nature and quality of the act or omission called negligence can only in many such cases be determined as result of such examination.

The relation between a company like the respondent and a tenant can hardly as of course and of necessity explain away all the rights of the owner seeking relief against negligent conduct of the company towards him such as in evidence herein.

If the tenant and company were both found to have entered, without his permission, into any enterprise endangering the premises, that would not of itself answer the claim of the owner.

As this phase of the matter was not presented in argument and the evidence is far from clear, the only use I wish to make of it is by way of illustration of how little there is, when one comes to consider the respondent's pretensions in the answer it makes, relative to the failure to protect by grounding the wire.

In such a case as I put, and as possibly in fact exists herein, there could be found no excuse for attempting to supply electric current without testing to see if the fixtures were sufficient to ensure safety when protected by means of grounding. If so found it could and should protect by grounding. Otherwise it should, out of regard to the lives and property of others, refuse to turn its dangerous machine's destructive forces upon the property.

It seems, from the evidence, clearly established that when this course is pursued, there is practically no danger of fire or loss to any one; save in the possible loss to the company of the possible profits derivable from an undesirable customer. It should never be forgotten that in such case the safety of adjacent properties either not using electric lights, or using them with the very best electrical fixtures available, are all jeopardized by following any other course.

I think the duty was the same in the case of any one applying as owner for lighting to be done, unless the owner contracted to assume the risk.

The owner's ignorance is generally as great, when he contracts for such service, as if he had never been consulted, as in the case I put of a tenant doing so behind his back as it were. But even in such a case what right has the respondent or any like company to endanger adjacent properties of others? The franchise given

by its charter never was intended to permit such a course of conduct.

Again, in the case of any one being applied to, who is supposed to possess skill in his business, to undertake anything for someone relying upon his skill, he is not generally supposed to presume that the man he is to serve knows as much as he. If he neglects to inform him of the risks he runs he is negligent of his duty in the premises.

How much more must that be implied in the case of one who has to answer for his conduct under art. 1054 of the C.C.?

Again, it has been well pointed out by Carroll, J. (if he is right in assuming the rules appearing in the case apply to respondent's contract), one of the rules it requires to be observed is:—

> The consumer is not permitted to make additions or alteration in his installation without receiving the written consent of the company.

This seems to pre-suppose an inspection and a contract in relation to the existing features as the basis of acting.

Assuming, for argument's sake, the answer made which I have been considering to present something arguable, I am far from accepting the view presented by counsel for respondent relative to the facts as bearing out his argument.

The report of Morissette looks as if many things had to be rectified, but that was a year before the fire, and what happened meantime I cannot assume to have been complete neglect of the report and its requirements, and I cannot find it satisfactorily explained in a way to support the contention.

Nor does the evidence seem to bear out the suggestion of its construction being old, as it seems to have been done over in 1909 under a contract intended to satisfy the underwriter.

In my view, however, this does not matter for it certainly, even if all that is claimed by respondent, would not prove that the best wiring would have prevented a fire with a current of 2,200 volts which it seems to be admitted entered the house as result of the accident.

I, however, do not find the repondent excused thereby. I think it might well be found guilty of negligence under art. 1053 C.C. But, at all events, under art. 1054 C.C. it clearly was negligent and has not, upon the evidence, been excused in any way. I see no difficulty in the pleading which is comprehensive enough to cover either case the evidence fits. I think art. 1054 C.C. fits

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the pleading, and the proof. And both pleading and facts adduced in proof thereof peculiarly fit the case for which art. 1054 was framed. I am not disposed to fritter away the effect which should be given and I think was intended to be given respectively to the admirable and comprehensive arts. 1053 and 1054 C.C. for the respective situations to which each is applicable.

The respondent failed in its obvious duty under the then well known results of experience and the advancement of scientific knowledge, to take proper precautions.

It had no right in law to attempt to shift, as it did, long before this accident now in question, the responsibility devolving upon it under the law in such circumstance or await the result of a public prosecution by way of indictment for continuing a public nuisance. It should have refused to undertake anything so easily discoverable as likely to endanger the property of others and constitute an indictable nuisance and must be assumed to have run the risk of negligently so proceeding. To appeal to *force majeure* as a defence under such circumstances seems an idle confusion of thought.

The judgment in the case of *The Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220, relied on by respondent, at foot of p. 230 and top of p. 231, disposes, in the following sentence, of all that rests therein:—

> The permission, of course, does not authorize the thing to be done negligently or even unnecessarily to cause damage to others.

This was, if ever there was, an unnecessarily causing of damage.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial Judge be restored.

The question of procedure invoked by the respondent is one with which we never interfere unless something more than costs is involved and that is all that seems to me in that regard involved herein.

Duff, J.

DUFF, J. (dissenting):—I have throughout used the word "appellants" as if the actions had been brought on behalf of the owners of the property and that it was the owners who are now appealing to this Court.

The first question to be decided turns upon the effect of certain statutory provisions upon which the appellants rely. The principal Act of the respondent company is ch. 59, of 58 & 59 Vict. (1895), in which the undertaking of the company (then known as the Quebec Montmorency and Charlevoix R. Co.) was declared

to be a work for the general advantage of Canada and by which it was further declared that that Act and the Railway Act of Canada should apply to the company and its undertaking instead of certain statutes of Quebec. The statute of 1895 was amended by ch. 85 of 62 & 63 Vict. (1899), and by this statute the name of the company was changed to the name which it now bears. By the Act of 1895 the company was authorized to "construct, work and maintain" a railway in, among other places, the streets of Quebec and telegraph and telephone lines; and extensive compulsory powers were granted for these purposes. By sec. 2 of the Act of 1899 the company was authorized to:—

(*a*) "manufacture, furnish, use and sell or lease in the city and district of Quebec, light, heat and motive power, generated from electricity, and construct, acquire, work and carry on any lines of wires, tubes or other apparatus for conducting electricity either by land or water;

(*b*) "acquire lands, water powers and watercourses, and erect, use and manage works, machinery and plant for the generation, transmission and distribution of electrical power and energy;

(*c*) "build power houses and stations for the development of electrical force and energy, and acquire the factories or stations of other like companies, or lease their works, equipments, appurtenances and power;

(*d*) "acquire any exclusive rights in letters patent, franchises or patent rights for the purposes of the works and undertakings hereby authorized, and again dispose of such rights."

For the first time, apparently, the appellants raised the point in this Court that sec. 13(*e*) of the Act of 1895 has the effect of imposing upon the respondent company an absolute responsibility for harm arising from the working of the company's undertaking. I quote sec. 13 in full:—

Sec. 13:—With the consent of the municipal council or other authority having jurisdiction over the roads and streets of any city, town, municipality or district, the company may, by its servants, agents or workmen enter upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places in any city, incorporated town, village, county, municipality, district, or other place, for the purpose of constructing, erecting, equipping, working and maintaining its lines of telegraph and telephone and lines for the conveyance of electric power upon, along, across, over and under the same; and may erect, equip and maintain such and so many poles or other works and devices as the company deems necessary for making, completing and supporting, using, working and maintaining the system of communication by telegraph and telephone and for supplying power; and may stretch wires and other electrical contrivances, thereon; and, as often as the company, its agents, officers or workmen think proper, may break up and open any part whatsoever of the said public roads, highways, streets, bridges, watercourses, navigable and non-navigable waters and other like places subject, however, to the following provisions, that is to say:

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(a) The company shall not, in the construction or operation of its lines, interfere with the public right of travelling on or using such public roads, highways, streets, bridges or watercourses, and other like places, and shall not do any unnecessary damage, nor in any way obstruct the entrance to any door or gateway or free access to any building erected in the vicinity.

(b) The company shall not affix any telegraph or telephone wires less than 22 feet above the surface of the street, or road, nor erect without the consent of the municipal council having jurisdiction over the roads or streets of the municipality, more than one line of poles along any street or road;

(c) In all municipalities the poles shall be as nearly as possible straight and perpendicular, and shall, in cities, be painted, if so required by any by-law of the council.

(d) Whenever, in case of fire, it becomes necessary for its extinction or for the preservation of property, that the poles or wires should be cut, the cutting under such circumstances of the poles or any of the wires of the company, under the direction of the chief engineer or other officer in charge of the fire brigade, shall not entitle the company to demand or to claim compensation for any damage thereby incurred;

(e) The company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works;

(f) The company shall not cut down or mutilate any shade, fruit or ornamental tree;

(g) In all municipalities the opening up of streets for the erection of poles, or for carrying the wires underground, shall be subject to the supervision of such engineer or other person as the council appoints for that purpose, and shall be done in such manner as the council directs; the council may also direct and designate the places where the poles are to be erected in such municipality; and the surface of the streets shall in all cases be restored as far as possible to its former condition by and at the expense of the company.

(h) No Act of Parliament requiring the company in case efficient means are devised for carrying telegraph or telephone wires under ground, to adopt such means, and abrogating the right given by this section to continue carrying lines on poles through cities, towns or incorporated villages, shall be deemed an infringement of the privileges granted by this Act, and the company shall not be entitled to damages therefor;

(i) No person shall labour upon the work of erecting or repairing any line or instrument of the company, without having conspicuously attached to his dress a medal or badge on which shall be legibly inscribed the name of the company and a number by which he can be readily identified;

(j) Nothing in this Act contained shall be deemed to authorize the company, its servants, workmen or agents, to enter upon any private property for the purpose of erecting, maintaining or repairing any of its wires without the previous assent of the owner or occupant of the property for the time being;

(k) If in the removal of buildings or in the exercise of the public right of travelling on, or using any public road, highway or street, it becomes necessary that the said wires be temporarily removed by cutting or otherwise, it shall be the duty of the company at its own expense, upon reasonable notice in writing, from any person requiring the same, to remove such wires or poles, and in default of the company so doing it shall be lawful for any such

person to remove the same at the expense of the company, doing no unnecessary damage thereby; and such notice may be given either at the office of the company or to any agent or officer of the company in the municipality wherein such wires or poles are required to be removed, or in the case of a municipality wherein there is no such agent or officer of the company, then either at the head office or to any agent or officer of the company in the nearest or any adjoining municipality to that in which such wires or poles require to be removed.

The French version of sub-sec. (*e*), to which it may be convenient to refer, is as follows:—

"La compagnie sera responsable de tous dommages que ses agents, employés et ouvriers causeront aux particuliers ou aux propriétés en *exécutant ou entretenant quelqu'un de ses dits ouvrages.*"

This provision has not, in my judgment, the effect contended for; Lord Halsbury's language in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 310, is applicable.

When one considers how frequently the distinction between the execution of the works and the use of them when executed had been the subject of comment and discussion, I think it must be taken that the language used has been deliberately chosen by the legislature as pointing to a distinction, now well recognized, between the construction of works and the user of them when constructed.

A reference to other provisions of the Act shews that this distinction was not overlooked. See sec. 7*b*, sec. 8, sec. 9*a* and *b*, sec. 10, and sub-secs. 2 and 3, sec. 12 and sub-sec. 2, the whole of the substantive part of sec. 13 and sub-sec. *a*.

These provisions also suggest that the distinction between the user and maintenance was not unobserved. It may be noticed, also, that the collocation of words in sub-sec. (*e*) "damage caused by the agent's servants or workmen of the company" when read with sub-sec. (*j*) would indicate that the section contemplates such operations only as those specifically authorized in the substantive part of sec. 13,

entry upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places . . . erecting, equipping and maintaining

of poles and other works and devices; the stretching wires and other electrical contrivances thereon; breaking up, opening public highways, watercourses and other like places; and not to the acts of the "agents, servants or workmen" of the company in the working of its railway, for example, in the running of its cars.

The provision, of course, ought to be read with sec. 92 of the Dominion Railway Act then in force (51 Vict. ch. 29). Sec. 92 has always been held in itself to give only a right to compensa-

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tion under the special provisions of the Railway Act for lands taken or injuriously affected and this right has always been held to be available in those cases only in which lands are taken for the exercise of some legal right annexed to the ownership of the land, the right of access, for example, which is or is to be directly prejudiced by the construction or the operation of the railway. It is sufficiently obvious that sec. 13e may be given a considerable scope outside of the operation of sec. 92 of the Railway Act, without adopting the sweeping construction advanced on behalf of the appellants.

I think the language of the section cannot properly be held to extend to damages resulting from the non-negligent exercise of powers declared by the statute to be lawfully exercisable in the working of the company's undertaking (as distinguished from the construction or maintenance of its works), as, for example, the running of its cars in the streets of Quebec and in the working of its electric light plant.

Decisions upon one statute ought, of course, to be applied very cautiously in the construction of another statute, but I think it right to say that when one considers the manner in which secs. 92 and 288 of the Railway Act in force in 1895 and 1899 were construed and applied in *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220 (see particularly p. 231), and the manner in which the provisions of the Quebec statute 1 Edw. VII., ch. 66, and especially the provisions of sec. 10 (only quoted in part in the judgment), were applied in *Dumphy* v. *Montreal Light, Heat and Power Co.*, [1907] A.C. 454, one is not disposed to charge oneself with rashness in rejecting the construction proposed by the appellants.

Some of my learned brethren think that the plaintiffs are entitled to recover under a provision found in the last sentence of section two of chapter 71, 44 & 45 Vict. (Que.) incorporating the Electric Light Company of Quebec and Levis, which, apparently, became the Montmorency Power Co., the words relied upon being:—

> La compagnie sera responsable de tous les dommages qu'elle pourra causer dans l'execution de ses travaux.

I observe, in passing, that there is sufficient evidence in the language of the Act, sec. 6 for example, to shew that "travaux" is used in the sense of, to quote Lord Atkinson's expression in *City of Montreal* v. *The Montreal Street R. Co.*, 1 D.L.R. 681,

[1912] A.C. 333, of "physical things not services" and any contention founded upon this provision is properly subject to the observation made above as to the distinction between the "execution" of works and the use or operation of such works when executed, a distinction which was plainly not overlooked by the authors of this statute.

But the fatal objection against resorting to this provision as ground of relief is that there is nothing before us entitling us to hold that the damage complained of in this case was the result of the exercise of any of the powers conferred by the statute in which it is contained. Sec. 2 of the Act of 1899, quoted above, gives ample authority for the establishment and operation of a system of electric lighting for the City and District of Quebec, and I do not know on what ground this Court could judicially say, the matter not having been touched in the evidence and no point having been made of it by the parties, that the works in question here were constructed or are operated under the provisions of the Quebec Act. Sec. 15 of the Act of 1895 authorized the purchase of the "works, buildings and machinery" of the Montmorency Electric Power Co. There is nothing in sec. 2 of the Act of 1895 which imports the provision relied upon as a qualification of the powers thereby given. The Dominion Parliament, of course, did not assume in sec. 3 to legislate with regard to the works of the Montmorency Electric Power Co. as an undertaking established and carried on under the authority of the Legislature of Quebec. It necessarily (otherwise there would be no jurisdiction) treated these works as part of the undertaking of the Dominion company whose undertaking had been, by the statute of 1895, declared to be a work for the general advantage of Canada. The "franchise powers and privileges" referred to in sec. 3 as those enjoyed by the Montmorency Electric Power Co. "in virtue of its charter" which it is declared the Dominion company "may in future exercise and enjoy" must be read as "franchise powers and privileges" granted by the Dominion Parliament. I think it is questionable whether one is entitled to treat that as importing a provision of the local Act relating to the responsibility of the Montmorency Electric Power Co. in view of the fact that the works authorized by the local Act are being brought into and made part of a larger undertaking under the control of the Dominion and governed by different statutory provisions. At all events

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until adequate grounds are shewn against it the respondent company is entitled to justify under the general provisions of the Acts of 1895 and 1899 including section 2 of the Act of 1899. There are other difficulties in the appellants' way on this branch of his appeal. 1. Does a provision of this kind, construed as relating to the operations of the companies' undertaking, govern the legal relation between the company and its customers to whom it supplies electric light or power? The appellants must maintain the affirmative. The language is not apt for the purpose of making the company insurer of its customers against accidents in operation not attributable to negligence. But I pass that. It is quite too late now, in the state of the record, in view of the considerations above mentioned to base any relief upon this statutory provision which was not relied upon at the trial or mentioned in the pleadings.

2. Assuming the appellants to be right in their construction of the provisions I have been discussing and assuming the second of the provisions to be applicable, there is still, I think, an insuperable difficulty in the way of giving effect to the appellants' claim to relief in so far as it rests upon these provisions if the finding of the Court of Appeal be accepted, and I think it ought to be accepted, that the diversion of the electric current from the primary to the secondary wire was the result of *vis major*. Accepting that finding it results, I think, that on no admissible construction of these provisions can the company or the agents, servants and workmen of the company be held to have "caused" the damage for which reparation is claimed.

Lord Moulton in delivering the judgment of the Privy Council in *Rickards* v. *Lothian*, [1913] A.C. 263, at 278, said:—

> Their Lordships are of the opinion that all that there is laid down as to a case where the escape is due to "*vis major* or the King's enemies" applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. To follow the language of the judgment just recited—a defendant cannot, in their Lordships' opinion, be properly said to have *caused or allowed* the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.

A passage in the judgment of Lord Sumner in *Charing Cross Euston and Hampstead R. Co.* v. *Boots*, [1909] 2 K.B. 640, was relied on in the argument as authority for the proposition that the "cause" in the juridical sense was the generation of electricity

and the transmission of it through the company's wires, which was the work of the company's agents, employees and workmen; but the passage in question has obviously no reference to a case where *vis major* or the independent volition of a third person has intervened. An authority perhaps more directly in point is the judgment of the Privy Council delivered by Lord Robertson in *Dumphy's* case, [1907] A.C. 454. The injury complained of was the result of a derrick used by a building contractor being brought into contact with the overhead wires of the Montreal Street R. Company, the current of electricity thereby diverted having killed the plaintiff's husband. Speaking for their Lordships, Lord Robertson says:

> on the face of the case it is manifest that the *causa causans* of the casualty was the act of the person using the derrick.

The generation of the electricity by the respondent company which would have been harmless but for the interposition of a *novus actus interveniens* (*vis major*) ought not any more than the storing of water to be regarded as the cause of the resulting harm for the purpose of assigning responsibility.

A little consideration makes it plain that no distinction can for this purpose be drawn between the case of water stored for the storer's purpose and electricity generated for his purpose. If a mischievous person opens the outlet of a storage basin, or the confining barrier is destroyed or rendered useless by some accident of nature not foreseeable amounting to *vis major*, the storer is not responsible for the ensuing damage because, as Lord Moulton says, he has neither caused the water to escape nor allowed the water to escape although it was he who constructed the storage basin and collected there water which on escaping was certain to become a destructive agency. So if he constructs a flume to carry water from his dam to his power-house and somebody breaks down his flume at a place where the water, under a high head, escaping becomes an instrument of harm, or if this happens through some operation of nature which he could not be expected to foresee or to provide against he is not responsible in absence of negligence because he has neither caused nor allowed the water to escape; so also the energy of the water flowing through his conduits operating on the machinery of his power-house having become converted into electric energy which solely by reason of the mischievous interference of a third person, or of

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the operation of *vis major*, escapes control, this is a result which, for juridical purposes, cannot in general be properly ascribed to the measures he has taken for the purpose of and resulting in the conversion of mechanical energy into electrical energy but must be ascribed to the agency to which its escape is immediately due.

Strictly, of course, what I have said upon this point postulates a correspondence of meaning between "cause" as used in the provisions under consideration and "cause" as used by Lord Moulton in the passage quoted above. I think this is a legitimate reading; any broader reading of the word "cause" would, on the proposed construction, subject the company affected by these provisions to a stricter responsibility than that which would arise from the unfettered operation of the doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330.

In the result the rule governing the responsibility of the defendant company in respect of the operation of its electric lighting system, apart from special provisions in its statutes which have no application here, is that, generally speaking, they are responsible for harm caused by negligence and not otherwise —the rule applied in *Dumphy's* case, [1907] A.C. 454 and *Roy's* case, [1902] A.C. 220.

But the important question arises:—Is the status of the appellants *vis-à-vis* the respondent company either as regards the rules governing the burden of proof, or as regards the rules governing their substantive rights, affected by the circumstance that they were customers of the respondent company; and that the injury in respect of which reparation is claimed was an injury that would not have occurred but for the connection, at their instance or by their consent, between their houses and the respondent company's system by service wires put in place for their accommodation? Dealing with the question, apart from arts. 1053, 1054, 1055 C.C., I should have no difficulty in holding that the company's duty arising out of the situation, except in so far as it is modified by contract, is a duty to take proper care to protect the appellants and their property, and proper care involves, where the consequences of neglect may in the ordinary course be expected to be very serious, the use of a high degree of knowledge, skill and diligence. That is the view which has been taken in a number of cases in Canada and the United States

in which the question has come up, *Royal Electric Co.* v. *Hévé*, 32 Can. S.C.R. 462; Joyce, Electric Law, par. 445 *d* and *e*; and I think it is conformable to the legal principle according to which persons undertaking to perform services for others involving risk of harm from want of skill and from accidents beyond prevention by the highest skill are held generally not to be insurers but to warrant the execution of the undertaking with knowledge, skill and diligence commensurate with the gravity of the risk. The doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, is inapplicable because, apart from the effect of the statute, the risk arising from the connection between the customer's premises and the lighting company's system is a risk due to a situation created with the consent and for the benefit of the customer as well as of the company, and that risk, so long as it is not augmented by the company's negligence, is a risk which he assumes just as a passenger on a street-car assumes the risk of accident not avoidable by the exercise of proper care by the carrier. A risk arising from a situation created by common consent for the common benefit is not within the contemplation of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330; *Carstairs* v. *Taylor*, L.R. 6 Ex. 217, *Blake v. Woolf*, [1898] 2 Q.B. 426.

But the Judges in both Courts below have taken the view, and I understand the majority of the members of this Court also take the view, that the effect of arts. 1053, 1054, 1055 C.C. is to create a presumption of fault which is a presumption of law capable of being repelled by the respondent company only by establishing that the fire in question was not due to any want of care on its part, the effect of these articles being, according to this view, that once it is shewn that the fire is the result of the escape of electricity from the respondent company's system the burden of establishing that the escape was not due to negligence on his part is cast *by law* upon the company.

Although such cannot, in view of the decisions I have mentioned, be held to be the operation of art. 1054 C.C. as between a member of the public having no special relation with the company carrying on a statutory undertaking, *e.g.*, a way-farer struck by a street-car, I am not aware of any decision that excludes the application of art. 1054 C.C., according to whatever be the proper construction of it, for determining the reciprocal obligations and rights of the company and persons taking advantage of its services

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although it would appear strange to find a rule of law putting upon a railway company the burden of proof in the issue of negligence or no negligence between it and a passenger and leaving the incidence of the burden upon a farmer whose crop is destroyed by fire resulting from the escape of sparks from an engine. I shall point out what seems to me to be a conclusive reason against the application of arts. 1053, 1054, 1055 C.C. according to the appellants' construction of them to this case; but first I shall briefly discuss the appellants' contention as to the effect of them. Before going into arts. 1053, 1054, 1055 C.C. it is, perhaps, desirable to point out in a word or two the difference in practical effect between the view, which, I think, is the right view, as touching the onus of proof resting on the appellants and the view in relation to the subject which has prevailed with the majority of the Judges who have been called upon to pass upon the appellants' claims. The appellants' claims being, I repeat, according to my view, necessarily based upon an allegation that they were injured by the respondent company's negligence in respect of the custody of the electricity in their system, the burden of the affirmative of that issue is a burden which remains upon the appellants to the end; the question put to itself by the tribunal of fact at the conclusion of the whole case is—taking all the evidence together—have the appellants established by an adequate preponderance in the weight of evidence the affirmative of the issue negligence or no negligence? The situation is well explained in the judgment of Brett, M.R., in *Abrath* v. *North Eastern R. Co.*, 11 Q.B.D. 440, at 452. The subject of the burden of proof in this aspect of it is discussed in the treatise on Evidence in Halsbury's Laws of England, vol. 13, pp. 433 to 436, and, in a very illuminating way, in ch. 9 of Thayer's Preliminary Treatise on the Law of Evidence.

This is not to say, however, that the burden of proof, in another sense, did not shift from the appellants to the respondent company during the course of the trial. The moment the appellants established a *primâ facie* case the burden of proof was cast upon the respondent company in the sense that if no further evidence were given there would have been judgment for the appellants. The *primâ facie* case shifts the burden of proof in this sense although it does not affect the burden of establishing the issue which remains with the appellants to the end.

The appellants, as I have said, made out a *primâ facie* case the moment they proved that the fire was due to a current of excessive voltage. So to hold is entirely in conformity with authority and long practice. In *Great Western R. Co.* v. *Braid*, 1 Moo. P.C. (N.S.) 101, a passenger injured in a railway accident due to an embankment giving way was held to have made out a *primâ facie* case of negligence on proof of the fact that the embankment had given way; so the fact of the collision of trains constitutes a *primâ facie* case of negligence. The sufficiency of facts to constitute a *primâ facie* case is not determined by any rule of law of general application. The doctrine of the *primâ facie* case rests upon this—that the facts proved taken together with the failure on the part of the defendant to give any explanation justifies the inference of negligence. The doctrine of *res ipsa loquitur* rests upon that.

But the appellants having given evidence constituting a *primâ facie* case, the respondent company could meet that case by proving facts which, while not establishing the non-existence of negligence, should destroy the preponderance of evidence in favour of the plaintiff. The practical effect as regards this appeal is, as I have already indicated, that the question to be determined is whether or not, on the whole of the evidence, the appellants have shewn that the fire in question was due to the negligence of the respondent company.

The other view is this: art. 1054 C.C. declares that where one person suffers harm from something in the care of another the law presumes that the harm is due to the fault of the person having care of the thing which has caused the harm, the practical consequence being, as regards the case before us, that the burden of establishing the negative of the issue negligence or no negligence is cast by law upon the respondent company the moment the origin of the fire is proved; and that at the conclusion of the case the appellants must succeed unless the tribunal is satisfied that the respondent company has established the non-existence of negligence leading to the escape of electricity.

In *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, I have given my reasons in support of the view above indicated as to the construction and effect of arts. 1053, 1054, 1055 C.C. which is that, except in the particular cases specified in those

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articles where *faute délictuelle* is the ground of the action, it must be proved and that the legal presumption of fault for harm caused by "things under one's care" arises only in those specific cases.

There appears to be very little room for dispute that such was the French common law. Admittedly this view of the effect of arts. 1382, 1383, 1384, and 1385, C.N. was accepted without dissent or suggestion of dissent both by *la doctrine* and by *la jurisprudence* in France down to 1870.

[Reference to an article by M. Saleilles (10 Rev. Trimestrielle p. 38): also to (Cours Elémentaire de Droit Civil Français, vol. 2, p. 390).]

It was not until 1908 that the Cour de Cassation departed from the traditional French view. In this country the Quebec Court of Appeal (Taschereau, C.J., Bossé, Trenholme, Lavergne, Cross, JJ.) in *Canadian Pacific R. Co.* v. *Dionne*, 14 Rev. de Jur. 474, decided in 1908, expressly and formally declared as follows:—

> The fact of the injury alleged having been caused by a thing under the control of the defendant, has not in law of itself the effect of placing upon the defendant the burden of proving that the injury was caused without fault on the part of the defendant or his servants.

A declaration in harmony with decisions of the same Court pronounced in great numbers during the preceding 40 years.

And in the Supreme Court of Canada, in 1906, in *Paquet* v. *Dufour*, 39 Can. S.C.R. 332, Mr. Justice Girouard referred to the course of the decisions in this Court in the following language:

> Before closing, I wish (says the learned Judge), to point out a considérant of the trial Judge to which I cannot subscribe:
>
> "Considérant que la dite explosion ayant été causée par de la dynamite dont le défendeur était le propriétaire et dont il avait la garde, il doit être tenu responsable des dommages qui en sont résultés pour le demandeur, à moins qu'il n'ait preuvé qu'il lui a été impossible de l'éviter."
>
> We have so often decided in our Court that proof of fault, whether by direct evidence or by presumption, rests upon the plaintiff, that it is not necessary to quote authorities.

Without entering upon an analysis of the language of the articles 1053, 1054, 1055 C.C. for which I may refer to my judgment in *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, at p. 312, I quote two paragraphs from that judgment touching the effect of the legislation by which the Civil Code was formally declared to be law in the Province of Quebec.

> A far stronger reason against excluding the pre-existing law from consideration is afforded by the terms of the enactments under the authority of

which the Code came into force as law which evince very plainly the intention to declare, in articles 1053, 1054, 1055 the law as it then stood. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of Commissioners and directing that they should embody in the Code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force, giving the authorities on which their views should be based, but stating separately any proposed amendment. Then (the commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioners as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain specified amendments eliminating and altering the provisions of it only so far as should be necessary to give effect to these amendments; and providing that the Code so altered, should, on proclamation by the Governor, have the force of law.

It hardly seems necessary to comment on the effect of this legislation. It very manifestly exhibits the intention of the legislature that the provisions found in the roll referred to were not, excepting in so far as they should be affected by the amendments specified, to effect any substantial alteration in the law then actually in force in Lower Canada. Among the provisions contained in this roll (and untouched by the amendments sanctioned), are articles 1053, 1054, 1055 C. C.; and in construing them we have therefore this clear and important guide to the intention of the legislature.

The view of the effect of art. 1054 C.C. which appears to have been taken by the majority of the Court below, namely, that it creates a presumption of law that harm arising from things under one's care, whether in their nature dangerous or not, is due to one's fault, which presumption can be repelled by proper and sufficient general evidence of the absence of fault. This view has not been accepted in France either in *la doctrine* or in *la jurisprudence*. A very lucid and concise account of the present state of *la doctrine* and *la jurisprudence* on this subject is given by MM. Colon et Capitant at pp. 390-391, vol. 2, of the work already referred to.

In *la doctrine* the weightiest authorities favour the theory known as *faute objective* or *risque professionel* of which the late M. Saleilles was the most eminent protagonist, the doctrine, in a word, that the incidence of responsibility in law depends upon the incidence of risk and that one ought to bear the risk of harm from things one exploits for one's own benefit. In exploiting for one's benefit *choses inanimées* one acts at one's peril. The course of la jurisprudence may be described in the language of MM. Colon et Capitant, as follows:—

On a pu croire un moment que la jurisprudence allait suivre les novateurs dans la voie qu'ils frayaient. Un arrêt de la Chambre civile du 16 juin 1896

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(D. P. 97. 1. 433, S. 97. 1. 17) semblait en effet s'y engager, car il affirmait la responsabilité du propriétaire d'une machine, (d'un remarqueur), qui avait fait explosion, bien que cette explosion fut due à un vice de construction auquel il était étranger; et après cette décision autour de laquelle on mena grand bruit, on en rencontre quelques autres encore se rattachant par leurs motifs à la théorie du risque créé (Trib. Seine, 23 janvier 1903, D. P. 1904, 2. 257; Lyon, 18 janvier, 1907, D. P. 1909, 2, 245; Trib. com. Seine, 23 décembre 1911, Gaz. Pal. 19 janvier 1912). L'une de ces décisions n'avait-elle pas condamné le propriétaire d'un café à indemniser un consommateur par ce seul motif que le demandeur avait été blessé par l'éclatement d'un siphon?

Mais ce courant peut être considéré aujourd-hui comme définitivement tari. La Cour de Cassation a, par plusieurs arrêts, condamné le nouveau système d'interprétation (Req. 30 mars 1897, D. P. 97. 1. 433, S. 98. 1. 65; Civ. 31 juillet 1905, D. P. 1905. 1. 532, S. 1909. 1. 143).

Néanmoins, si la jurisprudence a refusé de suivre les novateurs dans l'interprétation audacieuse qu'ils proposaient, elle n'en a pas moins subi leur influence. En effet, elle admettait autrefois, nous l'avons vu, que la victime d'un accident causé par un objet inanimé devait prouver la faute commise par le propriétaire de cet objet, ou par celui qui s'en servait. Aujourd'hui, au contraire, elle considère que l'article 1384, al. 1, crée une présomption de faute à l'égard de ce propriétaire, et, en conséquence, elle fait peser sur lui la charge de la preuve.

La jurisprudence, toujours sous la même influence se montre plus sévère; elle applique ici la même solution qu'au propriétaire ou gardien d'animaux. Il ne suffira donc pas au défendeur d'établir qu'il n'a commis ni négligence ni imprudence; il devra prouver que le dommage provient soit de cas fortuit, soit de la force majeure, soit de toute autre cause étrangère, par exemple de la faute de la victime ou de celle d'un tiers, en un mot il faudra qu'il précise le fait générateur du dommage subi par son adversaire (Req. 22 janvier, 1908, D. P. 1908, 1. 217; 25 mars 1908, D. P. 1909. 1. 73, S. 1910, 1. 17; Bordeaux, 14 mars, 1911, S. 1913, 2. 257; Pau, 13 janvier, 1913, Gaz. Pal. 2 avril, 1913; Paris, 4 décembre, 1912, D. P. 1913, 2, 80, S, 1913, 2. 164 et Req., 19 janvier, 1914. Gaz. Pal. 7 février, 1914.) V. cependent Req. 29 avril 1913, D. P. 1913. 1. 427, exemptant le propriétaire d'un chaine ayant occasionné un accident par sa rupture, motif pris de ce qu'on n'a pu relever aucun vice de construction et "qu'il a été impossible de déterminer la cause d'un événement qu'il ne dépendait de lui ni de prévoir ni d'éviter.)

From the point of view of verbal interpretation simply there is probably more to be said in favour of these views which have found acceptance in France than can be said for the view adopted by the Quebec Court of Appeal.

I have pointed out in the *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, at 317 to 320, the impossibility of reading par. 6 of art. 1054 C.C. as applying to the first paragraph of the article as well as to the particular case mentioned in paragraphs two to five. The English version is conclusively against this application of par. 6 and art. 2615 C.C. requires us, where the two differ, to resort to that version which is the more conformable

to *le droit commun*. The French theories above referred to both rest upon the hypothesis that the first paragraph of 1384 C.N. while not in itself establishing a principle of responsibility, indicates a principle of responsibility underlying the precise dispositions of arts. 1385 and 1386 C.N.; and that, although the framers of the Code Napoleon had no thought of any such principle, it is the legitimate function of the Courts to extend by analogy the supposed principle of those dispositions (harmoniously with the *ensemble* of the law in force for the time being) to new conditions as they arise. M. Saleilles in the article to which I have just referred (p. 42) uses these words:—

> En réalité, les avocats et les juges n'avaient pas donné de la loi une interprétation inexacte, en l'interprétant jadis autrement qu'on ne l'interprète aujourd'hui. Ils lui attribuaient alors, et avec raison, le sens qui ressortait des principes généraux admis autrefois par l'ensemble de la législation. Ces principes généraux se sont modifiés aujourd'hui; et, en se modifiant, ils ont influé sur le sens qu'il faut attribuer actuellement aux textes restés sous la dépendance directe de ces mêmes principes juridiques. C'est le sens intime de la loi qui a varié, ce ne sont pas les juges.

And he adds that it is the duty of the Courts to act upon their view of what the legislator would have enacted if he had envisaged the conditions of to-day. If this were a legitimate procedure much might be said for the conclusion of M. Saleilles, and much for the theory of *la jurisprudence* in France and much also it may be added for the view of the Court of Appeal; in truth the want of unanimity as to result (there are other theories current in France), is but the natural consequence of following a procedure which, under the name of judicial interpretation, in reality amounts to explicit judicial amendment of the law. I use this phrase because the process described by M. Saleilles is what we should unquestionably call legislation, and there can be no doubt that the abrupt reversal by the Quebec Court of Appeal in *Doucet* v. *Shawinigan Carbide Co.*, 18 Que. K.B. 271, of the principle of its previous judgment in *Canadian Pacific R. Co.* v. *Dionne*, 14 Rev. de Jur. 474, pronounced only a very short time before was the direct result of French influence. I cannot understand on what principle (compatible with proper respect to judicial precedent), this Court can now sanction an interpretation of art. 1054 C.C. which it has again and again rejected. See *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, at 309 and 310.

There is, moreover, I think, this complete answer to any claim

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under art. 1054 C.C. Assuming the first paragraph of art. 1054 C.C., when read with art. 1055, to justify the extension of the dispositions of art. 1055 to analogous cases, it is quite clear that there is no analogy between the specific cases therein provided for and the case where as here the risk, incidence of which the plaintiff seeks to make the defendant discharge, arises out of a situation created by the common consent and for the common benefit.

As to the questions of fact, I think the judgments of the Chief Justice and Pelletier, J., shew satisfactorily that the appellants have failed to make out that the fires are ascribable to the negligence of the respondent company. I will add that I do not differ from the finding that the circumstances in which the high-voltage current escaped to the secondary wire constitute a case of *vis major*.

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ANGLIN, J.:—The question for determination in these cases is the liability of the defendant company for damages occasioned by fires caused by a high-tension electric current (approximately 2,200 volts), carried on its primary wires, having passed from them to its secondary or low-voltage wires and thence into buildings of its customers fitted with a system of wiring designed to carry a current not exceeding 108 to 110 volts. It appears to be so well established that it is practically common ground that the immediate cause of connection having been established between the primary and secondary wires was the falling across them of a large branch from a near-by tree, which stood on the adjacent property of one of the defendants' customers.

In this Court the plaintiffs rested their claims upon four distinct grounds:—

1. That by the statute (58 & 59 Vict. (D.) ch. 59, sec. 13) under which they were operating, the defendant company is declared to be

> responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works.

Its original Act of Incorporation (44 & 45 Vict. (Q.), ch. 71, sec. 2), provides that the company

> shall be responsible for all damages which it may cause in carrying out its works;

and the works authorized by the section in which this provision is made are, *inter alia*,

> to manufacture, furnish, produce, use and sell or lease light, heat and motive

power in the city and district of Quebec generated from electricity and to establish, construct, etc., lines of wires, etc.

Under this legislation, it is asserted that the company is liable for damage caused by the electric current which it transmits upon its wires, without regard to any consideration of fault or negligence on its part.

2. That without proof of fault or negligence, absolute liability of the company is established under art. 1054 C.C. upon its being shewn that the damage sued for was caused by a thing which it had under its care.

3. That liability under art. 1054 C.C. exists at all events, because the company failed to prove that it "was unable to prevent the act which caused the damage."

4. That proof has been given of specific negligence or fault on the part of the company (*a*) in not having taken adequate precautions to guard against the fall of the branch which fell across and broke its wires (*b*) in not having had its transformers grounded.

I make no allusion to other grounds of fault which were urged, either because they were not alleged in the particulars furnished, or because they were so clearly disproved that they are not open for consideration in this Court.

It was so obviously unnecessary to provide expressly for liability of the company in case of fault or negligence that the explicit declarations of responsibility above quoted can scarcely have been inserted to cover that ground. There is nothing in the language of the clause in either statute which requires that it should be so restricted in its application, and it is

a settled canon of construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. The *Queen* v. *Bishop of Oxford* (4 Q.B.D. 245, 271); *Ditcher* v. *Dennison* (11 Moo. P.C. 325, 337).

It would, therefore, seem proper to regard these clauses as intended to declare that, in empowering the company to do what would otherwise be unlawful, both the Legislature and Parliament meant to subject it to liability for injuries which might arise from the carrying out of its undertaking in cases in which the legislative authorization of such undertaking would, but for such provisions, entitle it to claim immunity. *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C., 220; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381. With

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similar clauses in legislation conferring special privileges we are not unfamiliar. *Gale* v. *Bureau*, 44 Can. S.C.R., 305; *Dumont* v. *Fraser*, 48 Can. S.C.R. 137, (affirmed in P.C. *sub nom. Fraser* v. *Dumont*, 19 D.L.R. 104). In conferring such privileges in the present instance the legislature apparently thought it reasonable to provide that its sanction should not be invoked as a shield against responsibility for any injuries to others which the exercise of those privileges might entail.

The injuries sued for were caused in carrying out or maintaining "the works," *i. e.*, the undertaking of the company. This seems to be clear from the terms of the original Quebec statute, wherein the furnishing of electric current for lighting purposes by means of wires is part of the works authorized by the very section in which the declaration of liability is found. Although the fall of a branch from a tree was, in a certain sense, the cause of the fires, it in reality but created the situation in which the transmission of a high-voltage current by the company acting through its servants or workmen, along its wires in the course of carrying out its undertaking caused the damage complained of. I have found no reason for confining the effect of the clauses in question to injuries done in the course of constructing or repairing the company's lines or installation. The phrase, "carrying on and maintaining its works," or "carrying out its works," in these statutory provisions, in my opinion, covers operation as well as construction. In this respect the statute differs from 1 Edw. VII., ch. 66, under which the works had been constructed in *Dumphy's* case, [1907] A.C. 454, and a provision somewhat similar to that above quoted from 44 & 45 Vict. (Que.) ch. 71 does not appear to have been there relied upon.

Neither can I, without frittering away these legislative declarations of responsibility, regard this case as outside their purview merely because the fall of a branch from a tree was the immediate occasion of the existing danger created by the defendant company producing actual injury. On the first ground, therefore, I think the defendant liable.

I assume, that in so far as these actions are brought under art. 1053 C.C., it has been rightly held that the burden of proving fault or negligence of the defendants, which rested on the plaintiffs, had not been satisfactorily discharged. They certainly failed

to shew that the defendants' high-tension wires were in too close proximity to its low-tension wires, or that the distance between pins on cross-arms was not sufficiently great, and there was no evidence that these defects, if they existed, had anything to do with the cause of the fires. I am not prepared to say that the Court of King's Bench erred in holding that the plaintiffs had failed to prove actual requirements of the Canadian Fire Underwriters' Association or orders issued by the Public Utilities Commission with which the defendants had not complied, or, upon the evidence as to the safety or advisability of grounding transformers to reverse the finding of the appellate Court that it was not affirmatively established that, having regard to the condition of the wiring of the houses in the neighbourhood, it was actionable fault or negligence on the part of the company not to have had its transformers grounded, or that it was negligent in not having foreseen that there was reason to apprehend that the branch which fell across its wires would do so.

The matter last mentioned, though not included in the particulars furnished, was fully gone into at the trial. Whether the branch which fell actually overhung (surplombait) the defendant company's wires is a point in dispute. The trial Judge apparently thought it did—the appellant Judges, that it did not; and the evidence seems to support the latter view. But it appears that branches at a lower level undoubtedly did overhang the wires and it would seem reasonably certain that, when the large branch, which fell, was broken off by the weight of the ice upon it, probably aided by the action of the wind, in falling, again aided in all probability by the high wind, it glided or slid on the icy surface of these lower overhanging branches out from the tree towards the defendant's wires and was thus brought over and allowed to fall upon the two outer wires which it broke, the inner wire—that nearest the tree—remaining intact. Whether this occurrence was something which should have been anticipated and guarded against or ought to be regarded as a case of unforeseeable accident, or an "act of God," or the result of *vis major*, against which there is no obligation to provide, is an issue. That the storm, with its accompaniments of sleet and heavy ice formations on trees and wires and high wind, was not in itself so extraordinary that it should be regarded as unforseeable, or as constituting *force majeure*, so that its ordinary or not

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improbable consequences would be something which persons in the position of the defendants would not be bound to anticipate and guard against is, I think, quite clear. But whether, having regard to its situation and the surrounding circumstances, the fall of the branch in question across the company's wires should be deemed such a consequence is a debatable point.

As to the other defects in installation suggested at the trial, as Pelletier, J., points out, the existence of some of them was not shewn, and the causal relation of others, assuming their existence, was not established. Indeed, some of these grounds of negligence were raised only when evidence was being given in reply. I proceed, therefore, on the assumption that the plaintiffs failed to establish liability of the defendants under art. 1053 C.C.

In considering the case presented under art. 1054 C.C. several questions arise. That electricity is a thing within the purview of that article I entertain no doubt. *Sed vide* 3 Rev. Trimestrielle, pp. 1-19.

It is urged that the plaintiffs preferred their claim only under art 1053, and that, having failed to establish negligence or fault on the part of the defendants by positive evidence, they should not be permitted to fall back upon a presumption of fault under art. 1054.

The fourth paragraph of each of the declarations of the several plaintiffs contains a general charge that electric current produced by and under the control of the defendants was, by their negligence, introduced into the plaintiffs' buildings at a very high tension, much in excess of that required for purposes of illumination, and that it caused the fires which occasioned the injuries complained of. In the sixth paragraph of each declaration defective installation of the defendants' system is charged. Upon application particulars were ordered of the defects charged under the latter paragraph; but particulars of the fault or negligence alleged in the fourth paragraph were refused—apparently because that paragraph was regarded by the Judge who heard the motion as merely an allegation under art. 1054 C.C. intended to cast upon the defendants the burden of proving that they could not have prevented the act which caused the damage sued for.

Carroll, J., and the trial Judge, it is true, have expressed the view that, in making a claim under art. 1054, it is sufficient to

allege injury and consequent damage caused by a thing under the care of the defendant, without adding an allegation of fault or negligence. But the Chief Justice of Quebec, on the contrary, in a somewhat elaborate argument, maintains the view that, while proof of fault is not necessary, an allegation of it in the pleadings is required. With very great respect, if a presumption of fault on the part of the defendant arises upon its being shewn that the injury complained of was caused by a thing under his care, I cannot understand why it should be necessary to allege more than this latter fact. But if a general allegation of fault is necessary, notwithstanding that the law presumes it, it is furnished by paragraph four, which was probably inserted to prevent difficulty should the view taken by the Chief Justice of Quebec prevail. In any case I agree with the trial Judge that in making the allegation of fault contained in that paragraph the plaintiffs cannot be taken to have abandoned the advantage of their position under art. 1054, but were on the contrary seeking to secure it.

While still adhering to the view which I expressed in *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, at 342, *et seq.*, that, for reasons there stated, the sixth paragraph of art. 1054 C.C. probably does not apply to the first paragraph of that article, in the present instance I proceed upon the assumption that either the sixth paragraph applies to the first as well as to the following paragraphs, or that, if not, the first paragraph is subject to a similar qualification, as had been held in regard to the corresponding art. (1384) of the C.N., in which the application of the exculpatory clause, corresponding to the sixth paragraph of art. 1054 C.C., to the first paragraph of art 1384 C.N. is clearly excluded. Recueil, Phily, 1909, p. 926, No. 5039.

Assuming, then, that the defendant company could acquit itself of liability by proving that the introduction of high-voltage current into the plaintiff's buildings was due to a cause the operation of which it could not prevent (2 Planiol, Droit Civil, Nos. 929-30-31) I am of the opinion that it has failed to discharge that burden. While the evidence may be insufficient to enable us to say that it affirmatively establishes fault or negligence, it has, in my opinion, not been shewn that the defendants could not have prevented the occurrence of the fires in question either by grounding their transformers; by taking proper steps to secure

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the removal of the branch which fell or of the lower overhanging branches, which in this instance seem to have increased the danger, or by employing other means to guard their wires against the fall of the branch which broke them. It has not established that they were wholly free from fault.

Moreover, I am not satisfied that, having regard to the contractual relations between the parties and to the defendants' knowledge of the danger to buildings of their customers attendant upon high-tension wires being carried in proximity to secondary wires connected with house services when their transformers were not grounded, it was not their duty to have disconnected the premises of their customers during a storm such as the witnesses describe, and until danger from its consequences had passed, failure to perform which entails liability for resultant injury.

The defendant company invokes a provision of the contracts under which it alleges electric current was supplied to the injured premises, whereby it was stiuplated that

> the company shall not be liable for damages resulting from electric current when its appliances shall have been installed according to the rules of, or approved by, the Board of Fire Underwriters.

Assuming that it has been established that this provision is binding on the plaintiffs, the defendants failed to shew installation approved by, or in conformity with, the rules of the Board of Fire Underwriters. While it may be that actual enforcement of the decision of the underwriters to insist upon the grounding of transformers was deferred until after the fires in question had happened, the system of the defendant company was not in conformity with the rules of the Board and its disapproval had several times been brought to the attention of the company, which had promised a year before the date of the fires to improve its installation and to meet the requirements of the underwriters. The term of the contract which the company invokes, therefore, affords no answer to the plaintiff's claim.

I would, for these reasons, allow this appeal with costs in this Court and the Court of King's Bench, and would restore the judgment of the trial Judge.

Brodeur, J.

BRODEUR, J.:—In this case we have to decide whether or not the Quebec Ry., Light, Heat and Power Co., the respondents, should bear the damages resulting from the destruction by fire of the properties of the appellant, Mr. Vandry, and of Mr. Chateauvert.

The respondent company carries on the business of furnishing electric light in the city of Quebec and its vicinity. It furnishes to individuals the lighting which they need for their houses, and, in virtue of the contracts which it makes with its consumers, it transmits to them an electric current of about 110 volts which causes but little or no danger from fire or violent shocks. The installations of the electric wires on the private properties is made by the proprietors; but the respondent itself looks after the connections to be made between the house-wiring and its own electric wires. By means of instruments of remarkable precision, it can ascertain and easily determine, and without cost, whether the installation of a proprietor is sufficient and convenient.

In order to furnish to its consumers an electric current which is not greater than that to be supplied under its agreements and by usage, it installs on its poles transformers which reduce the current intended for the consumers from a voltage of 2,200 to about 110 volts.

During the night of December 19 and 20, 1912, a branch of a poplar tree laden with icicles, which overhung the respondent's line, was broken, it evidently fell upon the line and established a connection between the wire which carried 2,200 volts and that which carried 110 volts. As the result of this contact, the electric wire which conducted the current to the houses of Messrs. Vandry and Chateauvert became charged with a current of 2,200 volts and set the fire by which they were destroyed.

Hence the action to recover damages by Mr. Vandry and by the insurance companies which paid part of the losses which were occasioned by the fire.

The evidence in these cases, which have been joined together, is very voluminous and very complete, and affords the tribunals the advantage of being able to pronounce upon all the facts and the incidents of the cases.

There was an attempt made to circumscribe the discussion and, in this regard, reliance was placed upon subtleties of procedure and pleading. It was contended, for instance, that the claim in the declarations of the plaintiffs should necessarily be limited to the dispute as to particular faults which were specifically alleged.

But it was forgotten that there are in these declarations general

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allegations of negligence and of fault which open the way to any evidence of negligence which might be presented. Moreover, as I have just said, the evidence was as complete as possible, covers all the facts and all the circumstances and, consequently, it would be very unfortunate now that the parties have urged all their reasons as well for the claim as for the defence to hold them down to allegations more or less specific. If there was any necessity, moreover, this Court, with the powers which it has in regard to the amendment of pleadings, should allow them to be made in order to render complete justice to the parties. But I consider that it is not necessary to have recourse to such procedure in the circumstances of the case.

Here we have a company which ought not to have sent into the houses of its consumers more than 110 volts. At a certain time, the current was raised to 2,200 volts and caused the fire which took place and might equally have been the cause of the death of persons who, at that moment, might come in contact with this deadly current.

It cannot be denied that the accident was caused by an electric current which it had under its care and, in virtue of art. 1054 of the C.C., it has become liable for damages unless it proves that it was unable to prevent the act which caused the damages.

It is part of the duty of a company which carries on business of such a dangerous kind to take all the precautions necessary to prevent any accident which it might occasion, as this Court decided in the case of the *Royal Electric Co.* v. *Hévé*, 32 Can. S.C.R. 462.

There is evidence that the insurance companies informed the respondent on several occasions, by correspondence which is in the record, that numerous fires were caused in Quebec on account of its system, which was not of a perfect character. It had been suggested to it, naturally, that it should place upon its transformers electric wires which went into the ground and which would prevent in a great measure, if not entirely, the occurrence of such fires.

The respondent, at one time, appeared disposed to adopt these suggestions, and, in the spring of 1912, it declared that it was merely awaiting the thawing out of the ground in order to be able to do the work.

But the thaw took place, the summer passed, nothing was done; and about the middle of December, 1912, the fire in question took place. It became necessary, in the following year, that an order should be made by the Public Utilities Commission in order to compel the respondent to make these improvements which were deemed necessary.

But it tells us that this grounding of an electric wire would not have brought about the desired result unless the consumers improved their interior systems. On this point the evidence is far from being certain; but then, why did it not require its consumers to make these improvement if it believed that their system was defective. It was as easy a thing for them as to refuse to supply current to their consumers if they did not wish to make the necessary improvements or such as considered proper by the Board of Fire Underwriters. This was, moreover, one of the conditions of its contracts with the consumers.

The improvements would have been expensive and it preferred to take the risks of accidents rather than adopt the suggestions of the insurance companies.

Now, I consider that the respondent is equally responsible for the reason that it caused its line to be strung at a place where it was liable to be struck by the branches of trees. (Art. 1053 C.C.). It pleaded *vis major*.

This excuse is without value. Every winter, and several times in our winters, we have these rain-storms when the water falls in drops upon the trees, freezes there and forces the trees to bend and finally to break. This is a case of such frequent occurrence that one cannot reasonably contend that companies which furnish power are not bound to take it into account. Laurent, vol. 16, No. 265; 4 Aubry & Rau. p. 104, note; 24 Demolombe, No. 560.

The respondent, therefore, in the present case, should have protected its wires from the poplar tree from which the branch was broken off. These trees, as we know, break easily; consequently, a further reason for the company to protect itself against this danger which it cannot easily cause to disappear, but it did not think proper to do so.

I have had the advantage of seeing the opinion of my colleague, Anglin, J., as to the statutory responsibility of the company

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respondent, and I entirely concur in it. The legislature granted extensive powers to the respondent, even in excess of the common law (44 & 45 Vict. ch. 71, and 58 & 59 Vict. ch. 59). This latter has, in effect, the right to place its poles on the municipal streets, which are, nevertheless, the property of the municipalities, and this without making compensation. But, on the other hand, if in the exercise of its powers or in the operations of its very dangerous business it causes damages, the statute declares, in my opinion, that it becomes responsible, whether or not there is fault on its part.

This legislation is not new. We see it in several of our laws. So, for instance, the lumber merchant has the right to make use of private watercourses without paying compensation. But, if he causes damages by negligence or without negligence he becomes responsible. Art. 2256, Rev. Stat. Que., 1909; art. 503 C.C.; art. 1627 Rev. Stat. Que.; *Dumont* v. *Fraser*, 48 Can. S.C.R. 137. Railway companies which set fire to property adjacent to their railways were ordinarily held responsible for these damages whether or not their locomotives were well or badly constructed. (Beauchamp, C.C. par. 175, under art. 1053). The Privy Council having reversed this jurisprudence and having decided in the case of the *Can. Pac. R. Co.* v. *Roy*, [1902] A.C. 220, that a railway company which had caused a fire by the cinders which escaped from one of its locomotives in the ordinary operation of its railway was not responsible for the damages caused, Parliament intervened and declared, by sec. 298 of the Railway Act, that there was responsibility on the part of the companies if the locomotives caused damages, whether there was negligence or not.

In my opinion, therefore, it would be a mistake to say that the respondent company is not responsible except in a case where fault is proved against it. I am of opinion, on the contrary, that it is responsible in every case where it has caused damages, even where these damages do not result from any act of negligence.

I consider, therefore, that in the circumstances the company should be held responsible for the accident which occurred on the premises of Mr. Vandry and of Mr. Chateauvert, and I think that the judgment of the Court of Appeal, which gave effect to the respondent's defence, is not well founded and that the appeal should be allowed with costs. *Appeal allowed.*

[Leave to appeal to Privy Council granted, May 9, 1916.]

PIERSON v. EGBERT.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

CORPORATIONS AND COMPANIES (§ V B 1—178)—SUBSCRIPTIONS—INFERENCE OF STOCK ALLOTMENT—PAYMENT.

An allotment of stock pursuant to an application for the same can be shewn by inference and implication as well as by express words. Subsequent payments made on account of the stock, and acceptance thereof by the company, constitute an inference that the applications had been accepted and stock allotted.

[*Pierson* v. *Egbert*, 28 D.L.R. 759, affirmed.]

Statement.

APPEAL from the judgment of Walsh, J., 28 D.L.R 759. Affirmed.

A. A. Hannah, for plaintiffs, respondents.

F. W. Griffiths, for defendants, appellants.

Stuart, J.

STUART, J.:—The only point in this case upon which I have since the argument entertained some doubt was in respect of the finding of fact by the trial Judge that there had been an allotment of stock. It is true that there seems to have been no formal notification of the allotment nor indeed any motion passed by the directors accepting the plaintiff's application. But an allotment of stock is after all nothing more than the acceptance of an offer and this can be shewn by inference and implication as well as by express words. Owing to the subsequent payments which were made by the plaintiffs and the acceptance of these payments by the company, I think the only possible inference is that both parties thoroughly understood that the applications had been accepted and this, of course, constitutes an allotment for the rest. I concur in the reasons given by the trial Judge, and I think the appeal should be dismissed with costs, and the cross-appeal dismissed without costs.

Scott, J.

SCOTT, J., concurred.

Beck, J.

BECK, J.:—I think the judgment of Walsh, J., is right for the reasons he has given and I would, therefore, dismiss the appeal with costs and the cross-appeal without costs.

McCarthy, J.

MCCARTHY, J.:—I would dismiss this appeal and confirm the judgment below for the reasons given by Walsh, J.

The action was brought by the respondents against the appellant company and their directors individually to recover the amounts paid by the respondents for subscriptions for shares of stock in the appellant company and for the return to them of certain promissory notes given for the balance owing on said

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stock, and also for the removal of their names from the company's register.

The respondents base their claim for relief from the contract upon three grounds:—1. That no prospectus had been filed. 2. That no amount is fixed by the company's memorandum or articles of association or was named in the prospectus as a minimum subscription upon which the directors might proceed to allotment. 3. That the directors were liable under sub-sec. (2) of sec. 109 of the Companies Ordinance.

The trial Judge gave judgment in favour of the plaintiffs against the defendant company, but dismissed the action as against the directors. From this judgment the defendant company appeals. Their grounds are:—(a) That the evidence discloses the fact that the plaintiffs did not repudiate promptly after knowledge of the defects complained of by the plaintiffs. (b) That the evidence discloses that the plaintiffs after knowledge of the defects complained of affirmed their position as shareholders in the company.

The defendant company admitted at the trial that no prospectus had been filed and that no amount had been fixed as a minimum subscription upon which the allotment of stock might be proceeded with.

Their remains therefore only two grounds for the consideration of this Court, whether (a) the repudiation was prompt on the part of the respondents, and (b) if they affirmed their position as shareholders. The trial Judge, upon the evidence, finds that there had been an allotment of the shares to the respondents.

I think the trial Judge was right in deciding upon the evidence that the respondents, after knowledge had come to them of their right, to repudiate the contract for subscription for shares, did not make any payment or do anything to estop them from voiding the contract, the facts upon which he bases his finding are gone into in his judgment at length and it is not necessary for me to repeat what he has said.

Counsel for the appellant contends that by reason of the participation of the respondents in the meeting of the company of April 24, and their actions prior to such date, that the contract was no longer voidable. He uses the very apt words: "You cannot negotiate and repudiate at the same time," but what

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appears to me from the evidence is that the conduct of the respondents amounted to an investigation into the affairs of the company to ascertain what the true position of affairs was.

The repudiation by the respondents was by letter of March 21, 1914, and the question to be considered is, did they act promptly after acquiring some knowledge of the irregularities in connection with the affairs of the company. The trial Judge has found on the evidence that at least 3 weeks elapsed between the acquiring of this knowledge and the repudiation. In this connection it is pointed out that the company never held its statutory meeting and that the time allowed under sec. 109 of the Companies Ordinance had not expired within which the respondents might have repudiated their contract for subscriptions. The opportunity for the subscribers of shares to attend the statutory meeting not having been afforded by the company may or may not have had a bearing on the question of delay—from a perusal of the trial Judge's judgment I think it had.

As to the cross-appeal of the plaintiffs, I think the trial Judge was right in dismissing the action against the directors for the reasons set out in his judgment, and I would dismiss the appeal with costs and the cross-appeal without costs.

Appeal dismissed.

HUCK v. CANADIAN PACIFIC R. CO.

SASK.

S. C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Lamont and McKay, JJ. July 14, 1916.

1. NEW TRIAL (§ II—6*a*)—ERROR OF COURT NON-SUITING CASE—WEIGHT OF EVIDENCE—ADMISSIONS.

Where counsel for one party to an action places in evidence an admission made by the opposite party, containing some statements in favour of and some adverse to the interest of his client, it is not necessary to give equal credence or weight to the several statements. A new trial will be ordered, therefore, where the trial judge has withdrawn the action from the jury on the ground that the whole admission must be accepted as truthful, and if so, negatives negligence.

2. TRIAL (§ II C 8—110)—QUESTION OF FACT FOR JURY—NEGLIGENCE.

Honest belief that no danger exists does not negative negligence; the real question is, would a reasonably careful and prudent man, under the circumstances, arrive at that conclusion; that is for the jury to decide.

Statement.

APPEAL from the decision of the trial Judge at Moose Jaw, in which he directed judgment to be entered for the defendants at the close of the plaintiff's case. Reversed.

G. E. Taylor, K.C., and *Johnson*, for appellant.

W. B. Willoughby, K.C., for respondent.

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Lamont, J.

The judgment of the Court was delivered by

LAMONT, J.:—The plaintiff sued on behalf of herself and her children for damages for the death of her husband, A. H. Huck, which, she alleges, was caused on October 14, 1914, during the course of his employment in the defendant's yards through the negligence of the defendant's servants.

Huck was a switch foreman in the defendant's yards at Moose Jaw. At 7 o'clock on the morning of October 14th, the deceased along with a number of other employees, reported at the defendant's office for duty, and then started to go through the yards to their work. It was customary for the employees to go to their work by this route, although by going along the tracks they ran greater risk of accident than if they had crossed them at right angles. Whilst a number of men, including the deceased, were walking along or angling across the tracks, one of the defendant's engines with water tank attached backed down the track. There was evidence that the engine was going at a fast rate of speed; one witness, a foreman of the defendant company, considered the rate of speed to be dangerous. There was also evidence that certain employees, seeing the men on the track ahead of the engine, had given engineer Betters, who was in charge, signals to stop; that Betters had acknowledged these signals by giving two short toots of the whistle, which meant, according to some of the witnesses, that the engineer was placing his judgment against that of the person giving the signal, and that he was going ahead. When Betters received the stop signals he was eight or ten lengths from the men on the track and had ample time to stop his engine before reaching them. He, however, disregarded the signals and went ahead, striking Huck, who had failed to get off the track, and inflicting upon him injuries from which he died. In addition, counsel for the plaintiff put in evidence the following report made by Betters to the company as to the cause of the accident:—

> While backing up yard on to train through No. 11 track East Yard when about opposite coal chute saw gang of men walking on track. I blew my whistle and bell was ringing. I saw men getting off the track and I believed they were all off. I got signal to stop from brakeman that was riding back end of water car. When stopped they told me we ran over a man. Was backing up about 6 or 7 miles an hour. J. A. BETTERS, *Engineer*.

The trial Judge, although of opinion that there was some evidence of negligence on the part of the defendant's servants, held

that, as the plaintiff's counsel had put in Betters' report, and made it part of the plaintiff's case, the report must be accepted *in toto* and, as Betters had therein stated that he believed all the men were off the track, this conclusion negatived any negligence on his part as there was no obligation on him to stop his engine if he believed the men were off the track.

With great deference I am of opinion that this view cannot be supported.

Where counsel for one party in an action places in evidence an admission made by the opposite party, which admission contains some statements in favour of the contention of the plaintiff and some in favour of that of the defendant, it is not necessary to give equal credence to the several statements. Had the plaintiff, instead of putting the report in evidence, called Betters as a witness at the trial, and he had made in the witness-box precisely the same statements which are found in his report, it would have been open to the jury to accept the statements in favour of the plaintiff's case and to refuse to accept the statement that he believed the men had got off the track. The unsworn report cannot be more conclusive than the testimony of Betters would have been. The jury might, not unreasonably, it seems to me, have come to the conclusion that if an engineer could see the track in front of his engine, and he were keeping a proper look-out, he must have known that all the men did not get off the track.

On the other hand, if he could not see the track or if he were not looking, they might conclude that his belief amounted to no more than a supposition that the men would likely get out of the way. That it is for the jury to determine the credibility to be given to the various statements in an admission is laid down in Taylor on Evidence, 10th ed. at p. 523, where, after stating that the whole statement containing the admission must be taken together, the author says:—

> But though the whole of what he said at the same time, and relating to the same subject must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him.

But, even if the engineer's statement that he believed all the men were off the track be wholly accepted, it is not in my opinion

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a conclusive answer to the plaintiff's claim. The duty resting upon the engineer was to take such care as a reasonable and prudent man would take under the circumstances. He admits he saw the men walking on the track. He received signals to stop. These he disregarded, evidently because he believed the men had all got out of the way of danger. The question, to my mind, is not did he believe that they had got off the track, but, would a reasonably careful and prudent man under the circumstances have arrived at that conclusion? Would a prudent man, under the circumstances, have disregarded the signals to stop and have gone ahead at the rate of speed at which Betters actually went? To free him from the charge of negligence, his belief must have been that at which a prudent man would have arrived under the circumstances of that particular case. Whether a prudent man would have arrived at that conclusion, is a question to be determined by a jury.

The appeal, in my opinion, should be allowed with costs and a new trial directed, the costs of the former trial to abide by the event of the new trial. *Appeal allowed.*

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Ex. C.

RAYMOND v. THE KING.

Exchequer Court of Canada, Audette, J. April 17, 1916.

1. EMINENT DOMAIN (§ III C 1—140)—COMPENSATION—BASIS—"SPECIAL ADAPTABILITY."

Where property is taken by the Crown for a proposed public work, in assessing compensation to the owner, it is not proper to treat the value to the owner both of the land, and rights incidental thereto, as a proportional part of the value of the proposed work or undertaking when realized; but the proper basis for compensation is the amount for which such land and rights could have been sold had there been no scheme in existence for the work or undertaking. On the other hand, regard must be had to the adaptability of the property for such a use and the possibilities of the same being realized.

[*Cunard* v. *The King*, 43 Can. S.C.R. 88; *Lacoste* v. *Cedars Rapids Company*, 16 D.L.R. 168, [1914] A.C. 569; *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; and *The King* v. *Wilson*, 22 D.L.R. 585, 15 Can. Ex. 283, referred to.]

2. EMINENT DOMAIN (§ III C 2—150)—EXPROPRIATION OF WATERSIDE PROPERTY—COMPENSATION TO OWNERS.

Where waterside property is expropriated by the Crown before the owner has asked for or obtained statutory permission to build wharves or other erections upon the *solum*, in the absence of evidence to shew that the possibility of obtaining such permission had increased the value of the property in the market, such possibility ought not to be taken into consideration in assessing the compensation.

[*Gillespie* v. *The King*, 12 Can. Ex. 406; and *The King* v. *Bradburn*, 14 Can. Ex. 419, 437, referred to.]

3. EMINENT DOMAIN (§ III C 1—140)—"SPECIAL ADAPTABILITY" AS ELEMENT OF COMPENSATION.

"Special adaptability" as used in expropriation cases does not denote an element over and above or separable from the value of the land

in the market; but on the contrary signifies something that enters into and forms an essential part of the actual market value.

[*Sidney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629, applied.]

4. PUBLIC LANDS (§ I C—15)—PATENTS—RESERVATION BY CROWN AS TO RE-POSSESSION—RIGHT OF DOMINION OR PROVINCE.

In letters patent for a water-lot in the River St. Lawrence, granted by the Crown in the right of the Province of Canada in the year 1848, the Crown reserved the right to resume at any time possession of the property upon paying to the grantee the value of any improvements and erections thereon. The right so reserved was never exercised before confederation. *Held*, that the right so reserved was indivisible, and could only be exercised in respect of the whole of the land mentioned in the grant and not for a part thereof. *Quære*: Whether the right to resume possession enures now to the Dominion Crown, or the Crown in the right of the Province of Quebec.

[*Samson* v. *The Queen*, 2 Can. Ex. 30, referred to.]

5. EMINENT DOMAIN (§ III C 1—140)—COMPENSATION—ALLOWANCE OF 10 PER CENT. UPON MARKET VALUE—SPECULATIONS.

The allowance of 10 per cent. upon the market value in view of the compulsory taking of property ought not to be made when the property was acquired with the open purpose of speculating on the chances of the property being expropriated.

[EDITOR'S NOTE.—See commentary on the 10 per cent. allowance for compulsory taking in the annotated case of *The King* v. *Courtney*, 27 D.L.R. 247.]

Statement.

PETITION of right to recover the sum of $390,000, as representing the alleged value of certain land or part of a beach lot, expropriated by the Crown, and the damages resulting from such expropriation.

E. Belleau, K.C., and *N. Belleau*, for suppliants.

G. G. Stuart, K.C., for defendant.

Audette, J.

AUDETTE, J.:—The Crown, acting under the provisions of the Expropriation Act, expropriated at Lauzon, P.Q., part of a certain beach lot, belonging to the suppliants, for the purposes of a graving dock, a public work of Canada, by depositing, both on January 15, 1913, and July 16, 1913, plans and descriptions of the said lands, in the office of the registrar of deeds for the County of Levis, P.Q., where the same are situate.

It is admitted and agreed upon by both parties that under the plan and description deposited on January 15, 1913, the area expropriated is 272,000 ft., and under the plan and description deposited on July 16, 1913, the further area expropriated is 317,000 ft., making in all 589,000 ft., which is the whole area admitted to have been expropriated by the Crown from the suppliant's property.

The Crown, by the statement of defence, avers *inter alia*, that the land, taken herein under the Expropriation Act, was originally granted by His Majesty the King's letters-patent, in favour

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of one Duncan Patton, whose successors in title the suppliants purport to be, and that the grant made under the said letters-patent, which bear date February 9, 1848, and are filed herein as ex. "D," is so made subject to the following proviso, viz.:—

Provided further and we do hereby expressly reserve to us, our heirs and successors full power, right and authority upon giving 12 months' previous notice to our said grantee his heirs and assigns in possession of the said lot or piece of ground, beach and premises to resume for public improvements the possession of the said lot or piece of ground and premises on payment to him or them of a reasonable indemnity in that behalf for the ameliorations and improvements which may have been made on the said lot or piece of ground, beach and premises to be ascertained and determined by experts to be nominated and appointed by our governor of our said province for the time being and our said grantee respectively in default of an offer of the fair value of the same being accepted.

The Crown further alleges in its statement in defence—and it is admitted by both parties in the course of the trial—that there are no ameliorations or improvements upon the said land so expropriated, and the respondent therefore concludes its plea by contending that the suppliants are not entitled to any compensation in respect of the value of the lands so expropriated.

At the trial, counsel for the Crown stated that no notice had been given as provided by the terms of the above recited proviso. Therefore it must be taken that the Crown in the present issues proceeded under the provisions of the Expropriation Act, with respect to the taking of the suppliants' land.

Having disposed of the question that the prsent case must be treated as one coming within the ambit of the Expropriation Act, it is, perhaps well to offer a passing remark upon the question raised at trial as to whether or not the power to exercise the rights under the proviso of the grant is in the Crown as representing the provincial government or in the Crown as representing the federal government.

The Crown grant in question was given in 1848, that is by the old Province of Canada. And in view of the possibility of the right of redemption upon notice, as above mentioned, being in the Province of Quebec, notice of trial was given by the suppliants to the Attorney-General for the Province of Quebec, and to the Minister of Crown Lands for the said province— and a copy of the pleadings served upon them, as will more clearly appear by reference to ex. No. 1. Nothing came out of this, and the trial went on without anyone appearing on behalf of the Province of Quebec.

In the case of *Samson* v. *The Queen*, 2 Can. Ex. 30, it was held, upon a similar grant before confederation on the south shore of the harbour of Quebec, that the property being situated in a public harbour, the power of resuming possession for the purpose of public improvement would be exercisable by the Crown, as represented by the Government of Canada. However, in the view I take of this case it becomes unnecessary to decide the question.

The parties in a case instituted by petition of right stand in a different position from those in a case instituted by information under the Expropriation Act (R.S.C. (1906) ch. 143), where, by sec. 26 thereof, it is enacted that such information shall set forth the persons who, at such date (the date of the expropriation), had any estate or interest in such land or property and the particulars . . . of any charge, lien or incumbrance to which the same was subject.

In a case instituted by petition of right it would seem the suppliant is entitled to have his own right and interest adjusted without calling in any other parties who may have any right in the same property.

The suppliants, by their answer in writing, to the Crown's statement in defence, have raised a formidable array of questions of law, such as the following, viz.:—1. That the registration of the said Crown grant has not been renewed since the coming into force of the Cadastre in 1877:—See however art. 2084 C.C. 2. That the right of redemption invoked by the Crown has been long prescribed. 3. That the suppliants are the owners of the land in question under a sheriff's title which has liberated the land of all charges of real right which might originally affect it. 4. That the government of the Province of Quebec is alone possessed of the right of the old Province of Canada, and that the government of the Dominion of Canada has no right whatsoever under the said grant. 5. That the said lands in question are outside the harbour of Quebec, and that the Crown has renounced the right it is now setting up.

While some of these contentions set forth by the suppliants are full of interest, it has obviously become unnecessary to decide any of them because of the view I take of the case. Indeed, this right of redemption under the provisions of the grant, if at all exercisable, can only be exercised for the whole of the land mentioned in the grant, and not for only a part thereof. It is a right

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which is indivisible although the object of the right is physically subject to a division, yet from the character given to it by the grant, the object becomes insusceptible not only of performance in parts but also of division.

(Art. 1124 C.C.P.Q.). It is a right which might be exercised with respect to the whole property but not in part, and it cannot be invoked in this case when only about one-quarter of the property is expropriated. If there were wharves and buildings on certain parts of the property, could it be contended that the proviso in the grant would give the right to redeem only such part upon which there would be no amelioration or improvements — destroying thereby the value of the parts improved? The terms and conditions of this power may very well be compared and assimilated to the *droit de réméré*, right of redemption, provided for by the C.C.P.Q., wherein *inter alia*, by art. 1558, the redemption may be exacted for the whole and denied for part only.

Therefore, for the purposes of this case it is sufficient to find that the Crown proceeded under the Expropriation Act—that it did not give the notice provided by the grant, and had it given such notice the rights thereunder are not divisible and could only be exercised for the whole property:

The whole property contains an area of 2,148,600 sq. ft., of which the Crown expropriated 589,000 sq. ft., and the suppliants are entitled to the value thereof at the date of the expropriation, that value, however, is to be determined with reference to the nature of the title as decided in the case of *Samson* v. *The Queen*, *ubi supra*.

On the question of value, the following witnesses were heard on behalf of the suppliants:

Witness A. Gobeil values the land taken at 40 cts. a sq. ft. In that price he reckons 30 cts. for the land taken and 10 cts. for damages to the balance of the property, because more land is taken on the front than at the back. He bases his valuation upon the capabilities of the land to be used for a graving dock, wharves, marine railway and ship-building. He would value the whole of the suppliants' property at 25 cts. a sq. ft., adding that his whole theory is based upon the fact that the graving dock could not be built anywhere else.

Witness E. A. Evans values the land taken at 50 cts. a sq. ft.,

or 40 cts. a sq. ft. for the whole lot, but taking only part values it at 50 cts.

Witness Auger, who being ill at the date of the trial, was examined at his residence, before the acting registrar, testified that the destination of the suppliants' property was to be used for graving dock, ship-building, or industries of that kind, and placed a value upon it at between 40 to 50 cts. per sq. ft. including damages; these being approximative figures he says. He also says he was called by the engineers who had something to do with the selection of the site of this dock and advised that it should not be at right angles with the river, as the old dock—but that it should have a diagonal to the east or the west.

This diagonal, it will be seen by referring to the plan, was given to the east — had it been given to the west, it would seem no part of the suppliants' property would have been necessary for the building of the new dock.

Witness Charland, taking into consideration the adaptability of this property for ship-building and dry dock, values it at 40 cts. a sq. ft., including damages; adding, it is not a disadvantage to have the dry dock on the suppliants' property with respect to the balance of the property. The dry dock is an advantage for ship-building.

Witness Ernest Roy places a value of 35 cts. to 40 cts. a sq. ft. for the piece taken.

On behalf of the Crown, witness Ogilvie testifies he offered to the Crown the Davie property, right adjoining the dock, at 2 cts. a sq. ft., for the purposes of this graving dock.

Witness Couture values the land taken at 1½ cts. per sq. ft., and adds that the result of the expropriation is to enhance the value of the balance of the property by the prospective improvements which will be realized by the operation of the dry dock.

Witness Giroux, taking into consideration the advantage or plus value given to the balance of the suppliants' property by the graving dock, and the sales in the neighbourhood, values the land taken at 1 to 1½ cts. a sq. ft.—adding that 1½ cts. would be the maximum.

Witness Shanks, basing his valuation upon the Kennedy sale of the adjoining property at 2 cents per sq. ft., with wharves and buildings, values the land expropriated at 1½ cts. a sq. ft.

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Witness Davie contends that before the date of expropriation the suppliants' property had no commercial value.

Now, the land expropriated herein is part of a water lot lying exclusively between high and low water marks, at Lauzon, on the south shore of the River St. Lawrence, on the Levis side of the harbour of Quebec, and is almost facing the Montmorency Falls. As already stated, 589,000 sq. ft. are taken from a total area of 2,148,600 sq. ft., and which originally came out of the hands of the Crown under the letters-patent of 1848. The lot is of irregular shape and depth as may be ascertained by reference to plan, ex. E, referred to in the said letters-patent.

This property must be assessed, as at the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking in consideration any prospective capabilities or value it may obtain within a reasonably near future, subject, however, to the title, power and franchise possessed by the suppliants.

Great stress is laid on behalf of the suppliants upon the assumption of the exclusive adaptability of their land for the purposes of the public work in question, namely, the present graving dock. It is, however, now clearly settled that in assessing the compensation for property taken under compulsory powers, that it is not proper to treat the value to the owners of the land and rights as a proportional part of the value of the realized undertaking proposed to be carried out; but the proper basis for compensation is the amount for which such land and rights could have been sold, had the present scheme carried on by the Crown not been in existence—but with the possibility that the Crown or some company or person might obtain those powers. *Cunard* v. *The King*, 43 Can. S.C.R. 99; *Lucas* case, [1909] 1 K.B. 16; *The Cedars Rapids* case, 16 D.L.R. 168, [1914] A.C. 569; and *The King* v. *Wilson*, 22 D.L.R. 585, 15 Can. Ex. 283.

Now this assumption that the suppliants' land to the exclusion of all other lands at Lauzon, is alone adaptable for this public work is not supported by the evidence. Witness Valiquette, a civil engineer of great experience and in the employ of the government for a number of years, who has been during 10 years superintendent of the old dry dock at Lauzon and whose business, since 1900, is in connection with all the dry docks in Canada, says

he prepared some few years ago a plan filed as ex. "K," in connection with a tender to build a dry dock at Levis by the St. Lawrence Dry Dock & Ship Building Co., and that under that plan the whole of the dock was to be built outside the suppliants' property. The construction of the present graving dock has been somewhat changed, in that it was placed in another direction as referred to in Auger's evidence. This contention of the suppliants in respect of exclusive adaptability may well be bracketed with that class of evidence on record, that the harbour commissioners' property, known as the Kennedy property, could not be used for any other purposes than those for which it has been bought by the commissioners—and that is you could not there build a marine railway, or establish a ship-yard, etc., notwithstanding that the contrary is clearly testified to by two engineers, Evans and Laflamme, one heard on behalf of the suppliants and the other on behalf of the Crown. Mr. Evans says that the suppliants' property for ship building, is just as suitable, just as advantageous as other places, but for dry dock purposes, the most advantageous. This witness further adds that there is more space between the long wharf, on the Kennedy property, and the suppliants' property than the size of the suppliants' property, and that the long wharf on the Kennedy property serves as a protection to the Kennedy property, and even to a certain extent to the suppliants' property. All of this part of the evidence is mentioned in connection with the extraordinary contention by some witness that the Kennedy property which is adjoining and which has been sold recently at 2 cents a square foot, with wharves thereon erected, is not to be compared to the property in question, because you could not build ships, marine slips, etc., thereon. The topography of the two properties is practically identical—they are both open beach lots. Witness Engineer Laflamme states also that a ship-yard for the purpose of building ships could have been established equally well on the Kennedy property as on the suppliants' property. We have also in evidence that there was competition in the selection of Lauzon for the building of the graving dock—such sites as Beauport, Wolfe's Cove, Lampson's Cove and the Island of Orleans; but Lauzon was preferred and duly selected.

The suppliants, under the patent of 1848, had the right to

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erect wharves upon the land so granted—that is between high and low water; but for the purposes of the graving dock—and the same may be said with respect to wharves, marine slips and ship-yard—that right to extend beyond low water mark was absolutely necessary. The present dry dock has two guide piers, one of them extending 600 feet out from the low water mark, and the river has to be dredged for a long distance from low water mark to a depth of 30 ft. For all of this the suppliants had no title and no franchise. They have no franchise to build or put erections of any kind beyond low water mark, and that right, the property being in a public harbour, can only be obtained from the federal Crown under the provisions of ch. 115 of R.S.C., 1906, as amended by 9-10 Edw. VII. ch. 44. Also the fee in the bed of the river would have to be acquired. And as witness Gobeil put it — a beach or foreshore would have very little value if it cannot be used for the purposes of building wharves, docks and marine railways, it is useful but for that purpose. In *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, and other cases in which the question of special adaptability is invoked to give the property an enhanced value, there was a complete title vested in the owners of the lands expropriated which enabled the promoters to construct the works without obtaining any other or further title or franchise. In *The King* v. *Gillespie*, 12 Can. Ex. 406, confirmed on appeal to the Supreme Court of Canada, the defendant was owner on a harbour of a piece of land which was a natural site for a wharf. The Crown expropriated his land and erected a wharf thereon, and the Court, in assessing the compensation, declined to entertain the view of the possibility, by the defendant, of obtaining the right to erect a wharf thereon as an element of compensation. See also *The King* v. *Bradburn*, 14 Can. Ex. 419.

In the case of *Central Pacific R. Co. of California* v. *Pearson*, 35 Cal. 247, where the defendant was owner of land with riparian rights and suitable for wharf purposes, and where it was claimed that the compensation should be allowed on the basis that a wharf franchise might be given to the owner of the land, the Court, at p. 262, states the law as follows:—

> The testimony in relation to the value of wharf privileges on the shore of the Sacramento River, where the tide ebbs and flows, given for the purpose of enhancing the value of some of the land sought to be appropriated, was

improperly received for the obvious reason that the party *claiming the compensation had no wharf franchise*. The mere fact that the party might at some future time obtain from the State a grant of a wharf franchise if allowed to remain the owner of the land, is altogether too remote and speculative to be taken into consideration. The question for the commissioners to ascertain and settle was the present value of the land in its condition and not what it would be worth if something more should be annexed to it at some future time.

And as stated in *Corrie* v. *MacDermott*, [1914] A.C. 1056, at 1065, by Lord Dunedin: "The law of compensation being as they have stated it, namely, the value to the owner as he holds." See also *Benton* v. *Brookline*, 151 Mass. 250, and *May* v. *Boston*, 158 Mass. 21.

There is also the case of *Lynch* v. *City of Glasgow* (1903), 5 Ct. of Sess. Cas. 1174, where it was decided that the hope of obtaining the renewal of a lease should not be taken into consideration in assessing compensation in expropriation proceedings.

See also *Cunard* v. *The King*, 12 Can. Ex. 414, 43 Can. S.C.R. 88 and *Wood* v. *Esson*, 9 Can. S.C.R. 239, two well-known cases bearing upon the same point.

Therefore, in the present case there was no obligation on the part of the Crown to grant the suppliants the right or franchise to build wharves or put other erections beyond the line of low water mark, and it is not even rational to expect that the Crown would have granted such franchise in view of the fact that the construction of this new graving dock was mooted, as witness Gobeil said, as far back as between 1900 and 1905. The suppliants had no legal right to such franchise and nothing but a legal right could form an element of compensation. The suppliants had not that right at the date of the expropriation, and it is as the property stood on that date that it is to be valued.

The element of "special adaptability" has been pressed and argued at considerable length, and upon this question, in addition to that which has already been said, it must be admitted that the compensation which should be awarded is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to. *Sidney* v. *North E. R. Co.*, [1914] 3 K.B. 629. This element of special adaptability is, after all, nothing but an element in the general value, and as such it is admissible as the true market value to the owner and not merely value to the taker. This element of special adaptability existed

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and formed part of the price paid by the owners, both at the time of the sheriff's sale and at the date of the execution of the Leclerc conveyance, because at those dates the property had hardly any other value than its prospective potentiality in its adaptability for such purposes as mentioned above.

In the case of *Sidney* v. *North E. R. Co.*, *supra*, a very instructive discussion on this question of special adaptability will be found. At p. 637, Rowlatt, J., says:—

> Now, if and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it and for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail, to what can any further value be attributed? The point has been reached when the owner is offered more *than* the land is worth to him for his own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owners need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them? There can be only one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

And at p. 171 of the *Cedars Rapids* case (16 D.L.R. 168, [1914] A.C. 569), Lord Dunedin lays down the following rule for guidance upon the subject of special adaptabilities in the following language:—

> For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.
>
> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability as pointed out by Fletcher Moulton, L.J., in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realized possibility.

Indeed, in the present case the lands expropriated would be of very little value but for this prospective potentiality, residing

in its special adaptability. While this property in the days of wooden ships and when the lumber trade was flourishing at its best in Quebec, commanded perhaps a high price and was worth a good deal of money for the purposes of such trade, but when the latter disappeared the value of that property went down to almost nothing and there was no market for it.

It appears from the evidence that this property was unoccupied and not used for between 25 to 27 years prior to the beginning of the building of this graving dock. The property had been lying idle for a number of years when it was bought, by some of the suppliants, on May 18, 1900, for the sum of $800, and it has never yielded any revenue of any kind ever since. On April 5, 1907, Mrs. Belleau deeded to Moise Leclerc one undivided half of the property— the evidence establishing that Leclerc was actually one of the purchasers of the sheriff's sale and that this conveyance of 1907 was only to give him title to his undivided half.

Then on December 3, 1912, barely a month before the date of the expropriation, Leclerc sells his undivided half interest in the whole of the suppliants' property composed of 2,148,600 sq. ft. for the sum of $30,000 to four of the above named suppliants The conveyance recites that out of the $30,000, the sum of $15,000 is paid in cash, and that the balance will be paid to the vendor as soon as the said land, or part thereof, will have *been sold or expropriated for private or public purposes.* In the meantime the said purchasers are to pay interest on the said balance, unless they prefer liberating themselves of their debt before the said sale, either by paying this balance, or by surrendering to the vendor the land so purchased; but in so surrendering they will be barred from recovering the amount already paid on account which will be forfeited to the profit of the vendor and which will be considered as the rent of the said property. The sale of December 3, 1912, is made at the rate of $0.027, that is two cents and seven-tenths of a cent, if one takes into consideration that the whole property is of an area of 2,148,600 ft., and that the sale of ½ of it at $30,000 under the easy conditions above mentioned, would represent that amount for the half.

To this sale reference will be hereafter made when dealing with the compensation moneys which should be paid the sup-

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pliants, as it is indeed the best illustration of the market value of these lands in December, 1912, when the purchase was made by one not pressed to buy and not at a forced sale. There is further no evidence to shew the market value of the property could and would be different on December 3, 1912, from January 15, 1913, the date of the expropriation.

On March 27, 1913, after the expropriation of part of the lands in question, in this case, the property adjoining to the east of the suppliants' beach lot, was sold at 2 cents a foot, and upon it is a wharf of 1,500 ft. long, containing 94,000 cu. yds., three small piers, shed office and forge, etc., coupled by the statement of the chief engineer of the Quebec harbour commission, that after purchasing the commissioners erected a mill and tracks on the wharf without having to make repairs to it. Adding that the wharf was in good condition at the time of the purchase and had been in use by the vendors up to the date of the sale. Deed filed as ex. "A."

We have further the offer by the Davie Co. to the government of some of their land, at 2 cents a foot, at Lauzon, adjoining the dock, for the purpose of the present public work.

We have also upon this question of sale of property in the neighbourhood, the purchase on January 25, 1916, for $4,685 of 1,413,284 sq. ft. forming what has been called the Glenbury Cove and the St. Lawrence Cove. This property was resold on February 24, 1916, for $7,565, taking care of a mortgage of $5,500. It is, however, well to mention that these two coves, situate at some little distance west of the suppliants' property, are not as desirable properties as that of the suppliants, the railway severing their hilly part from their shallow shore. While these two coves may be considered of the same class of property because they are beach lots, their respective value is not the same and the great balance of advantage is in favour of the suppliant's land.

By reference to exhibit "H," it will be found the whole of suppliant's property at Lauzon was assessed in 1912, at $2,000, and in 1913, the year of the expropriation, at $4,000.

Under the provisions of sec. 50 of the Expropriation Act, the Court in determining the amount of compensation must take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue by the con-

struction and operation of the public work, to such person in respect of any land held by him with the lands so taken.

There can be no doubt whatsoever, notwithstanding some isolated contention to the contrary found in the evidence —and I so find without any hesitation— that the balance of the property now remaining to the suppliants has been and will be greatly benefited by the present graving dock, and that in arriving at the proper compensation to be paid them, such advantage and benefit must be taken into consideration by way of set-off.

In this case, as is customary in most all expropriation cases, there exists a great conflict between the evidence adduced on behalf of the suppliants and the evidence adduced on behalf of the respondent. What can help us out of this difficulty, what can reconcile the testimony of witnesses who are so far apart, if not sales of property in the neighbourhood? Is not, indeed, the amount at which owners of neighbouring property selling and buying *de gree a gre*, the best evidence of the market value of lands in that locality? Because, after all, the market value of property is as defined in *The King* v. *Macpherson*, 20 D.L.R. 988, 15 Can. Ex. 215, at 216.

> The value that a vendor not compelled to sell, not selling under pressure, but desirous of selling, is to get from a purchaser not bound to buy, but willing to buy.

We have the advantage in this case, as a determining element to be guided by, not only sales in the neighbourhood but the sale of half of the undivided interest in the very property expropriated, barely a month before the expropriation. The prices paid under these circumstances afford the best test and the safest starting point for the present inquiry into the market value of the present property. The best method of ascertaining the market value of property is to test it by sales in the neighbourhood. *Dodge* v. *The King*, 38 Can S.C.R. 149; *Re Fitzpatrick* v. *Town of New Liskeard*, 13 O.W.R. 806.

Moreover, the evidence of value arrived at based upon the sales of property in the neighbourhood is obviously more cogent than the opinion evidence built upon unwarranted optimism and sometimes amounting but to mere lip-service reaching the nadir of reasonableness.

Part only of this property has been expropriated and where part only of a property is sold or expropriated a higher price

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should be paid than when the whole property is taken. Then by the present expropriation a larger part is taken on the river front than on the land side; that is, the piece taken is of irregular shape with more taken of the more valuable part. These two elements must be thrown in the scale in fixing a fair compensation.

Taking into consideration all that has been above set forth, making fair allowance for the fact that part only is taken and also the manner in which the expropriation is made, together with the accrued advantages and benefit to the balance of the property accruing to the owners from the public work in question, I have come to the conclusion, for the reasons above mentioned, to allow as compensation not the bare market value but a liberal value of the lands expropriated, which I fix at the sum of 4 cents a sq. ft. —amounting to the sum of $23,560—the whole in satisfaction of the land expropriated and for all damages, if any, resulting from the expropriation.

This is a case where the customary 10 per cent. upon the compensation moneys for compulsory taking should not be allowed. The original purchasers at the sheriff's sale in 1900 never, up to the date of the expropriation, made any use of the property. They derived no revenue therefrom. They did not use it for themselves or for any purposes of development whatsoever. The other four parties who bought in 1912, did so buy at a speculative price with the open and distinct object of speculating on an expropriation, as set forth in the deed of purchase itself. This Court must guard against fostering such speculation at the expense of the public and must discourage the same. While 10 per cent. may be allowed the owner of premises where he, and sometimes his father, has lived upon the property for years, and is forced to sell, is dispossessed against his will in the interest of the public, and has to face the expense of moving, and should be recouped for certain contingent items— the present case offers none of these elements, no such analogy and does not come within the class of cases where the 10 per cent. can be allowed. *The King* v. *Macpherson*, 20 D.L.R. 988, 15 Can. Ex. 215; Cripps on Compensation, 5th ed. 111, and Brown & Allen on Compensation, 2nd ed. 97.

Therefore, there will be judgment as follows: 1. The lands expropriated herein are hereby declared vested in the Crown

from the respective dates at which they have been expropriated, namely, January 15, and July 16, 1913.

2. Compensation for the land and real property so expropriated, with all damages arising out or resulting from the expropriation, are hereby fixed at the sum of $23,560, with interest on the sum of $10,880 from January 15, 1913, to the date hereof, and on the sum of $12,680 from July 16, 1913, to the date hereof.

3. The suppliants are entitled to recover from and be paid by the respondent the said sum of $23,560 with interest thereon as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges, rents and incumbrances whatsoever, the whole in full satisfaction for the land taken and for all damages whatsoever resulting from the said expropriation.

4. The suppliants are also entitled to their costs of the action.

Judgment for suppliants.

REX v. CARSWELL.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, Simmons and McCarthy, JJ. June 29, 1916.

THEFT (§ I—1)—ELEMENT OF OWNERSHIP ESSENTIAL TO CRIME—SUFFICIENCY OF INDICTMENT.

Where an indictment for theft charges the defendant with stealing a cow the property of a person definitely named therein, a ruling by the trial Judge that the question of ownership of the cow is immaterial to the crime, is erroneous, and a conviction based upon such ruling will be quashed.

[See *R.* v. *Jennings*, 29 D.L.R. 604.]

APPEAL from a conviction for theft. Statement.

H. C. B. Forsyth, for respondent.

M. C. Brownlee, for defendant, appellant.

SCOTT, J.:—The defendant was tried at Stettler on March 21, 1916, upon the charge "for that he the said Albert Carswell at or near Consort in the Province of Alberta on or about November 18, 1915, did steal a certain cow the property of one Christ. Fendrick." He was convicted of the charge and sentenced to imprisonment for 3 years in the Edmonton penitentiary. Scott, J.

Counsel for the defendant afterwards applied to the trial Judge to reserve certain questions of law for the opinion of the Appellate Division. The application was refused and the defendant now appeals from such refusal.

The evidence of Fendrick is to the effect that in the month of July, 1915, he lost a cow which he described as an unbranded light

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red cow about 4 years old, weighing about 900 or 1,000 lbs., the only other means of identification being that, owing to her propensity to hook other cattle, he had cut off about an inch from the tips of her horns. He admitted, and one Bartlett, another Crown witness, also stated that it was not unusual to see cows with the tips of their horns cut off.

Bartlett and Gattey, two neighbours of the defendant, living about a mile from his place, state that during the summer and fall of 1915 they had seen a cow answering the description given by Fendrick running with other cattle at a place about 3 miles from defendant's farm.

Gertrude Mohr, a child of 11 years (whose evidence not under oath was received by the trial Judge on the ground that she did not understand the nature of an oath), testified that she lived about a mile from defendant's place, that on her way to and from school she had to pass through his pasture, that he had about 30 head of cattle in the pasture which were so well known to her that she would notice if there were any strange cattle among them, that one day in the fall of 1915 while on her way to school she saw a strange cow in the pasture which had the tips of its horns cut off, that she noticed its colour but, owing to her ignorance of the names of the different colours, she was unable to name its colour. A cow's tail was then shewn to her, and she stated that it was the same colour as that of the strange cow she had seen. She further states that when returning from school that day, while passing with her brother through a valley on defendant's place, she heard a shot, that her dog ran up the hill but shortly afterwards ran back to her as if someone was chasing it, that when returning from school on the following day with her brother the dog left them and shortly afterwards returned with a piece of tallow which she took from him, that he went off again, and, upon following him, they found somewhere in the defendant's pasture the head, hide, feet, and tail of the animal she had seen the day before, that she recognized the head by the fact that its horns were cut off and that the hide was the same colour as the tail produced at the trial.

One MacKay, who lives about 3 or 4 miles from the defendant's place, states that at a later date he went to Gertrude Mohr to ask her about the animal she had seen, that her brother took him

to a certain place on defendant's farm where he (MacKay) found the tail and offal of an animal and that he took the tail with him to Bartlett and Gattey's place. Upon being shewn the tail then in Court and asked if that was the tail, he replied, "Yes, I would say that was the tail," that he afterwards went with constable Wilson, of the R.N.W.M.P., to defendant's place and that after some conversation with him they went together to the place where he (MacKay) had found the tail and offal and that the defendant upon seeing them shewed great surprise and said "That is one on me."

Constable Wilson states that he went with MacKay to defendant's place to investigate the butchering of an animal near his shack and there saw the defendant, that after some conversation between them they went together to the place where MacKay found the tail and offal, that during this interview the defendant, in answer to certain questions put to him by the constable, stated that he had butchered but one animal, viz.: a red yearling steer owned by him which was one of two he had bought from one Noe and had left the hide at a tannery in Calgary to be made into a robe, that he produced a bill of sale from Noe of two branded yearling steers, one a red spotted yearling and the other a black one, and stated that it was the red one he had butchered, that he pointed out the spot where he had butchered which was at a place other than that where MacKay found the hide and offal.

The defendant, in his evidence at the trial, stated that the animal he killed was a long yearling, that is, one nearly 2 years old. He admitted that it was not one of those bought by him from Noe and that he had not sent the hide to Calgary, but that, on the contrary, he had retained it and cut it into strips and he produced certain strips of hide at the trial which he stated were from the hide of the steer he had killed. His explanation of why he had made untrue statements to constable Wilson was that from the way Wilson questioned and cross-questioned him he thought that there was something in the wind, that he became excited and thought it would probably make things better by telling a deliberate lie.

The evidence as to the weight of some of the quarters disposed of by the defendant was such as might reasonably lead the trial Judge to find as he did, that the animal which the defendant killed was one of greater weight than that of a long yearling steer.

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In his reasons for judgment the trial Judge, referring to the evidence of Gertrude Mohr, expressed the following view:—

That is largely the evidence as to the animal belonging to Mr. Fendrick. It is not extremely strong there is no doubt, and it could undoubtedly have been met without very much difficulty if it had been false. It is enough, however, to make a *primâ facie* case, especially inasmuch as the question of the ownership of the animal is not material to the crime itself. Although the charge is that the animal was owned by Fendrick, that is not a material part of the crime. The crime is the stealing of an animal belonging to some one else. Whether it was Mr. Fendrick or Mr. Brown would be of no consequence.

And, again, after referring to the question of the weight of the animal killed and to the false statement made by the accused to constable Wilson, he says:—

The fact is clear that it is only certain circumstances, a chain of circumstances which connect the animal which was seen astray and seen on the accused's farm with this particular cow, but it answers all the descriptions, and, coupled with the false story which was told, it seems to me the only reasonable conclusion I can come to is that the accused is guilty.

Some of the questions sought to be reserved are:—

2. Was there any evidence in point of law to justify the trial Judge in finding that the cow, the subject matter of the charge, was the property of Chris. Fendrick? 4. Was the trial Judge right in holding "That the question of ownership is not material to the crime itself; although the charge is that the animal was owned by Mr. Fendrick, that is not a material part of the crime, the crime is the stealing of the animal of someone else, whether it was Mr. Fendrick or Mr. Brown would be of no consequence to the crime itself." 5. Was the trial Judge justified in considering the false statements made by the accused to the police as evidence against the accused?

The evidence that the animal killed was Fendrick's cow is dependent entirely upon the description given by him of the animal which he lost. I have shewn that his only description of it was an unbranded light red cow about 4 years old, weighing about 1,000 lbs., and that the only marks she had was that the tips of her horns had been cut off, but in view of his admission that it is not unusual to see cows with the tips of her horns cut off that would not appear to be a reasonable means of identification. Assuming that it had been proved that the defendant had killed a cow answering that description, that would, in my opinion, fall short of proving beyond a reasonable doubt that it was Fendrick's cow. There, doubtless, are hundreds of animals to be found on the ranges which would answer that description in its entirety.

It is apparent from the trial Judge's reasons for judgment that he entertained the view that it was unnecessary for the

Crown to shew that it was Fendrick's cow which the defendant had killed, and he appears to have based his judgment, at least partly, upon the assumption that such proof was unnecessary.

In Russell on Crimes, 7th ed., p. 1292, it is stated that larceny may be committed by stealing goods the owner of which is not known, and it may be so stated in the indictment, but an indictment alleging the goods to be the property of a person unknown is improper if the person is really known.

Sec. 855 of The Criminal Code provides that no count of an indictment shall be deemed objectionable or insufficient for the reason only that it does not state who is the owner of any property therein mentioned.

It may be open to question whether, in view of this enactment, it is now necessary in a charge of theft to state the name of the owner of the stolen property, or that the owner is unknown, but, in my view, it is unnecessary to decide that question upon this appeal as, even if such statement were unnecessary, the Crown has restricted the charge in this case to one for stealing Fendrick's cow and it was to the charge of stealing his cow that the defendant pleaded and after which he was tried and convicted. Had the charge been tried by a jury and had the Judge charged that the question of the ownership of the cow was one which was not material to the charge there would clearly have been a mis-direction causing a mis-trial (*Rex* v. *Murray*, 75 L.J. K.B. 593, 595). I see no reason why the same result should not follow where, as in this case, the trial Judge has misdirected himself upon the point.

Under sec. 1018 (*d*) if this Court is of the opinion that the ruling of the trial Judge was erroneous and that the accused ought to have been acquitted, it may direct that he shall be discharged.

It is true that the trial Judge has found upon the evidence that the defendant was guilty of the offence as charged and, were it not for the fact that he entertained what, in my opinion, was the erroneous view that it was unnecessary to prove the ownership as charged, his finding upon the fact should not be disturbed. I cannot avoid the conclusion that his consideration of the evidence pointing to guilt may have been and probably was affected by reason of his entertaining that view and that, if he had not

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entertained it, he might have reached a different conclusion. I am, therefore, of opinion that it is open to this Court to consider the evidence and to determine whether the defendant should have been convicted upon it.

I have already expressed the view that the Crown failed to establish beyond a reasonable doubt that the animal which defendant killed was Fendrick's cow. The trial Judge appears to have attached considerable importance to the fact that the defendant made certain statements which he admitted were false respecting the animal which he had killed. The fact of his having made these false statements might reasonably create a suspicion or might even support other evidence that he had killed a cow the property of another or one which he had no right to kill, but, in my view, it should be held to be of but little, if any, effect in support of the charge that it was Fendrick's cow he had killed.

Counsel for the Crown and the defendant agreed that if this Court was of opinion that the trial Judge should have reserved any of the questions sought to be reserved, it should deal with the case as if they had been reserved.

I would direct the discharge of the defendant.

Stuart, J.

STUART, J.:—In my opinion the conviction in this case should be quashed. On the first argument before three Judges I was strongly inclined to this view but felt some hesitation. Now, after the further argument before the five Judges and further consideration, I am convinced that the conviction ought not to stand.

The accused was charged with stealing a cow belonging to one Fendrick. It seems quite clear and well settled that upon such a charge the Crown must prove that the animal with which the accused is alleged to have dealt was in fact the animal of Fendrick. In *Trainer* v. *The King*, 4 Com. L.R. at p. 135, Griffiths, C.J., of the High Court of Australia, said:

> The law of England and it is the same here, requires the ownership of the property to be laid in the indictment and proved. There is ample power of amendment, but in the absence of amendment it must be proved as laid. If the name of the person is not known and he is dead or gone and the stealing is proved then the charge may be laid as stealing from a person unknown. But if it is not known whether the goods were stolen or not you cannot get over the difficulty by saying the goods were stolen from a person unknown.

In the same case, at p. 132, it is said:—

> In any indictment for larceny you must prove first of all that the property has been stolen and you must then prove that the person who stole it was the prisoner.

In Hals., vol. 9, at p. 378, it is said:—

> The prosecution must first give satisfactory proof of the *corpus delicti*, *i.e.*, must prove that the offence charged has been committed by some one. The prosecution must then prove that the defendant is the person who committed the offence charged.

Now, I think these citations are sound in law but, of course, I do not think it was the intention of the writers to say that the proof of the *corpus delicti* must always necessarily come *first* in order of time. For example, in a note to the passage quoted from Halsbury it is said:—

> In such a case the proof of the *corpus delicti* is inextricably bound up with proof of the connection of the defendant with it.

The circumstances of the present case are to some extent an illustration of this latter principle. Unless the cow which the little girl saw on the accused's place and of which on another day she saw the remains was the cow that Fendrick lost then there is no proof that Fendrick's cow was ever stolen at all. She may be on the range yet. I think it must be borne in mind that it was the cow that Fendrick said he missed in July that the accused was accused of stealing. Unless that cow was identified with the one the little girl saw dead then there was no proof of the *corpus delicti*.

There is, no doubt, another avenue by which the mind may approach the subject. This is to assume that the charge was that the accused had stolen a certain cow which the little girl has *seen* on his place. Now, in that case, it was necessary either to allege that the owner of that cow was unknown or to allege that that cow belonged to some particular person. To allege the latter and to place the ownership in Fendrick was, of course, to allege the case which we have before us. But it is not permissible it seems to me, to treat the case partially as if the former allegation, *i. e.*, of an unknown ownership, had been made. Moreover, if we drop the allegation of ownership in Fendrick then we have the exact case that came up in *Trainer* v. *The King*, *ubi supra*. If that allegation be dropped as well as all evidence relating solely to it, then we have no evidence that anybody's animal was stolen at all.

It is also to be observed that no one saw the accused do anything at all to the animal that the little girl saw. The accused was found to have some beef at his place just as the accused in *Trainer* v. *The King* was found with some lambs. The accused lied about the source from which the beef came as the accused in

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Trainer v. *The King* lied as to how she got the lambs. And the High Court in that case held, as I think rightly, that there was no evidence upon which the accused could be convicted either of stealing or receiving even where the ownership was laid in a person unknown. So here, if we omit the allegation of ownership in Fendrick, it would be impossible to find the accused guilty of either stealing or receiving either the animal of which a portion of the carcass was found in his building or the animal of which the little girl saw the remains even if the property had been laid in some person unknown and whether you decide that those two ideally separate animals were in fact one and the same or not. A charge under sec. 392 of the Code with regard to estrays was not laid and aside from a resort to that section the animal in question must be shewn to have belonged to some one, even though that some one may be presently unknown. Otherwise there could be no theft. It is noticeable, indeed, that there is no proof that the accused himself did not own a red cow with the tips off her horns. Of course he did not claim to own one but he never said he did not and it would be for the Crown to prove that he did not.

It seems to me that this reveals the very essential nature of the allegation of ownership in Fendrick. In the case of *Rex* v. *Isaacs*, 5 N.S.W.L.R. 369, digested in the South Wales Digest, 1825-1904 at col. 360, the prisoner was charged with receiving goods the property of T. knowing them to have been stolen. It was proved that the goods consisting of a quantity of boots and shoes were stolen from a wharf and that the prisoner feloniously received them. In proof of the ownership of the goods the Crown called the agent of T. who said that T. was a large manufacturer in England of boots and shoes and that he was his Sydney agent; that the marks on the trunks found in the prisoner's possession corresponded with the marks put upon T.'s goods and that the goods were T.'s make. It was held that the evidence was insufficient to prove that the goods stolen were the property of T.

Then, in *R.* v. *Brown and Duncan*, 9 N.S.W.L.R., digested at col. 361, it appears that on a trial for larceny the jury were directed that if they thought the question of the guilt of the accused turned upon the question of ownership they must acquit if they saw any reasonable doubt on the question whether the goods alleged to be stolen were the property of the person in whom they were laid; but that if they were satisfied that the accused

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was guilty irrespective of the question of ownership then *primâ facie* evidence of ownership was sufficient. It was held that the direction was right; that under the circumstances it was not necessary to leave expressly to the jury the question of reasonable doubt as to ownership: that the jury by their verdict having found as a fact that the question of guilt did not turn upon the question of ownership, the question of ownership became immaterial; and that there was no substantial wrong or other miscarriage of justice to justify the Court in setting aside the conviction. Also, *Rex* v. *Isaacs* was overruled so far as it lays down a general rule that in all cases of larceny there must be strict proof of ownership of the goods stolen.

Now that case seems to support any argument which was addressed to us by counsel for the Crown, but the exact facts are not reported and it is possible that the ownership may not have been so material a matter as it is in the present case. And, however that may be, *Rex* v. *Isaacs* was affirmed by the High Court of Australia in *Trainer* v. *The King*, and Griffiths, C.J., said in the latter case:—

> So far as *Rex* v. *Brown and Duncan* purports to overrule *Rex* v. *Isaacs*, I think it was wrongly decided. In my opinion Sir James Martin's decision (in *Rex* v. *Isaacs*) is good law;

and he quoted with approval the words of Sir James Martin, as follows:—

> A mere defective proof may not be a substantial wrong or injustice in a civil action, but I am not disposed in a case like this, where the liberty of the subject is concerned, to say that this was not a substantial wrong and that proof of the property of the goods was immaterial.

Now, in the present case, the trial Judge, after referring to the evidence, said:—

> That is largely the evidence as to the animal belonging to Mr. Fendrick. It is not extremely strong there is no doubt, and it could undoubtedly have been met without very much difficulty if it had been false. It is enough, however, to make a *primâ facie* case, especially inasmuch as the question of ownership of the animal is not material to the crime itself. Although the charge is that the animal was owned by Mr. Fendrick, that is not a material part of the crime. The crime is the stealing of an animal belonging to some one else whether it was Mr. Fendrick or Mr. Brown would be of no consequence as to the crime itself. It appears to me the evidence is sufficient in the absence of their being anything to rebut it.

And, again, at the conclusion, after reviewing the evidence further, he said:—

> The fact is clear that it is only certain circumstances, a chain of circum-

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stances, which connect this animal which was seen astray and seen on the accused's farm with this particular cow, but it answers all the descriptions and coupled with the false story which was told it seems to me the only reasonable conclusion I can come to is that the accused is guilty.

Now, when it is remembered that for the reasons I have given, the identity of the cow seen dead by this little girl and the beef in the accused's building with each other and with Fendrick's lost cow was an absolutely essential ingredient in the crime charged and essential to be proven before the accused could be convicted, I am clearly of opinion that if the words used by the trial Judge had been addressed to a jury they would have amounted to a misdirection. The accused would have been entitled to have the jury told that that identity must be established and the property of Fendrick in the cow seen dead by the girl and in the beef found on the accused's place must be shewn before he could be convicted on the charge laid against him. He would have been entitled to have that problem plainly placed before the jury to solve and decide. I, therefore, think he was also entitled to have the Judge who tried him face that problem fairly and with a full recognition of the essentiality of the proof of ownership in Fendrick. Of course, one must recognize that when a Judge alone tries a person he is not apt to be so careful in his choice of language as if he were addressing a jury, but nevertheless, when the Judge does give his reasons for deciding against an accused person, that person is entitled to take the reasons given, *as* they are given, as the real reasons for his conviction and to question their validity in point of law accordingly.

Reading the whole of the language of the trial Judge together I am in grave doubt whether he did in fact bring his mind to a settled conviction as to the ownership of the cow, but I am convinced that if he did make a decision on that point he did so apparently, at least, without, I say it with much respect, a clear enough appreciation of the significance and essentiality of the question. In other words, I think he came to the conclusion of guilt owing to a possible misapprehension on a point of law which, if it had been expressed to a jury, would have been clearly a misdirection.

I am convinced that the trial Judge must have meant something more than merely that a theft could be committed without stealing something from Fendrick or that there was not one class of persons from whom property could be stolen and another from

whom it could not. Yet only in some such colourless sense was the observation true as a matter of law, because ownership is material to the crime of theft. I am also convinced that the learned trial Judge felt satisfied that the accused was stealing *somebody's* cow and that it was comparatively unimportant whether it was Fendrick's or not.

I may add that if the decision in *Rex* v. *Isaacs*, *supra*, was good law, as apparently the High Court of Australia thought it was at least in another respect, there would not seem to have been here enough evidence in any case from which a jury could reasonably infer that the animal seen dead by the little girl was the same animal as that lost by Fendrick. Even the trial Judge recognized the weakness of the evidence of identity. I prefer, however, to rest my decision on the ground already given which is sufficient to quash the conviction.

In view of the general weakness of the Crown's case, especially in regard to identity, upon a review of the whole evidence I think the accused should have been acquitted and therefore its power to order a discharge instead of a new trial is open for us to exercise under sec. 1018 (*d*) of the Code. I would therefore order the discharge of the accused.

BECK, J.:—Theft is defined by the Criminal Code sec. 347. This definition very much extends the Common Law definition. Beck, J.

To put it briefly, in every criminal case two things must be established, first that the offence was committed by some one, that is, to use a technical term, the *corpus delicti*—the body of the crime; and, secondly, that the accused was the person who committed it. Halsbury, vol. 9, tit. Criminal Law and Procedure, p. 378. The *corpus delicti* must be proved in a case of theft as in every other criminal case.

The question of the ownership of the thing alleged to be stolen is essential because the intent, the *animus furandi*—is not established unless it be proved that the taking or conversion was against the consent of the owner (*invito domino*) 25 Cyc. 126, Halsbury, vol. 9, p. 636. For instance, the finder of anything lost or mislaid cannot be convicted of theft of the thing unless at the time of the taking or (or by virtue of the provisions of the Code) of the conversion, he is shewn to have taken or converted it believing that the owner could be found. *R.* v. *Knight* (1871),

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12 Cox C.C. 102. *R.* v. *Mathews* (1873), 12 Cox C.C. 489, and cases discussed in Roscoe's Crim. Ev. 13th ed., pp. 549 *et seq.* and unless the owner has been discovered and identified this proof would be generally impossible. It is quite true that one may be convicted of the theft of a thing of which the owner is unknown. In Stephen's Commentaries on the Laws of England, 15th ed., vol. IV., p. 102, it is said:—

> The crime of larceny may be committed as to a thing where the owner is *unknown*, provided it appear that there is an owner other than the taker; and an indictment will lie for stealing the goods of a person unknown. An example of this may occur in the case of stealing a shroud out of a grave, which is the property of *those, whoever they were*, that buried the deceased.

Two references are made by the author to Hale's Pleas of the Crown:—

> Every indictment of larceny ought to suppose the goods stolen to be the goods of somebody. An indictment of the goods *cujusdam ignoti* is good, for it is the King's suit and though the owner be not known, the felony must be punished. Hale P.C. 512.
>
> I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. 2 Hale P.C. 290.

In an anonymous case, 8 Mod. 248; 88 E.R. 177:—

> A loose and idle person was apprehended . . . and being brought before a justice of the peace, a silver tankard was found in his possession and he giving no satisfactory account how he came by it, and the justice suspecting he stole it, committed him to prison.
>
> He was indicted for stealing a silver tankard, value 10 pounds, of the goods and chattels of a *person unknown*.
>
> At the trial the prosecutor offered to give evidence that this was a loose and disorderly person and therefore it must be presumed that he could have no property in the tankard but that he stole it. Gilbert, C.B., said that though an indictment might be good for stealing the goods *cujusdam ignoti* yet a property must be proved in somebody at the trial, otherwise it shall be presumed that the property was in the prisoner, by his pleading "*not guilty*" to the indictment.

Sec. 855 says that:—

> No Court shall be deemed objectionable or insufficient for the reason only, (*b*) that it does not state who is the owner of any property therein mentioned.

This section cannot, in my opinion, affect in any way the proof of the essential elements of the crime; and for the reason I have given I am of opinion that ownership—absolute or special—in some person other than the accused must, in all cases, be proved as a basis for the proof—though it be a mere inference—that the taking or the conversion was without the consent of the owner,

and that though the owner may be unknown he yet must be capable of being individualized by description—not necessarily physical description—as in the case referred to of grave clothes. See Archbold, Crim. Pr., 24th ed., p. 49. Sec. 859 empowers the trial Judge to order particulars.

If he does so it must be clear that the prosecutor is bound by the particulars which he gives in accordance with the order.

If without order he gives particulars he must be equally bound.

Here the charge laid the property in one Fendrick. So long as the charge was and remained so particularized I think the prosecution was bound by the particulars. In effect it was so held in *Rex* v. *Murray* (1906), 75 L.J. K.B. 593, by the Court for Crown Cases Reserved composed of 7 Judges. In that case the conviction for larceny was quashed because the property being laid in a named person, the evidence shewed the owner was that person's wife. An application to amend so as to make the indictment accord with the evidence was made at the trial before verdict but was refused. The Court held that the trial Judge ought to have allowed the amendment but that, no amendment having been made, the conviction could not stand. I have already expressed a similar opinion in *Rex* v. *Nier*, 28 D.L.R. 373.

In the course of his reasons for finding the accused in the present case guilty, the trial Judge said with reference to the evidence directed to proof that the animal alleged to have been stolen was the property of Fendrick as laid in the charge:—

> It is enough, however, to make a *primâ facie* case, especially inasmuch as the question of ownership of the animal is not material to the crime itself. Although the charge is that the animal was owned by Fendrick, that is not a material part of the crime. The crime is the stealing of an animal belonging to some one else, whether it was Fendrick or Brown would be of no consequence to the crime itself. It appears to me the evidence is sufficient in the absence of there being anything to rebut it.

As I have indicated, I think the trial Judge was wrong in his opinion that the question of ownership was not material; and it would seem to be probable that his finding that the evidence was sufficient to prove Fendrick's ownership was influenced by this opinion. For my own part, having carefully considered the evidence, I think there is no proof which had there been a jury, ought to have been submitted to them as evidence of the identity of the animal killed by the accused with that lost some considerable length of time before by Fendrick.

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Much was made in the argument of the fact that the accused told a story to the police which was false; and I cannot help inferring that this had an influence upon the mind of the trial Judge beyond its legitimate effect.

Conduct of this sort on the part of the accused casts suspicion upon him as the offender but it goes only to the question of his identity as the person who committed the offence. It does not go to prove the *corpus delicti*, which must be established by clear proof directed to that very fact. See Best on Evidence, 11th ed., pp. 416 *et seq.*, 426 *et seq.* Bouvier Law Dict. tit. *corpus delicti*.

In the result I think (1) that the trial Judge was influenced in his apparent finding on the facts by a mistake in law relating to the question of the ownership of the animal alleged to have been stolen and that the result was a self-misdirection on the sufficiency of the evidence of the identity of the animal lost by Fendrick with that killed by the accused; (2) that the suspicious conduct of the accused ought not to be taken into account in considering whether the *corpus delicti* was proved, namely, whether Fendrick's cow which he lost was stolen by anybody and that in this view the evidence of the *corpus delicti* fails in sufficiency. I do not mean to say that in no case does the incriminating conduct of the accused tend to prove both his guilt and the *corpus delicti*. The suppositious case put by Maule, J. (Bouvier C.C.) is a very apt illustration to the contrary. But the case is different here.

Simmons, J.

SIMMONS, J. (dissenting):—The facts concerning this appeal are set out in the judgment of Scott, J. It is admitted that there is sufficient evidence to convict the defendant of the theft of an animal the ownership of which has not been established, but the main ground for the appeal is that since the charge against the defendant alleged that one Kendrick was the owner, the Crown failed to establish the ownership and that for this reason the conviction should be set aside.

It is also claimed that the trial Judge erred in law in stating that "the question of ownership of the animal is not material to the crime itself."

At the conclusion of the case for the Crown counsel for the defendant applied for dismissal on the grounds that it had not been established that the animal in question was the property of Mr. Kendrick, and that the trial Judge during the discussion that ensued said:

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I do not think any question of possession arises in this case. The case which is made is simply that an animal was there and an animal was killed by the accused, and sold or parted with by the accused, an animal corresponding with this animal. I do not think there is any question of possession here; if they rested on that I would quite agree with you. There is nothing to shew on which he would be convicted, that the animal was in his possession which he would have to be called upon to give an account of. If the animal he sold was this same animal, it is not a question of possession at all; it is a question of stealing it or appropriating it to his own use; it is a question whether the evidence sufficiently shows whether the animal alleged to be astray was the animal which he killed and sold.

The application made at the conclusion of the case for the Crown was refused and the defendant gave evidence on his own behalf and called witnesses to testify for him.

In the reasons for his conclusion that the offence had been established the Chief Justice observed:

that is largely the evidence as to the animal belonging to Mr. Kendrick. It is not extremely strong there is no doubt, and it could undoubtedly have been met without very much difficulty if it had been false. It is enough, however, to make a *primâ facie* case, especially inasmuch *as the question of ownership of the animal is not material to the crime itself. Although the charge is that the animal was owned by Mr. Kendrick, that is not a material part of the crime.*

It is not contended that the evidence was insufficient to establish that the defendant had killed and disposed of an animal which he did not own.

The defendant had by this Act destroyed the evidence which might have established with an absolute certainty the identification of the animal in question. A cow answering generally the description of Kendrick's cow was seen on the range close to the defendant's farm by two neighbours and it was seen on Kendrick's place by the Mohr girl. A hide and head answering generally the same description was seen by the girl on defendant's place the next day. Some of the entrails and a tail were found on defendant's place subsequently and the defendant gives no explanation of how they came there.

I am of the opinion that the Chief Justice was correct in his conclusion of law applicable to the case. It has been established by proper evidence that the crime of theft had been committed by the defendant. No means exists now of establishing absolute identification of the animal in question, as it has been butchered and disposed of by the defendant.

The Crown has made out a *primâ facie* case as to the ownership of an animal which was upon the defendant's premises about the

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time when the defendant had in his possession the carcass of an animal killed by him and which was unlawfully in his possession. It is obvious that if the defendant set up any claim of ownership in an animal answering generally the description of Kendrick's cow, then the proof of ownership of the cow in question would be the material part of the Crown case.

The defence does not, however, go to the question of identification of the cow which was on or about defendant's premises with the cow which Kendrick claimed. The defence relied upon is a denial that the defendant had anything to do with a cow answering either generally or particularly the description of the cow in question.

In regard to the corroboration of the unsworn testimony of Gertrude Mohr, required by the Canada Evidence Act, sec. 16, I am of the opinion that there is *some other material evidence* in the finding of the offal and tail of animal upon the defendant's premises and in addition the possession by the defendant of a carcass which he has not accounted for. I would therefore dismiss the appeal.

McCarthy, J.

McCARTHY, J., concurs with STUART, J. *Conviction quashed.*

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

1. APPEAL (§ IV G—140)—LOSS OF STENOGRAPHER'S NOTES IN CRIMINAL CASE—EFFECT.

Upon an appeal on questions reserved from a conviction for theft, where the questions involve consideration of the evidence given at the trial, and the stenographer's notes containing the only official record of such evidence have been lost, or are not available, through omission of the Crown officers, it is compulsory upon the Crown to furnish such stenographer's notes or an authenticated transcript thereof, and in default of their so doing within a time limited by the Court, the conviction will be quashed.

2. THEFT (§ I—1)—ESSENTIAL OF OWNERSHIP—DESCRIPTION OF PERSON.

Upon a charge of larceny it is essential to prove ownership in some person other than the accused, and that person if unknown by name must be individualized by circumstantial description.

[See *R.* v. *Carswell*, 29 D.L.R. 589]

Statement.

MOTION for leave to appeal from the refusal of the trial Judge to reserve certain questions.

James Short, K.C., for the Crown.

A. A. McGillivray, for accused, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—By consent the motion is to be treated as if the questions had been reserved.

Each of the defendants was charged separately before Walsh, J., with stealing one roan steer of the value of $60 the property of J. W. Baird, and in the same charge with receiving the same animal knowing it to have been stolen. The two accused were tried together. Hamilton was found guilty of stealing, Jennings of receiving. The evidence was taken down by a Court stenographer but he seems to have been only temporarily employed by the Department of the Attorney-General and very shortly after the trial to have left the employment of the Department and gone to Spokane, U.S.A., taking with him his shorthand notes of the evidence. Under these circumstances the application which is before us—one by way of appeal from the refusal of the trial Judge to reserve a case which involves a consideration of the evidence—the appellants are able to furnish us with the Judge's notes only, which are somewhat meagre and which he has intimated he cannot supplement. During the argument of the case members of the Court expressed the opinion that the Court was bound to hear the appeal and that appellants ought not to be prejudiced if any part of the material upon which they have a right to base their appeal, without fault on their part, but through some omission of the Crown or of the Department of the Attorney-General or of the officers of the Court becomes not available. I am still of that opinion and take occasion to suggest to the proper authorities the making of such regulations as will prevent the occurrence of similar difficulties in the future.

In *Rex* v. *Pimes*, 28 T.L.R. 409, where evidence, upon a material point, upon which the appeal seemed to turn, did not appear in the shorthand notes nor in the notes of the deputy-chairman of the Quarter Sessions before which the case was tried, although the alleged evidence was made a point of before the jury and although the deputy-chairman informed the Court that he was under the impression the evidence was given and the counsel who conducted the prosecution was also under the same impression, the Court of Criminal Appeal said that as it did not appear to be certain that the evidence was given, the Court thought it was important, unless there were grave reasons for departing from the practice, that they should be guided by the shorthand notes especially when combined with the deputy chairman's own notes; that as considerable stress was laid by the deputy-chairman in summing up to the jury upon evidence which it was not certain

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had been given, the appeal must be allowed and the conviction quashed.

The Crown prosecutor agreed to the hearing of the appeal on the Judge's notes. Under these circumstances it might seem that we need not consider the question of the propriety of sending the case back to be more fully stated in the expectation that a transcript of the stenographer's notes can be procured, but the Crown prosecutor seems to have given his consent on the supposition that the stenographer's notes could not be procured. We have since been led to believe that they can be procured and that they will clear up the uncertainty existing on an examination only of the Judge's notes.

Although the credibility of the Crown witnesses who told of the defendants' actions in connection with the butchering of a head of cattle was very strongly impeached, there undoubtedly was ample evidence on which the learned Judge could properly find the two accused to be the persons guilty provided the commission of the crime by somebody was proved.

I have already expressed the opinion in *Rex* v. *Carswell*, 29 D.L.R. 589, argued at this session, that on a charge of larceny it is necessary to prove ownership in some person other than the accused and that though the owner may be a person unknown he must still be individualized at least by circumstantial description.

In the present case the utmost that the Judge's notes of evidence establishes is that the accused were guilty of stealing or receiving, knowing it to be stolen, an animal which was the property either of James Baird or of one Williams. Were we to allow the conviction to stand upon this evidence, theoretically at least the accused might be charged with similar offences laying the property in Williams.

After all, a decision that the conviction cannot stand on this evidence is in effect simply an enforcement of the very just rule that the Crown must sustain the burden of proving affirmatively —either by direct evidence or fair inference—a case which excludes any reasonable hypothesis upon which the accused may be innocent. *Rex* v. *Schama*, 84 L.J.K.B. 396.

As I pointed out in *Rex* v. *Carswell*, *supra*, the proof of ownership is essential because it is only by indicating the owner that it can be established—not necessarily otherwise than by

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inference—that the taking or conversion was against the will of the owner.

So that the Crown here in order to secure a conviction must, in my opinion, shew either that the animal was not one of those purchased by Williams from Baird or that at the time fixed as the time of the larceny Baird had not yet sold to Williams or any one else any of the cattle of which that in question was one.

Having little doubt of the guilt of either of the prisoners I would make this order: I would require the Crown to file with the registrar a properly authenticated transcript of the stenographer's notes of evidence within one month so that the Court under the authority of sec. 1017 of the Code may refer to them. If they are so filed I think the Court should without further argument reserve its decision until its next session. If they are not so filed I think an order should go quashing the convictions, and, in view of the fact that the prisoners have been undergoing sentence since April last and have been put to much expense and delay, I would not direct a new trial. *Judgment accordingly.*

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Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. May 2, 1916.

CORPORATIONS AND COMPANIES (§ VI C — 332) — ACTIONS AGAINST LIQUIDATOR IN ANOTHER PROVINCE—LEAVE OF COURT.

A company in process of winding-up, under order of a Court in one province, and a liquidator appointed by such Court, cannot be proceeded against in the Courts of another province to have the liquidator declared a trustee of moneys deposited with the company for investment, and for the appointment of a new trustee to preserve the trust, unless with the leave of the Court where the winding-up proceedings are pending.

[The Winding-up Act, R.S.C. 1906, ch. 144, secs. 22, 23, applied; *Stewart* v. *LePage*, 24 D.L.R. 554, reversed.]

Statement.

APPEAL from a decision of the Court of Appeal in Equity of Prince Edward Island, 24 D.L.R. 554, affirming the judgment of the Vice-Chancellor who refused to set aside the bill of complaint on the ground that the plaintiffs had not obtained leave to bring the suit from the Supreme Court of British Columbia.

Lafleur K.C. and *A. E. MacDonald*, K.C., for appellant.

Gaudet, K.C., for respondents.

Davies, J.

DAVIES, J. (dissenting):—This is an appeal from the Court of Appeal in Equity in Prince Edward Island dismissing an appeal from a judgment of Fitzgerald, V.C., dismissing in turn an application made to him by the appellant, as liquidator of the Dominion Trust Co., to have a bill of complaint filed in his

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Court against the said Trust Company and the liquidator thereof dismissed on the ground that the action was commenced without the leave of the Supreme Court of British Columbia as required by secs. 22 and 23 of the Winding-up Act.

The question for our determination is whether those 22nd and 23rd sections are applicable to proceedings such as these or whether they come within sec. 133 of the Act.

To determine that question it is necessary to see in what relation the complainants stand to the company and its estate and effects.

To do this, we have only before us the statements in the complainant's bill of complaint. The liquidator has not put in any answer to that bill and it seems to me that on this application we are bound to assume the truth of the statements in the bill.

There is no charge of any breach of trust or any claim that the complainants are creditors of the company. The bill seeks a declaration that certain moneys paid by the complainants to the Trust Company and received by it are trust moneys held by it for the use and benefit of the complainants and that certain mortgages set out in the schedule to the Act were obtained as securities by the defendant company for loans made with complainants' money, and that the company may be declared to be a trustee of such mortgages for the complainants and that as such company is now insolvent it may be removed from the office of trustee and some other person or company substituted for it.

The certificate or declaration of trust which complainants received from the company when they paid over their moneys to it is set out in the bill.

Assuming therefore the truth of the statements in the bill of complaint the question arises whether sec. 22 of the Act applies at all.

This section is one taken from the Imperial Winding-up Act and has been the subject of numerous decisions in the English Courts. In construing it and its application the Appeal Court has held in several cases that it did not extend to the case of a landlord distraining upon the goods of the insolvent company which were found upon the land leased and that the landlord's common law right of distraint was not interfered with by the section which "dealt only with *the company*, its *creditors* and its *contributories*.

In the case of *Re Lundy Granite Co.; ex parte Heaven*, 6 Ch. App. 462, the Lords Justices, reversing a decision of Lord Romilly, M.R., held that secs. 163 and 87 of the English Act (corresponding to secs. 22 and 23 of our Act), did not prevent a landlord from distraining upon the goods of the company for rent accrued since the winding-up. Sir W. M. James, at p. 467, said:—

It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention which could not have been that during the many years over which the winding-up may extend the Court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress.

In a later case of *Re Regent United Service Stores*, 8 Ch. D. 616, the Appeal Court, reversing a judgment of Malins, V.C., held that the landlord was not a creditor of the company and that his legal right as landlord could not be interfered with under these sections.

Jessel, M.R., at p. 618, says:—

The first question that arises is, whether the statutory provision applies where the landlord is not a creditor of the company. On this point, I need not say more than that it was decided by the Lord Justices in the case of *In re Lundy Granite Company*, 6 Ch. App. 462, that it does not apply. That decision is binding upon us, and we need go no further to find a reason for reversing the decision of the Vice-Chancellor.

The other justices concurred with him and Thesiger, L.J., referring to *Re Lundy Granite Co.*, 6 Ch. App. 462, said, at p. 620:—

The *ratio decidendi* was not the difference between claims existing at the time of the winding-up order and claims subsequently arising, but that, where a person has no right to claim as a creditor against the company, the Court has no jurisdiction to interfere with his legal right against the company's property.

In the case of *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150, it was held that the mere fact that an order had been made for winding-up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security and for that proposition the authority of the Court of Appeal in *Re David Lloyd & Co.*, 6 Ch. D. 339, was cited as "emphatically negativing the existence of any such right."

In *The Longdendale Cotton Case*, 8 Ch. D. 150, Jessel, M.R., says (p. 153):—

Then the third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the

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action, the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights.

Then the only other point is whether the winding-up makes any difference or confers any new rights. The mere fact that a winding-up order has been made makes no difference, and does not confer upon the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *Re David Lloyd & Co.*, 6 Ch. D. 339, an authority which emphatically negatives the existence of any such right.

It has been suggested that this case is not a binding authority because it was a *voluntary* winding-up. But the judgment of the Master of the Rolls is not based upon that, but broadly upon the construction of the statute and the authority of *Re David Lloyd & Co.*, 6 Ch. D. 339, above cited which was a company being wound up under a *compulsory* winding-up order.

I think we are bound by the decisions of the courts of appeal and should not grant the order dismissing the action under secs. 22 and 23.

Then sec. 133 is relied upon, but it seems to me that the same reasoning which confined the operation of secs. 163 and 87 of the English Act to claims of creditors only, must apply to this section also. That section reads as follows:—

> All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

To give sec. 133 the broad construction claimed for it and to extend it to all persons creditors and non-creditors would have the effect not only of practically reversing several English decisions of the Court of Appeal, but would result in transferring the exclusive jurisdiction over trusts and the property trustees hold as such, which is now vested in the Court of Chancery of the Province of Prince Edward Island with regard to trust property held in that province, to the Court winding-up an insolvent company in another province.

The result would be that the winding-up Court in British Columbia could determine on "summary petition" the legal rights of trustees and *cestuis qui trustent* in Prince Edward Island

whether these *cestuis qui trustent* were creditors of the insolvent company or not.

Now I can well understand that such an enactment, however far reaching it might be and however much it might interfere with his civil rights in the province in so far as it dealt with the creditors or contributories or assets of the company and so was reasonably necessary for the purpose parliament was legislating upon, would be *intra vires* of the Dominion Parliament, but I should more than doubt the power of parliament when legislating upon the subject matter of bankruptcy and insolvency to deal with and take away the rights of third parties not creditors or contributories of the company and not claiming any right to share in the distribution of the assets of the insolvent company.

Surely the negative words of sec. 133 prohibiting "an action, suit, attachment, seizure or other proceeding of any kind whatsoever" being brought "to enforce any claim for debt, privilege, mortgage, lien, or right of property" have reference only to actions of creditors or contributories and do not extend to third parties who are not creditors and are not concerned in the distribution of the assets but seek to assert a legal or equitable right to property they claim as theirs and which the company holds in trust for them.

Of course, I can appreciate the fact that in a case such as the one before us there ought not to be and there would not be any difficulty in obtaining leave from the Judge of the British Columbia Court having charge of the winding-up proceedings to bring and prosecute this action under sec. 22, but if the construction of sec. 133 is as broad and comprehensive as contended for, the only way complainants could enforce their claim as set forth in this action would be a summary petition before the Court in British Columbia.

I am strongly inclined to adopt the view of Haszard, J., that at any rate the application to dismiss the action is premature. It is possible that at the trial if a defence is put in and the crucial statements of fact made in the complainants' bill are controverted and found against the complainants, or if at the hearing they should be found to be creditors or their claim one which affected the distribution of the assets of the company, in other words, if the Court found that these moneys and mortgages in controversy

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were really assets of the company and not trust property held for the claimants, a condition would then be found to exist which would make secs. 22 and 133 applicable. In my opinion and as the suit stands at present, they are not so applicable and the Courts below were right in so holding.

I would therefore dismiss the appeal.

Idington, J.

IDINGTON, J.:—The appellant is the liquidator of the Dominion Trust Co. which was incorporated by an Act of the Dominion Parliament and ordered by the Supreme Court of British Columbia, acting by virtue of the powers conferred upon it by the Winding-up Act and amendments thereto, to be wound up.

The respondents instituted thereafter proceedings by way of a bill filed in the Court of Chancery in Prince Edward Island against the said company to have it removed as trustee of certain parties for purposes within the scope of its Act of incorporation and another substituted.

The appellant as liquidator moved the said Court to have the said bill dismissed on the ground that leave to bring the suit had not been obtained from the Supreme Court of British Columbia as required by sec. 22 of the Winding-up Act which is as follows:—

> 22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes.

The language of this section seems so clear and comprehensive that I can see no room for doubt as to its meaning.

The Dominion Trust Co. is a corporate creature of parliament and everything relative to its existence or extinction in any way its creator chooses to direct and the relation of those contracting with it pursuant to its corporate powers must be governed by what it chooses to enact.

The Winding-up Act seems to apply to any such corporations as the one in question. Indeed there are only a few classes of the Dominion corporations which are excluded from its operation. This is not one. I am, therefore, unable to follow the reasoning upon which the Court below has proceeded.

The term assets therein relied upon so much is not defined by the Act and is of somewhat variable meaning according to the context in which it is used. Indeed the Act uses the word in one or two places, as for example, in referring in sec. 47 to

"money and assets" and sec. 93 "any property or assets," in a way that is illustrative of this.

The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the Court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation.

Sec. 133, for example, furnishes a summary remedy which might be made applicable to respondents' claims, if of the clear and undoubted character their counsel suggests.

If not of that character it is quite competent for the Court, in charge of the proceedings, to permit some more suitable remedy either in that Court or in such Court as it may direct.

The scheme of the Act does not in any way imply that any one is to be deprived of his right in law or equity.

To say that some of the trust funds are traceable in such a way that in law they must be appropriated to meet the demands of particular *cestuis que trustent* creditors, possibly in priority to others not so fortunate, means nothing in this connection.

All such rights as any man or class of men may have in that regard or any way, must be followed and enforced in a due and orderly manner such as the Winding-up Act contemplates and in part prescribes, and evidently intends should be pursued.

The Act in many of its provisions may fall short of meeting what might well have been provided and prescribed for the emergencies of such a case as the respondents present.

The evident scope of the Act, however, clearly is that the Courts should be resorted to in order to determine the rights of any creditor or claimant, whatever they may be, according to the settled principles of law applicable thereto.

I see no difficulty in the claims of the respondents, if what they assert be correct, being established just as much as a mortgagee may be permitted to assert his claim. It is not to be presumed that the Court will refuse, in a proper case properly presented, the right to establish any such claim. It is therefore incumbent upon the Court having the matter in charge to give every person the liberty to prosecute his rights, whatever they may be in law, to enforce same.

All that the Act, by sec. 22, as I understand it, means is that

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reckless and undesirable litigation should be avoided and the consequent waste or ruin thereby of the estate averted. But whenever there is a fair claim of right in the way of lien or otherwise presented, he having it or the class he belongs to having it, should be given the right to prosecute and establish same.

Trust funds may thus be traceable as in bankruptcy cases, and a prior claim thereto be established.

I observe that the Vice-Chancellor has pointed out the re-incorporation of the company by Prince Edward Island legislation. But that is not what the bill of complaint presents and we must be limited in our view to what it does shew as respondents' ground of complaint.

It is to be observed, moreover, that the effect of re-incorporation by a provincial legislature of a Dominion company, in light of the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *The Bell Telephone Co.*, [1905] A.C. 52, does not seem to hold out much encouragement to the founding an action or suit on the re-incorporation.

Incidentally it may well be that such legislation, treated as of a contractual nature, may help respondents in asserting their rights.

I think the appeal must be allowed with costs but without prejudice to the parties respondent, or any of them, asserting their right to apply for leave and prosecuting their rights under the direction of the Court seised of the proceedings under the Winding-up Act.

Duff, J.

DUFF, J.:—I would allow the appeal.

Anglin, J.

ANGLIN, J.:—Sec. 133 of the Winding-up Act provides a method whereby the complainants may obtain in a summary and inexpensive way the declaration of trust which they seek. The English statute does not contain a similar provision. I am, therefore, with respect, of the opinion that the reason for which the prohibitive clause of the English Companies' Act of 1862 (sec. 87), corresponding to sec. 22 of our statute, was held inapplicable in some of the cases referred to in Halsbury at p. 538, cited by the Chief Justice of Prince Edward Island, not to actions or suits against the company, but to proceedings by way of distress—most of them cases where there was no liability of the company itself: *Re Lundy Granite Co.*, 6 Ch. App. 462; *Re Trim-*

saran Coal, Iron and Steel Co., 24 W.R. 900; *Re Regent United Service Stores*, 8 Ch. D. 616—does not exist here. The complainants' interests are provided for and may be asserted by proceedings in the winding-up. No ground has been shewn, in my opinion, for excluding this suit from the operation of sec. 22, and a remedy in the winding-up being available, leave to maintain it would not improbably be refused, *Re David Lloyd Co.*, 6 Ch. D. 339, at p. 343, although it would otherwise be readily granted, *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 150.

I incline to think, however, that sec. 133 is prohibitive of any action or suit, such as that brought by the complainants in so far as they seek a declaration of trust and an allocation to the trust of certain "effects or property in the hands, possession or custody of a liquidator," and prescribes an application by summary petition as the exclusive means of obtaining this part of the relief sought. Once the trust has been established the appointment of a new trustee would seem almost a matter of course.

Counsel for the respondents urges the grave inconvenience to his clients in Prince Edward Island involved in their being obliged to proceed in the Courts of British Columbia. But by sec. 125 of the Act provision is made for the transfer of any matter relating to the winding-up to any of the several provincial Courts. That section contemplates the application for transfer being made in the first instance to the Court charged with the liquidation, with the concurrence of the Court to which removal is sought—orders of both Courts being obtained if thought advisable. I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island—as from what is now before us would seem to be the case—an order of transfer will not be made; preceded or accompanied by the necessary leave under sec. 22.

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But parliament probably thought it necessary in the interest of

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prudent and economical winding-up that the Court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

For these reasons I would allow this appeal.

Brodeur, J.

BRODEUR, J.:—The appellant is the liquidator of the Dominion Trust Co. and the respondents on behalf of themselves and other *cestuis qui trustent* began proceedings in the Court of Chancery of Prince Edward Island and prayed that the Dominion Trust Co. be removed from the office of trustee for the respondents and the other *cestuis qui trustent* and that a new trustee be appointed in its place. They asked also that certain mortgages in the Island taken as security for loans made by the company with moneys received from the respondent and other inhabitants of the Island be vested in the new trustee.

The insolvent company, through its liquidator, has asked that the complaint of the respondents be dismissed on the ground that leave to the Supreme Court of British Columbia to bring the suit was not first obtained as required by sec. 22 of the Winding-up Act.

The Courts below decided against the appellant and the company on the ground that the trust funds were not affected by the Winding-up Act and that the Courts of Prince Edward Island alone have jurisdiction over trusts and trustees in that province and must determine whether or not the moneys received by the Dominion Trust Co. from the respondents are trust funds.

I am unable to agree with the proposition that the proceedings could be instituted against the insolvent company without leave of the Court in whose jurisdiction the liquidation takes place.

Sec. 22 of the Winding-up Act is very wide and reads as follows:—

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes.

The object of this legislation is to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition (sec. 133).

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The Dominion Trust Co. was incorporated by the federal parliament and its chief place of business was declared by its Act of incorporation to be in the Province of British Columbia. The proceedings to wind up that company were naturally instituted in the Supreme Court of British Columbia.

It may be that by some provision of the Act suits against the company could be brought in some other province (sec. 125); but the Courts of the various provinces are declared auxiliary to one another for the purpose of the Winding-up Act and the proceedings may be transferred from one Court to another with the concurrence, or by the order, of the two Courts, or by an order of the Supreme Court of Canada.

That provision of the law, however, would not prevent the Court in which the liquidation takes place from granting its leave for the continuance or the instituting of suits or proceedings against the company. The distinction which is sought to be made between actions instituted by ordinary creditors and those instituted by or against trustees could not apply because the law is general and declares formally that no suit or proceeding can be commenced or proceeded with without the leave of the Court. The Courts have in different cases granted leave to proceed against the company, *Re David Lloyd & Co.*, 6 Ch. D. 339, but so far as I have been able to see they have not decided that proceedings even by mortgagees or *cestuis qui trustent* could be instituted without leave.

In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the Courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the Court of British Columbia which they did not secure.

This is a suit in which all the creditors of the company might be interested, because its purpose is to have a declaration that some funds should belong exclusively to the plaintiffs and should not be disposed of for the benefit of the creditors. Besides, the company, by the agreement with the plaintiff creditors, has an interest in those funds; because the interest and profits resulting from the investment of the principal sum over the rate of interest payable to the investor is the property of the company.

For those reasons, I would allow the appeal with costs.

Appeal allowed.

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Re J. F. BROWN & CO. Ltd. and CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 17, 1916.

DAMAGES (§ III L 4 — 260) — MUNICIPAL EXPROPRIATION — INJURY TO ABUTTING OWNERS — PUBLIC CONVENIENCE STATION — DEPARTMENTAL STORE.

An award of compensation under sec. 325 of the Municipal Act (R.S.O. 1914, ch. 192), to owners of a departmental store, for injurious affection of their land by the erection of a public convenience station upon a highway on which the land abutted, in exercise of municipal powers under sec. 406 (8), was sustained by an equally divided Court.

Statement.

AN appeal by the city corporation (contestants) and a cross-appeal by the company (claimants) from the finding and award of P. H. Drayton, K.C., Official Arbitrator, upon an arbitration to ascertain the compensation or damages, if any, to be paid to the company for the injurious effect upon their property caused by the construction by the city corporation of public conveniences (men's and women's lavatories, urinals, and water-closets) under and upon a highway in the city. The claimants' property consisted of land and a departmental store erected thereon, quite near the public conveniences mentioned. The Official Arbitrator awarded the claimants $10,200. The contestants appealed on the ground that nothing should have been allowed, and the claimants on the ground that more should have been allowed.

Irving S. Fairty, for contestants.

G. W. Mason and *F. C. Carter*, for claimants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Search as one may for a foundation upon which to place the award in question, the only real one that can be discovered is this: that the property in question is worth less now, for the purposes in which it is now employed, than it was before the construction of the public conveniences in question. That seems to have been a captivating consideration with the arbitrator, and one from which it seems to be even here difficult to dispel the glamour: though it ought to be very plain that it alone affords no foundation for the award. That ought to be very plain from the analogous cases suggested in argument: the case, for instance, of the municipal corporation acquiring land on both sides of the land-owner's building, and placing one of these necessary conveniences in each place: or the erection of a public school, or a hospital, on the adjoining lot; all cases in which the depreciation in value would be much greater, but no one could suggest that any one of them would be a case for compensation.

Before approaching a case of this kind in a reasonable frame of mind, one must overcome the prejudice arising from the mere fact of depreciation: one must strive to see what it is that is depreciated: if it be, as it is more than likely to be, merely an unearned value, a value attributable to the work and money of neighbouring land-owners and of the municipal coporation, it is obviously something that does not belong to the land-owner at all, but is something which can be taken away as freely as it may have been given: unless there is some contract or law to the contrary, every land-owner may put his own land to such lawful uses as he sees fit; quite regardless whether it enhances or depreciates the value of adjacent lands.

Now let us consider for a moment what has been done:—

The municipal corporation, as conservators of the public ways within their municipality, have constructed, solely in the interests and for the benefit of the travelling public, under one of their highways, such conveniences as the interests of public health and public decency need and demand: and on the other hand the arbitrator has awarded to this one land-owner over $10,000 for damage to property that is said to have cost him only $27,000, merely because these conveniences are in the highway upon which one side of his land abuts; with the logical result that every land-owner in the vicinity has an equally good claim for damages, and with the further result that these needs of the public are prohibited, the damages putting their cost at perhaps five times the value of the land-owner's property: or, to put it in another way, it would be more profitable for the municipal corporation to buy the lot adjoining this land-owner's lot, and erect there a convenience of palatial dimensions, than to make use of the unused soil under the highway for that purpose. There must of course be something radically wrong with an award that may lead to such results.

The first thing that is wrong with the award is: that it is in the teeth of the authorities, of which the arbitrator seems to have been aware, but which he seems to have thought he might get around, because the enactment expressly permitting the passing of by-laws for the construction of such conveniences provides also for their "maintenance:" Municipal Act, sec. 406 (8). But all works, whether railways or conveniences or anything else,

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must be maintained. The compensation (sec. 325) is for land expropriated for the purposes of the corporation, or injuriously affected by the exercise of its powers: that is, its powers affecting land directly. There has been no change in the law in this respect: and so there can be, in my opinion, no excuse for altering the practice upon this subject: and the less so in view of the recent cases of *Grand Trunk Pacific R.W. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224, and *Holditch* v. *C.N.O. R. Co.*, 27 D.L.R. 14, [1916] A.C. 536, which are quite in point, and, in my judgment, conclusive against this award. The Railway Act under which those cases, and other cases, were all decided in the same way, is quite as favourable to the land-owner as the Municipal Act; it provides that the company shall make full compensation to all persons interested for all damage by them sustained by reason of the exercise by the company of the powers conferred upon them by that Act or by any special Act.

But, quite apart from the cases, upon what ground can this award be supported? Apply to it any of the usual tests and it fails as to all; though failure as to one would defeat it: see *Westminster Corporation* v. *London and North Western R.W. Co.*, [1905] A.C. 426; *W. H. Chaplin & Co. Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329; and *Rowley* v. *Tottenham Urban District Council*, [1914] A. C. 95; *S. C., sub nom. Tottenham Urban District Council* v. *Rowley*, [1912] 2 Ch. 633.

Is the injury, if any, made lawful only by the enactment which provides for compensation? My unhesitating answer is: No. The construction of such conveniences would be lawful and proper under the rights and duties of municipal corporations respecting highways and traffic. The wide character of those rights and duties is not everywhere understood. In this Province not only does the duty to keep all highways in repair devolve upon the municipal corporations; and not only are they made answerable in damage for neglect of such duty; but they have complete jurisdiction over them, and even the soil and freehold of them is vested in them; and they may sell, for their own benefit, the timber and minerals in them. They have these rights subject of course to the paramount purposes as highways, as their duties respecting the repair of them make plain: but it would be idle to say that as conservators of such public ways their powers are not

very extensive; that they may not do largely as they deem best with them, so long as there is no curtailment of the right of way over them. No one will deny their right to turn a mud road into a paved street, with sidewalks, kerbs, and gutters, street lights, and other needs and conveniences for traffic: can any one with any more reason deny their right to build in the soil, under the highway, closets and urinals such as the needs of man imperatively demand? Provided of course that there is no substantial obstruction of the rights of traffic; which there need never be. The need of such conveniences is in a way greater than the need of raised sidewalks. No case has been referred to that conflicts with this view of the rights and duties of municipal corporations under the laws of this Province. I decline to waste time in discussing cases in which an obstruction has been placed in a highway by a mere wrong-doer; such cases can afford no kind of assistance in seeking for a limit to the powers and duties of conservators of public highways endowed by Parliament with the widest kind of interests and rights in such ways.

Then would the construction and maintenance of these conveniences have been actionable but for the expressed statutory power? What right of action could the land-owner have? For obstruction of the highway, none, because there is no obstruction: not as much as if there were a shaft to win minerals or troughs to water man and beast, or street lights, or sidewalks; and not only none detrimental to travellers, but, instead, these are a benefit and a need supplied to them. And, if an obstruction to a highway, indictment would be the only remedy. There is no special injury to any property right of the land-owner: he would suffer much more inconvenience than the man who passed once in a year only, but it would be only in quantity, the quality would be the same. Neither right of access nor any other right of property has been invaded. In the *Fort William* case there was the gravest kind of an obstruction to the right of way, a steam railway line down a city's street, yet the abutting land-owners were not entitled to compensation: see *Hislop* v. *Township of McGillivray* (1890), 17 S.C.R. 479, and *Ormsby* v. *Township of Mulmur* (1916), 10 O.W.N. 133, to be reported in these reports.

Then the injury the land-owners complain of, and for which they have been awarded compensation, is really an injury to their

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business, not their property: it is interference with their "plate glass front" benefits, not their land or any property right connected with it.

The three minor matters complained of: "seepage," smoke and odours, and misconduct of men using these conveniences, are not the subject of compensation, but are, if the land-owners have just cause for complaint, actionable, and the first two might have been, and might be, easily prevented but for the land-owners' objection and obstruction. Compensation is limited to "damages necessarily resulting" from the work. These things could and can be so controlled as to remove all cause for complaint: but the land-owner must act reasonably too. It is his duty to minimise rather than to create and magnify difficulties: to remember that there are generally two sides to every question; and that an impartial investigation would probably shew that the conveniences in question are placed and constructed with more regard for the susceptibilities of the public than those in the land-owners' building are for the susceptibilities of those who use them, and perhaps altogether preferable. And this we should all apply to ourselves if distressed by the notion that we or our neighbours may be the next "victim:" the municipal corporation cannot create nuisances, nor are they at all likely to attempt to do so: I know of no reason why they cannot be trusted to use just as much judgment and care in the placing of these public needs in the public streets as private owners use in placing the like needs in their own houses.

I can find no ground upon which this award can be supported; and so am in favour of allowing the appeal and dismissing the cross-appeal.

Riddell, J.

RIDDELL, J.:—An appeal from the Official Arbitrator, who awarded the respondents $10,200 for injury alleged to have been done to them by the corporation exercising their statutory rights.

The facts are simple and not very much in dispute.

The company are the owners of a valuable corner lot and the buildings thereon, which they utilise for a departmental store on a considerable scale. No little advantage, they think, is derived from their plate-glass windows, which attract the foot-passengers—and of course anything which will diminish the foot-traffic will prejudicially affect their business.

In 1913, the city corporation caused the erection of a men's and women's "lavatory," i.e., urinal, opposite this shop. From the dislike of most women—whether reasonable or not, we need not inquire, but undoubtedly existing in this city—to even the sight of such conveniences, the foot-traffic is diminished, the shop is less frequented, and the respondents have suffered in business.

This arises from the establishment of the lavatory itself, and is unavoidable.

Then it is alleged that there is a seepage of water into the respondents' cellar caused by the manner in which the lavatory is built, too near the wall of the building of the respondents, with the space filled with loose earth, &c.

The Act, R.S.O. 1914, ch. 192, sec. 325, gives the right to compensation through such arbitrations as this only "for the damages necessarily resulting" from the exercise of the powers of the municipality—see the cases cited in *Smith* v. *Township of Eldon* (1907), 9 O.W.R. 963—this seepage did not necessarily result from the city building a lavatory but from the manner in which it was built—e.g., a coat of waterproof cement on the wall of the shop would have prevented any damage of this kind—or, if that could not be done, the lavatory might have been placed further out under the street. Damages for such a cause cannot be claimed under arbitration.

So, too, what was pressed upon us as to smoke and odours—these can be avoided by a stand-pipe sufficiently high, or other means—the alleged nuisance caused by men arranging or disarranging their clothing in the street is not a necessary consequence. A couple of policemen could put a stop to that indecency in short order.

The arbitrator has found that access to the property is not really interfered with, and I agree with him. An owner of land adjoining a public highway is not, as against the municipality, entitled to access to the highway at every inch of his frontage—he is entitled to reasonable access, and his rights are limited by the necessities of the municipality: *McCarthy* v. *Village of Oshawa* (1860), 19 U.C.R. 245: *Williams* v. *City of Portland* (1891), 19 S.C.R. 159: *Donaldson* v. *Township of Dereham* (1907), 10 O.W.R. 220.

The substantial grievance undoubtedly, in our state of society,

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does exist and does follow necessarily from the very existence of the lavatory—women will not willingly go where such a structure is near and visible, or the entrance to it is near and visible—and the respondents are without doubt seriously injured.

That, however, is not enough—if the city were to build a more convenient or more attractive street near by, and the crowd which formerly went by the respondents' place, the place knew no more forever, that would be *damnum* indeed, but *damnum absque injuriâ*.

What must be paid under arbitration is damages necessarily resulting from the exercise by the municipality of powers given by the Municipal Act or some special Act—i.e., as I read it, the exercise of powers which a private individual would not have; or, to put it a little differently, the person injured is to receive compensation only if he could have brought an action were it not for the statute giving the powers.

The fee of the highway is in the city: R.S.O. 1914, ch. 192, sec. 433; no doubt subject to the right of all His Majesty's liege subjects, &c., &c., to pass, repass, &c., &c.; and the city can do on its own land anything which any other owner of land can do.

If this were the case of an ordinary adjoining proprietor, what then? It is not what a proprietor of the land thinks a reasonable use which must always be permitted: *Bamford* v. *Turnley* (1860), 3 B. & S. 62: *Bennett* v. *Stodgell*, in this Court (1916), *ante* 45: nor even what a Judge or a jury may consider a reasonable use.

Nor is it always the case that a necessary structure must be tolerated. "*Un tan-house est necessary*," the Court said in *Jones* v. *Powell* (1629), Palm. 536, 539, "*car touts wear shoes*"—but "*ceo poit estre pull down, &c., si est erect al nuisance d'auter*"—it may be pulled down, &c., if it is erected to the nuisance of another. However necessary for equally cogent reasons the lavatory may be, that does not entitle it to be erected "*al nuisance d'auter.*"

Nor is it what the complaining proprietors think objectionable—most men would prefer a decent lavatory, adjoining their place, to a millinery shop or a piano-school; most women, to a saloon or a pool-room; and yet these institutions must be tolerated, even though, as some certainly would, they should diminish the value of adjoining property.

It is impossible to be very precise in defining the rights of a land-owner; he is legally entitled to use and occupy his land for any purpose for which it may, in the ordinary and natural course of the enjoyment of land, be used and occupied—and each case must depend on its own facts. The land-owner is not responsible for damage, however natural and however grievous, sustained by others as a consequence of such ordinary and natural user and occupation: Halsbury's Laws of England, vol. 21, p. 525, para. 887.

I cannot see why an owner of land should not, if he sees fit, build a private or a public lavatory on his land—any less than (in the absence of excise and other statutes) he could build a saloon—of course he must guard against such effects as appeared in *Bostock* v. *North Staffordshire R.W. Co.* (1852), 5 DeG. & Sm. 584, and similar cases. And if, before the statute, a private individual could erect such a structure without fear of an action for damages, I do not see why the city should not—I am not, of course, speaking of an indictment or information at the suit of the Attorney-General for interference with the highway.

The fact that legislation, now R.S.O. 1914, ch. 192, sec. 406 (8), was passed on this subject is, to my mind, not material—this did not modify any common law right, but it enabled the city legally to expend municipal money on the project—avoiding the difficulty in such cases as *Cornwall* v. *Township of West Nissouri* (1874), 25 U.C.C.P. 9—and also prevented indictment and information.

I think the respondents have no claim enforceable by arbitration; the appeal should be allowed and the award set aside, both with costs.

Lennox, J.

LENNOX, J.:—The company are the owners of land on the south-west corner of Queen and Parliament streets in the city of Toronto, having a frontage on Parliament street of 125 feet, and on Queen street of 104 feet. The corner is occupied by a three-storey brick building 40 by 100 feet. The land, it is said, was chosen on account of its special adaptability to the company's requirements and as a promising business centre; and the building was planned and constructed with special reference to the business of the company and the advantageous display and advertisement of their goods. The whole frontage of the building, I think on

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both streets, is fitted with plate-glass windows extending for two storeys in height.

The city caused lavatories to be constructed beneath the roadway and sidewalk on Parliament street, extending along and within a few feet of the foundation walls of the company's buildings, with two entrances through the sidewalk. There is an iron railing around three sides of these entrances, and the distance from the north side of the one to the south side of the other is 50 feet. On one of the railings is fastened a sign "Men's Lavatory" and on the other "Women's Lavatory." Between the two there stands a shaft called "a breather," carried up about 15 feet above the sidewalk.

Arbitration proceedings have been had under the Municipal Act, the company have been awarded by way of compensation $10,200, and the arbitrator states: "Of this amount I allow $9,000 on account of the lavatories as such and $1,200 for the damage caused by the water."

Both parties have appealed. I will refer only to the city's appeal for the present. The city's notice of appeal is upon the ground that "no portion of the claimants' property having been taken or prejudicially interfered with by the contestants, the contestants say that the claimants are not entitled to recover any compensation from the contestants by reason of the matters referred to in the said award." There is, therefore, no question of quantum raised by this appeal, and counsel for the city restated his position to be that he does not question the amount, but simply takes the position that, no matter what loss the company actually sustain as a matter of fact, they cannot as a matter of law recover anything under the Act, inasmuch as there is no physical interference with their property, and no part of their property has been taken.

Upon the argument counsel seemed to agree that the rights of the parties are governed by the Municipal Act of 1913, as incorporated in R.S.O. 1914, ch. 192, sec. 406, sub-sec. 8, and sec. 325. The arbitrator seems also to have proceeded on this assumption. If the date when the company gave formal notice, in September, 1913, is what governs, then it is the present Revised Statute that applies; but, if it is the time when the city undertook the work and commenced construction, some time in 1912—

and I think this is the determining date—then the governing enactment is the Consolidated Municipal Act of 1903, 3 Edw. VII. ch. 19; and I will quote its provisions. I do not think there is any difference in meaning or effect, but I would prefer to take the later enactment, if I could, as I think the Legislature has made its intention a little more obvious in the Act of 1913 than it was before.

Going back, however, to the Municipal Act of 1903, sec. 552 (1) provides: "The councils of cities or towns may provide and maintain lavatories, urinals and water-closets and like conveniences in situations where they deem such accommodation to be required, either upon the public streets or elsewhere, and may supply the same with water, and may defray the expense thereof and of keeping the same in repair and good order."

By sec. 437: "Every council shall make to the owners or occupants of, or other persons interested in, real property . . . injuriously affected by the exercise of its powers due compensation for any damages . . . necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

Assuming that the work has been properly executed, and that the lavatories will be carefully operated and efficiently supervised, it is still not pretended that the simple fact of their being where they are has not and will not injuriously affect and greatly depreciate the value of the company's property for any purpose; indeed, the city's own witnesses have placed the depreciation in value arising from this cause in sums ranging from $5,500 to $8,000.

I have had the advantage of reading the judgment of the Chief Justice and my brother Riddell, and entirely agree in the statement that for improper construction or negligent management the remedy is by indictment or action; but, while entertaining for any opinion expressed by these distinguished and experienced Judges the profoundest respect, I am unable to reach the additional conclusion they have come to, namely, that the owners of property actually and necessarily depreciated in value by, say, the legitimate exercise of statutory powers such as are

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here conditionally conferred, are not entitled to recover any compensation under them, or that the land is not "injuriously affected" within the meaning of the Municipal Act; nor am I able to see that the admitted necessity of establishing these conveniences in cities and town is any argument for saying that the burden to be borne is to fall, not upon the community whose interest is to be served, but in great measure or mainly upon the unfortunate land-owner whose property adjoins the public convenience.

It is quite true that, if the Legislature authorises the construction of a work, without more—without saying anything about compensation—then the execution of the work, within the meaning of the statute, does not involve the payment of compensation or damages; and this, *where legislative intention is quite clear*, even though it involves the most drastic disregard of private rights, as, for instance, the entry upon the land of citizens or communities. But to have this effect it must be clear that this is what the Legislature intended. Confiscation is a legislative power, and can be delegated, but the delegation of the right to exercise it is not to be presumed; and, although the power conferred may be broad and general in its terms, the absence of any adequate provision for compensation is strong if not almost conclusive evidence that private rights are not to be invaded.

This is all subject, of course, if the language of the statute will admit of it, to the argument of the paramount public interest, of which the English Public Health Act and the Lands Clauses and Railway Clauses Consolidation Acts are notable, and, in the opinion of some eminent Judges, unfortunate, examples. In every case it is a question of construction, and in our own Courts we have very little to guide us in the interpretation of this statute.

In *Hammersmith, etc., R.W. Co.* v. *Brand*, L.R. 4 H.L. 171, a case very much relied on by counsel for the city, Lord Chelmsford, at p. 202, said: "The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provisions of the Acts of Parliament relating to the subject. It must be taken as an established fact, that by the use of the railway the plaintiffs' house has been depreciated in value to the extent of £272, and as they cannot recover the damage they have sus-

tained by action, one naturally feels a wish to find that the Legislature has not left them remediless, but has provided for them a means of redress in the shape of compensation to be paid by the company as the price of the right given to them to injure the plaintiffs' property. It is with this disposition that I entered upon the examination of the clauses of the Act to which your Lordships' attention was called in the argument, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to the compensation can be established."

The plaintiffs had already recovered all they were entitled to for direct loss occasioned by the construction. The injury in respect of which the £272 was assessed by the jury was for vibration caused by the operation of the railway, and for this they were held, upon the proper construction of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, 1845, not to be entitled to recover.

The feeling to which Lord Chelmsford gave expression as above quoted is the attitude in which I feel impelled to approach the consideration of this award; this, and the conviction that what the Legislature aims at is the imposition of a light burden upon many rather than an intolerable loss upon one person or a few.

In *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243, Lord O'Hagan, at p. 265, says: "The policy of that Act" (the Lands Clauses Consolidation Act, 1845) "I apprehend to have been to prevent caprice or selfishness from interfering with the promotion of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property."

The House of Lords were, as were all the Courts below, unanimously of opinion that the plaintiff was entitled to compensation for the shutting off of easy access to one of his highways, the river Thames, although it did not immediately adjoin his property; following *Chamberlain* v. *West End of London and*

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Crystal Palace R.W. Co., 2 B. & S. 605, and *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82.

It is clear, upon the authority of *Re Penny and South Eastern R.W. Co.*, 7 E. & B. 660, *Ricket* v. *Metropolitan R.W. Co.*, L.R. 2 H.L. 175, *Metropolitan Board of Works* v. *McCarthy*, *supra*, and other cases, that the Railway Clauses Consolidation Act, or the Lands Clauses Consolidation Act, does not create new rights, but only substitutes compensation for redress which a land-owner, etc., but for the Act, would otherwise have had. If it were material, I would not be at all prepared to say that this is the effect of the Municipal Act. Why should it be? It is not so stated in the statute, nor is it "a necessary implication." The widest powers of location are conferred upon the council; and, by a judicious exercise of its powers in the matter of selection, it need not often happen that prejudice is occasioned to any one. It is a power coupled with a condition, and the unqualified condition is that if by the exercise of the powers conferred lands are in fact "injuriously affected" due compensation shall be made to owners or occupiers.

Why should I read into the statute a qualification which the Legislature did not introduce? As said by Lord Bramwell in *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153, in refuting the argument of the Attorney-General, p. 169: "He would read therefore into sec. 49 these words 'and for which but for these powers hereby given an action would lie.' I see no reason for this; I think that the words of a statute never should in interpretation be added to or subtracted from without almost a necessity. The Legislature could have added these words if it had thought fit;" and for the purposes of that case—land taken, and other separated land in the same ownership not taken—effect was not given to this contention.

The rule was distinctly dissented from by Lord Westbury in *Ricket* v. *Metropolitan R.W. Co.*, L.R. 2 H.L. 175. In *Metropolitan Board of Works* v. *McCarthy*, the Lord Chancellor (Cairns) considered it a somewhat narrow but binding rule as applied to these Acts. We are here, however, breaking new ground, and, as said by Lord O'Hagan in the *McCarthy* case (L.R. 7 H.L. at p. 265): "It appears to me, or it would, as I have said, appear to me if the matter were *res integra*, and unaffected by decision, that

wherever there is injury there ought to be compensation, and that the statutable claim which is now newly established, with new machinery for enforcing it, needs no help from any operation of ancient law."

But, in the view I entertain of this appeal, this is not important. Except for the statute the city corporation could not divert their funds to the purpose of providing or maintaining lavatories; and, aside from the question of money, could not obstruct the highway by a work of this character, however beneficial in a general sense it might be. The diversion of a highway to any purpose except its paramount and primary purpose of a highway is unlawful, constitutes *per se* a common law nuisance, and subjects the municipality to indictment and to an action for damages at the suit of any one sustaining special and peculiar loss or inconvenience. It does not matter at all that the soil and freehold of the streets is now vested in the municipalities. They have always been and are still trustees for them for the public, and for specific limited purposes, that is, for highway purposes alone. See *Town of Sarnia* v. *Great Western R.W. Co.* (1861), 21 U.C.R. 59.

I know of no case in which the limitation of corporate power in this respect is more clearly defined than in the judgment of Lord Justice Lush in *Vernon* v. *Vestry of St. James Westminster*, 16 Ch. D. 449 (C.A.), a case in many respects like the present one. It was a case of establishing an urinal upon a highway. It was found to be a nuisance, and the vestry attempted to justify under 18 & 19 Vict. ch. 120, sec. 88, providing that "it shall be lawful for every vestry and district board to provide and maintain urinals, water-closets, privies, and like conveniences in situations where they deem such accommodation to be required, and to supply the same with water, and defray the expense thereof, and any damage occasioned to any person by the erection thereof and the expense of keeping the same in good order, as expenses of sewerage are to be defrayed under this Act." The general similarity to our Act is noticeable; but it is also noticeable that the area of selection is confined to lands vested in or controlled by the vestry, and there is no power to expropriate and no provision for compensation such as is provided for by our secs. 437 and 552. At p. 471, the learned Lord Justice says: "What other limitations, if any, the section is to receive, we may, I think, be better able to decide if we consider what was the state of the com-

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mon law upon this subject before the Act passed. It was well established at common law that an indictment lay against any person or body, whether a vestry, or the trustees of a turnpike road, or a private individual, who obstructed any part of a public highway; and it was not a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. You could not divert a road so as to get rid of an inconvenient angle. You could not put anything whatever upon the highway, and justify it by saying, 'It does far more good to the public than it does harm.' A telegraph company could not lay a line of posts along a highway without the authority of Parliament." Then the learned Lord Justice refers to a case in which he was engaged at the bar, and proceeds: "I mention that by way of illustration to shew how strict the law was against the occupying by any permanent structure any part of that which had been dedicated to public traffic, however beneficial to the public such structure might be, and whatever collateral advantages might have accrued to the public from it. The situation of the vestry, therefore, but for this 88th section and the other enactments of this Act, was this: They could not have erected any urinal in a public street, and this Act authorises them to do so . . . The vestry are authorised to deprive the public of a portion of their right to traverse every part of the public highway in return for the accommodation which the vestry are authorised to give; and the section is confined to that. The intention is that, as these erections were for the public accommodation, the public right should be infringed to the extent necessary for the affording of that accommodation. . . . It amounts to this, that the vestry are to be authorised to take away from the public, in return for the accommodation which the Act enables them to offer, part of the right which the public enjoyed at common law of demanding that every foot of a public highway should be kept open for them to pass over."

I need not elaborate this matter; the law is well settled upon it. See, amongst many other cases: *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *Regina* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L.J.M.C. 166, *per* Crompton, B., at p. 168, referring to what was said by Martin, B.; *Regina* v. *Mathias* (1861), 2 F. & F. 570; *Rex* v. *Jones* (1812), 3 Camp. 230; *Original*

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Hartlepool Collieries Co. v. *Gibb* (1877), 5 Ch.D. 713; *Rex* v. *Ward* (1836), 4 A. & E. 384; *Attorney-General* v. *Cambridge Consumers Gas Co.* (1868), L.R. 6 Eq. 282.

That the company sustained special and peculiar damage "differing in kind" from that, if any, suffered by His Majesty's other subjects, is not open to argument, and was not, I think, disputed. So localised and special is it that the arbitrator finds that the 25 feet of the company's property south on Parliament street not built upon, and the 84 feet on Queen street not built upon, were not "injuriously affected."

That the structure would injuriously affect property opposite it on the east side of Parliament street, is an argument that I can hardly accept. The evidence, as I understand it, and the tendency, I would judge, would be to divert traffic to the other side.

Something beyond mere personal inconvenience or loss, something that affects the property, as a property, and lessens its value, there must be: *Ricket* v. *Metropolitan R.W. Co.*, *supra*; and, as Lord Chelmsford, in approving the rule proposed by Mr. Thesiger, in *Metropolitan Board of Works* v. *McCarthy*, *upra*, pointed out "Where the right which the owner of the house is entitled to exercise is one which he possesses in common with the public, there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world:" L.R. 7 H.L. at p. 256.

These are conditions pointedly and incontestably established by the evidence and findings upon this award. What else is there, assuming that the company must shew a right of action but for the statute? There is the test of Mr. Thesiger, adopted unanimously by the House of Lords in *Metropolitan Board of Works* v. *McCarthy*, namely: "Where by the construction of works authorised by the Legislature there is a physical interference with a right, *whether public or private*, which an owner of a house *is entitled by law to make use of*, in connection with the house, and which *gives it* a marketable value apart from any particular use to which the owner may put it, if the house, by reason of the works, *is diminished in value*, there arises a claim to compensation:" p. 256.

I can find no means of eliminating the company's property from the operation of this rule or decarlation of law.

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It is well to keep in mind that sec. 437 of the Municipal Act embraces a very wide range of cases: all cases in which the council enters upon, takes, or uses any real property in the exercise of its powers, and all cases in which real property, although not entered upon, taken or used, is "injuriously affected by the exercise of its powers." These powers, not to go beyond the Municipal Act, and only to mention a few of those within it, include the establishment of houses of refuge (sec. 524); inebriate asylums (sec. 529); drainage works and sewerage systems and appointments of commissions to operate them (sec. 554 (1)); cab-stands and sheds and shelters upon the highways (sec. 559); street railways (sec. 569) public slaughter-houses (sec. 586); consumption hospitals (sec. 590*a*); and, by sec. 552, in part above quoted, a system of public scavenging and for the collection *and disposal* of ashes, refuse, and garbage within the municipality. Here is a comprehensive range of public duties and discretionary powers, their exercise in some cases, perhaps, causing no special or peculiar damage to anybody, and in other cases an almost complete annihilation of values. The effect in each case is a question of fact. They are all covered by one general provision as to compensation.

It is for the council to act with prudence and in good faith, doing as little damage as possible; and where, for the general good, individual injury must result, placing the burden not upon the individual land-owner or occupant, but upon the benefited community.

In this case, and in all cases, so long as that which has been done is what the statute authorises and is done in the statutory way, the remedy for the land-owner whose property is taken or injuriously affected is the same, namely, under sec. 437—now sec. 325 of R.S.O. 1914, ch. 192—and is to be worked out under the arbitration provisions of the Act.

So far as I have read, the principle which should govern the arbitrator in the assessment of damages is nowhere better indicated than in two cases to which I shall now refer.

The first of these is *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, in the House of Lords. It was a case under a special Act incorporating the Lands Clauses Consolidation Act, 1845; and I have already referred to cases determining that an

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owner whose land was not physically interfered with had no right to compensation for injuries resulting from the operation or carrying on of the authorised work after its complete construction. This case determined another point, that when a part of an owner's land is taken, and other land of the same owner, although separated by railways, etc., is "held therewith," and held for the same general purposes, the land-owner is entitled to compensation not only for the land taken, but also to compensation in respect of the separated lands to the extent to which they are injuriously affected by the construction of the work and the use to which they are to be put.

The circumstances of that case and this are widely separated, nor does that case go to shew that the company here are entitled to recover compensation at all—if our Act is to be interpreted as the English Act has been interpreted, they are not entitled to recover—but I am referring to it to shew, assuming that the company are entitled to recover, what should be taken into account in determining the measure of compensation—in other words, the principles underlying compensation.

Resuming, in the *Cowper Essex* case, Lord Watson, at p. 163, said: "Compensation was assessed by a jury, who allowed the appellant £8,737 for the purchase of his interest in the land taken, and also £4,000 for all damage sustained or to be sustained by reason of the injuriously affecting his other lands by the exercise of the respondents' statutory powers. It was admitted on both sides of the bar that the sum of £4,000 was awarded in respect of damage to the appellant's remaining lands, other than those let on building leases. The prospective damage, which the jury took into account in fixing that sum, can only be ascertained from the evidence submitted to them, and the directions given them by the under-sheriff in his charge. The inference which I derive from these sources is, that the jury, in estimating compensation for injuriously affecting, were mainly influenced by the consideration that sewage works of the character contemplated by the respondents, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, are nevertheless, even when so conducted, distasteful to householders, and tend to depreciate the market value of building land in their vicinity, and also that negligence in the conduct of the

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works may occasionally give rise to actionable nuisance. It therefore appears that a considerable part of the compensation awarded, in one lump sum, by the second finding of the jury, covers damage to arise from the future use of the works for statutory purposes." And at p. 166: "The kind of depreciation which the jury had in view appears to me to be *ejusdem generis* with that arising from traffic upon a public thoroughfare. Neither the use of sewage works, nor such traffic, amounts in itself to a legal nuisance; but the existence of either may alter the character of land in the neighbourhood, and diminish its value in the market. When the erection of sewage works at once diminishes the value of the claimant's other lands to the extent of several thousand pounds sterling, I think he suffers substantial and not imaginary injury, although the depreciation may be due, in a great measure, to an unreasonable antipathy to such works on the part of the purchasing or leasing public."

It is not to the point to argue, as was argued by counsel for the city, in regard to what an adjoining owner might do upon his own land. He could not maintain a nuisance upon it; and, but for the statute, what is complained of here is a public nuisance, causing direct special damage to the company. It is better to deal with the facts as they are, not as they might be, and governed as they would be by entirely different principles; for instance, the clearly pertinent illustration of Lord Watson, of traffic upon a highway built upon the appellant's lands, would have no application here, where no land has been taken. What is to be dealt with here is the statutory authorisation upon an existing highway of that which would otherwise be an actionable nuisance at the suit of the company; and whether, assuming that what has been done, if properly executed, is authorised by the statute, a matter which I shall directly discuss later on, it is to be done without, or upon payment of, compensation.

Lord Halsbury, L.C. (14 App. Cas. at p. 160) said: "Now I think that the liability of a neighbourhood to such, even occasional and exceptional, annoyances is a real injury to property, and not fanciful or imaginary. It is doubtless attributed to Lord Hardwicke that he once said 'the fears of mankind, though they may be reasonable ones, will not create a nuisance.' But if Lord Hardwicke ever really did say so it is quite clear that that is not

now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance (see *Regina* v. *Lister* (1857), Dears. & B.C.C. 209, 26 L.J.M.C. 196). The good reason of mankind recognises the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common-sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if and when the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance."

Lord Macnaghten (at p. 177) said: "It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance, or prejudice, or fancy; the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly."

In order to sustain the award it is not necessary to go, and the arbitrator has not gone, the limit of what was determined to be proper upon the facts in the *Cowper Essex* case. The probable consequences of subsequent user may or may not be matters which the arbitrator might have taken into consideration as well. What he has allowed is clearly within the law, namely—assuming that the lavatories will be efficiently and carefully managed—the depreciated value consequent upon the establishment of lavatories in immediate proximity to the property and upon its principal highway; the lessened value of the property, as a property, and without reference to the particular purpose for which the company happened to use it, necessarily occasioned by the establishment *per se* of lavatories in its immediate neighbourhood. As far as this, at all events, the arbitrator could properly go, and this is what I understand him to have done.

In a recent expropriation case from New South Wales, *Pastoral*

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Finance Association Limited v. *The Minister*, [1914] A.C. 1083, a much broader basis of compensation was sanctioned, but possibly the fact that lands were taken in that case marks a distinction. It is important in considering the principle of compensation here notwithstanding. In it Lord Moulton (at p. 1087) said: "The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property, and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them, whatever that might be." And at p. 1088: "No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalised value of those savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land." I quote particularly for the rule enunciated in this sentence (p. 1088): "Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it."

Here no land has been taken, but the principle can yet be readily applied. But, as this is a new Act so far as direct judicial interpretation is concerned, it is well to keep its wording, and, as I think, its obvious intention, in mind, and not hastily conclude that the clear line of demarcation between injury by the construction of the work, and injury resulting from its user or operation, is the effect of our legislation; as it has been determined to be the meaning of many of the Acts *in pari materiâ* of the Imperial Parliament.

Section 552, above quoted, is not mainly or primarily an authority to construct public conveniences, but is a power conferred upon the council to provide *and maintain* lavatories, etc., upon the public streets, *put and keep them in operation*, supply them with water, etc., *and keep them in repair and good order*.

This is the power conferred, the power to be exercised, and it is for injurious affection by the exercise of these powers that compensation is to be made. As yet, I have not been able to discover why, in the interpretation of this enactment, the right to obtain fair compensation should be hampered by establishing a line of cleavage between construction and maintenance; aside, of course, from the question of indictable or actionable liability for subsequent negligent operation or control.

Counsel for the city urged, and cited unquestioned authorities to shew, that lavatories and urinals and conveniences of that class are not necessarily nuisances. This is perfectly true. It depends upon the locality. What is an intolerable nuisance in one place may not be a nuisance at all in another.

This leads to an important question not discussed upon the argument of the appeals, that is: has the Legislature authorised the city to "provide and maintain lavatories" at the *locus in quo* at all? Specifically, of course, it has not; the selection of sites is left to the council; but is there statutory authority for erecting lavatories in a place of this character? The question is directly relevant to the issues here, for one of two results is almost inevitable: that is, that the city have the right to do that which would otherwise be a nuisance, upon payment of compensation; to expropriate the right to commit a nuisance—"the right to injure the plaintiffs' property"—upon payment of compensation, as Lord Chelmsford said in the *Hammersmith* case; or else that the city have not the right, under the statute, to invade the rights of the citizens, to depreciate the value of their properties, albeit that to do so would advantage the community. The law is not obscure upon this question. Wherever it is clear that private rights may be invaded, redress in the shape of compensation is to be looked for: *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305; Lord Loreburn, L.C., foot of p. 309; Lord Macnaghten, top of p. 314; Lord Atkinson, pp. 323, 324; *Love* v. *Bell* (1884), 9 App. Cas. 286.

The exercise of the corporate powers here claimed are permissive only.

In Halsbury's Laws of England, vol. 21, p. 516, para. 870, it is said: "Acts which would otherwise be wrongful may be justified as being authorised by statute. Whether or not the

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Legislature has authorised interference with private rights depends upon the construction of the statute under which the powers are exercised. The burden of proof of the authority of Parliament to do the act complained of rests upon those who claim the right to do it, and they are bound to shew, with sufficient clearness, that the statute under which they act does take away ordinary private rights.

"871. Statutes which confer a special authority affecting the property and rights of individuals must be construed strictly against the parties to whom the authority is given and in favour of persons affected."

I have already referred to *Vernon* v. *Vestry of St. James Westminster*, 16 Ch.D. 449, and it would not be unreasonable to infer that our statute, though giving a wider range in the selection of sites for public conveniences, and containing provisions for compensation not found in the English Act, is yet modelled upon the provision of the Imperial Act 18 & 19 Vict. ch. 120, sec. 88, upon which that case was decided. The important point to be made is that, notwithstanding the generality of its provisions it was determined that the vestry had not the right to establish an urinal upon a public highway to the prejudice of the properties adjoining the mews; and the decision turned mainly, if not solely, upon the fact that it contained no adequate provision for compensating the owners of lands injuriously affected. It was held that, while the vestry had a discretionary power in the selection of the site, and had acted in good faith, yet the Court would control their action if they exercised bad judgment or acted unreasonably or so as to occasion a nuisance to the owners of adjoining property; that, but for the provisions of the statute, the vestry had no authority to divert any portion of the highway to anything except its ordinary use as a highway, and to do so would immediately give a cause of action—by sec. 96, the highways themselves were vested in the vestry boards; that the maintenance of a public urinal upon private property would itself be a nuisance which the Courts would restrain (see judgment of Lord Justice James, in appeal, at p. 466, hereafter quoted); that the provisions of the Act authorising the vestry to erect urinals did not empower them to erect one *where it would be a nuisance* to the owners of adjoining property, there being no words in the Act which expressly or by necessary implication authorised them to create a nuisance.

The case is so illuminating that I am tempted to quote from it. At p. 459, Malins, V.-C., said: "But great as the powers of vestries under the Act are, they are not absolute, and vestries are, like all other public bodies, liable to be controlled by this Court if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment. This is clear also from the case already cited of *Biddulph* v. *St. George's Vestry*, 3 D.J. & S. 493, 500, where the Court of Appeal held it to depend upon the question whether the vestry were exercising their powers in a reasonable manner."

At pp. 460-461, the Vice-Chancellor quotes Lord Justice Turner as saying in the *Biddulph* case: "It is said that if the powers be as extensive as contended for on the part of the defendants they might erect an urinal in front of any gentleman's house." (The city claim the right to do this, and without compensation.) "The answer to that is, that such a proceeding could not possibly be held a *bonâ fide* exercise of the powers given by statute."

The Vice-Chancellor, at p. 461, proceeds: "In the present case, the plan is to place the urinal within a few feet of the back door of Mr. Thorne's house, and, notwithstanding the zealous testimony of the vestrymen and others who were examined, I am of opinion that such proximity must necessarily create a nuisance of a most disagreeable character. . . . The proposed urinal is therefore, in my opinion, calculated to cause an intolerable nuisance to the plaintiff Thorne . . . Therefore, taking all these circumstances into consideration, I am of opinion that the defendants ought not to be allowed to place the urinal where they propose to place it, and that the plaintiffs are consequently entitled to the injunction they ask."

In the Court of Appeal, Lord Justice James said (p. 466): "If the erection in question were made by a private land-owner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the Court for an injunction to restrain it." There is nothing in the case to indicate that the work would not be well and carefully executed, or that the service would not be properly and prudently managed. The case proceeds upon the assumption, as is shewn to be the fact here, that the establishment

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of an urinal *in that place* would lessen the comfort and convenience of owners of properties in the neighbourhood, and *per se* constitute a nuisance. The Lord Justice proceeds: "There are no words here that authorise the vestry to commit a nuisance. *Primâ facie* nobody is authorised to commit a nuisance, and nobody is to be held so authorised under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance . . . If private rights are to be interfered with, they must be interfered with by express legislation, and I am of opinion that there is no legislation in this case authorising the vestry, though they may be called a local parliament, to interfere with those private rights."

As I have said, there may be a right to commit a nuisance "by necessary implication" if a liability to make full compensation is provided for by the Act. Compensation is then substituted for complete enjoyment. Referring to this, Lord Justice James says (p. 467): "It is said that any damage sustained would be compensated for under the clause for compensation, but I am of opinion that clause does not apply to such a case as this."

After referring to sec. 88 and stating that the statute does not contemplate the expropriation of the right to commit a nuisance —a right which I think our statute may confer, if the municipality see fit to exercise it upon the statutory terms imposed—the learned Lord Justice sums up: "I am of opinion, therefore, that the vestry had just the same power as the trustees of the estate would have had if the settlement under which they acted had contained a similar power, and that they could no more under colour of this provision make an erection to the nuisance of the neighbours, than the owners of the estate themselves could have done if they had been minded to erect such conveniences upon their own property for the convenience of the public. In my opinion the vestry have exceeded their authority in doing that which, in my opinion, is a nuisance to the neighbourhood."

I have already quoted from the judgment of Lord Justice Lush in this case as to the use of highways. After dealing with this question he continues (p. 472): "That, in my judgment, is the true scope of the Act, and the extent of the enactment, therefore, is to authorise the erection of these conveniences upon a public

thoroughfare and highway, when public rights only would be interfered with, not necessarily in every place which is public—every court, or alley, or passage—but in places where, but for the statutory powers, the erection of them would have been an obstruction to the public highway, and an indictable offence. . . . There is nothing whatever in the section to suggest that it authorises interference with any private right."

After pointing out that no private right is to be invaded, as no compensation is provided for, the learned Lord Justice concluded (p. 473): "The result, therefore, is that the 88th section authorises the Board to take away so much of the public right of transit as they had before in highways and in streets, in return for accommodation which the Act authorises them to give, and which this structure presumably does give. That is the whole extent of the statutory power, and therefore in putting up the erection in this spot, though it is a public place, they have exceeded their powers, because it injuriously affects private rights."

It would better accord with the views I entertain as a matter of technical exactness to reduce the award to $9,000, leaving the company to sue for the $1,200 as damages. Counsel for the city does not ask for this. Financially speaking, there could be no gain to the city if this were done, and there is a great deal in what my brother Masten says upon this point. In the circumstances, with some little hesitation, I adopt his judgment upon this question. I would have been at least as well pleased if the arbitrator had allowed something for depreciation in respect of the 25 feet not built upon on Parliament street, but I cannot say that he erred as to this. Enough has not been shewn to convince me that the award should be increased. The cross-appeal should be dismissed with costs.

I am of opinion that the award should stand.

(1) That, but for the statute, what the Council of the City of Toronto has done would be an unlawful obstruction of the highway, a common law nuisance and an indictable offence.

(2) That, by reason of what has been done, the claimants have suffered financial injury differing in kind and extent from the injury and inconvenience occasioned to others; and but for the statute would have a cause of action against the city.

(3) That the statute gives the company an absolute right to

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compensation, to the extent to which their property is injuriously affected, without shewing a common law right of action—that the right of the city to injure the company's property is conditional upon making compensation.

(4) And that the assumption that fair compensation is to be made for injury to property affected is the only basis upon which it can reasonably be inferred that the city had the right to exercise their powers to the prejudice of owners or occupiers of properties; and, if otherwise, the statute conferred no power to execute the work where it has been executed, and the city could have been, and can be, restrained by injunction.

The city's appeal should be dismissed with costs.

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MASTEN, J.:—Appeal by the City of Toronto from the award of P. H. Drayton, K.C., Official Referee, whereby he gave to the respondents, the J. F. Brown Company Limited, damages of $10,200 for the injurious effect upon their land caused by the construction by the appellant corporation of public conveniences under and on Parliament street adjacent to the respondents' premises. These premises are situate at the south-west corner of Queen and Parliament streets, in the city of Toronto, and extend along Parliament street 120 feet.

On the premises is erected a three-storey brick building, adapted to the sale of goods to the public at retail, which building extends from the corner southerly 100 feet along Parliament street.

In the year 1913, the Corporation of the City of Toronto erected in Parliament street, on and under the sidewalk, on the west side of the street adjacent to the respondents' premises, a lavatory for men and a lavatory for women, with necessary and proper appurtenances. The structures, with entrances, occupy in length some 50 feet of the sidewalk on the west side of the highway, with a width at the street surface of some 5 or 6 feet. The conveniences are further described in the judgment of the learned Referee as follows: "At the time this proceeding was brought, there were three structures standing up in the sidewalk, that is, a man's entrance at the north, a woman's entrance on the south, and what has been called a 'breather' in the centre, all some 15 feet high. During the pendency of this proceeding, the city, with a view of meeting some of the objections brought forward by the claimants, removed the canopies at each end, leaving only an iron railing

protecting the steps leading down to the lavatories, the breather in the centre remaining as formerly, and this is the present state of affairs in respect to the physical aspect of the lavatories."

This description, coupled with the depositions of the witnesses and the exhibits, makes it abundantly plain, in my opinion, that the structures in question are of such a nature and so situate on the highway as to hinder and prevent the public from passing along it as freely, safely, and conveniently as heretofore.

Counsel for the appellants, the Corporation of the City of Toronto, expressly stated that he was not appealing in respect to the quantum of the award, but solely on the question of legal liability, alleging that nothing at all should have been awarded. The notice of appeal reads as follows: "No portion of the claimants' property having been taken or physically interfered with by the contestants, the contestants say that the claimants are not entitled to recover any compensation from the contestants by reason of the matters referred to in the said award."

And, in the written memorandum handed in, he bases his contentions on the following grounds:—

"(1) That the damage or loss must be such as would have been actionable but for statutory powers.

"(2) That the damage must be occasioned by the construction of the authorised works, and not by their user.

"(3) That a public lavatory is not of necessity a nuisance."

I therefore deal with the appeal of the Corporation of Toronto from the standpoint of legal liability only.

In approaching this case, the Court should, I think, be influenced by the consideration that, unless it clearly appears that the Legislature intended to authorise the municipal corporation to do that which injuriously affects private property, without paying or requiring the payment of compensation, such intention will not be inferred: *Commissioner of Public Works (Cape Colony)* v. *Logan*, [1903] A.C. 355: *Western Counties R.W. Co.* v. *Windsor and Annapolis R.W. Co.* (1882), 7 App. Cas. 178.

In the case of *Regina* v. *St. Luke's Vestry*, L.R. 7 Q.B. 148, at p. 153, Kelly, C.B., says: "I cannot but observe in a case like this, that, wherever it appears that the case is one in which it is plain

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that very serious injury may have been done to the premises of the party claiming compensation, I think that we must put a liberal construction on the Acts of Parliament before us in determining the points raised. Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operation of a public body, shall be entitled in a court of law to compensation."

The power of municipal corporations to construct public avatories is to be found in sec. 406, clause 8, of the Municipal Act, R.S.O. 1914, ch. 192, and the right of the respondents to compensation is claimed under sec. 325 of the same Act, which reads as follows:—

"325.—(1) Where land is expropriated for the purpose of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any disadvantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

"(2) The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

"(3) Where fencing or additional fencing will become necessary, owing to land having been expropriated, the cost of it shall be included in the compensation.

"(4) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance."

I have compared these sections with the provisions which were previously in force, and I cannot find that the powers conferred by these sections differ in substance from the powers conferred by the statutes which preceded them.

Numerous cases of compensation for land injuriously affected

have arisen in England under the Lands Clauses Consolidation Act, the Railways Consolidation Act, the Waterworks Clauses Act, the Public Health Act, the Local Government Act, and other similar Acts. In this country, similar questions have frequently arisen, under the Railways Acts, Dominion and Provincial, as well as under the Municipal Acts of the various Provinces. While the phraseology of these Acts differs somewhat in detail, yet the leading principles of the law of compensation, which assumed definite form in England many years ago, have, so far as I can ascertain, been uniformly applied to them all, including the Municipal Act of Ontario, under which this case falls to be dealt with. The matter is touched upon by Mr. Justice Osler in the case of *In re Leak and City of Toronto* (1899), 26 A.R. 351, at p. 356, where, in speaking of the provisions for the expropriation of land contained in the Municipal Act then in force, he says: "The principles upon which compensation is to be assessed under this section seem to me not different from those applied under the English Act, except when the contrary is expressly provided, as for example in setting off advantage, etc."

In dealing with the subject under the Acts above mentioned, certain legal principles in relation to them have been clearly established and are now beyond controversy.

These have been stated in various terms, but for convenience I quote the summary set forth in Cripps on Compensation, 4th ed., p. 123:—

"When no land has been taken the words 'injuriously affected' or words of similar import are limited to loss or damage under the following heads:

"1. The damage or loss must result from an act made lawful by the statutory powers of the promoters.

"2. The damage or loss must have been such as would have been actionable but for the statutory powers.

"3. The damage or loss must be an injury to lands and not a personal injury or an injury to trade.

"4. The damage or loss must be occasioned by the construction of the authorised works and not by their user."

These principles are not in controversy, and are accepted, as I understand it, by both parties to this present litigation. But it is alleged on behalf of the appellants, the Corporation of the City

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of Toronto, that this case raises certain new and different questions not covered by the principles above stated nor by any decided case, and the contention so put forth is presented in different forms:—

(1) That the Municipal Act having, by sec. 433, conferred upon the municipality the freehold in the highway, the municipality is free to exercise over highways so vested in it the same power and authority and to deal in all respects with them in the same way as though the highway was private real estate of an individual. So that, whatever a private owner might with impunity do upon his own lands, a corporation may do upon the highway, without any compensation being payable to adjoining owners.

(2) That a new right, viz., the right to construct lavatories in, on, or under streets has been conferred by the Legislature on municipalities, without any provision for compensation to persons whose lands are injuriously affected, and consequently that no right to compensation exists.

A consideration of the question and a perusal of the cases have led me to the conclusion that this is an overstatement of the powers of the municipality, and that the rights of compensation in favour of private owners whose lands are prejudicially affected are not limited to the extent indicated in the contention of the appellants. In order to reach a conclusion on the questions arising in this case, I have considered and digested a few of the numerous decisions which seem to me to bear most closely upon the questions here submitted for consideration, with the view of ascertaining the state of the law in relation to highways prior to the legislation above mentioned.

The case of *Regina* v. *United Kingdom Electric Telegraph Co.*, 31 L.J.M.C. 166, was an indictment for a nuisance, brought against the defendants for erecting, and placing on the highway, posts, with wires fastened to both sides of the posts, and so obstructing the highway. A verdict having been entered against the defendants, a motion was made for a new trial before the Court of Queen's Bench (consisting of Crompton, J., and Blackburn, J.) Martin, J., at the trial, had ruled that "in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or

way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers." This direction being moved against, the Court held it to be a very proper direction, and declared that "the first direction, therefore, is correct, and in point of fact is little more than saying what was said in the authorities referred to and in others, that the public have a right of passage over the whole highway." Crompton, J., then continues: "The second proposition is a larger one, and we have to see whether there is any misdirection in that. It is 'that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law; and that if the jury believed that the defendants placed for the purposes of profit to themselves, posts with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict.' That appears to us to be substantially a proper direction, because, in effect, it comes to this, whether there was a practical obstruction to the public using the highway. All the cases cited by Mr. O'Malley really come to that; and it was so explained in the case of *The Queen* v. *Russell* (1854), 3 E. & B. 942, that what was there called a mathematical obstruction, as was said, I think by myself, as where children build erections upon the sand, would be an obstruction, but not a practical one . . . Where there is a practical obstruction, as I understand my brother Martin to put it, on a part of a highway by which the public are prevented

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from using it, that is clearly a nuisance according to all the definitions of the word. The learned Judge was also right in saying that . . . it does not make any difference that the jury hold that sufficient space was left." Blackburn, J., agreed in the judgment, and I find no subsequent case casting any doubt upon the law as there laid down.

The case of *Regina* v. *Train* (1862), 31 L.J. M.C. 169, was an indictment against a tramway company, and it was held that the tramway was a nuisance, being an obstruction of the ordinary use of the highway for carriages and horses, and that it rendered the highway unsafe and inconvenient in a substantial degree. In that case the defendants sought to avoid a conviction on the ground that what was done was a reasonable re-arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic passing over it. In other words, that there was such a benefit to a large number of persons who would use the tramway as a mode of communication that, taking it altogether, it ought not to be considered a nuisance, and evidence was tendered to establish that contention. In refusing to concede the relevancy of this evidence, Mr. Justice Blackburn says (p. 173): "The evidence . . . proposed to be put in . . . was . . . to shew that this tramroad was not made for carriages which had been previously in use, but with the intention of using a new and substituted mode of carrying on the traffic in a way which it was said would be highly beneficial to the public. *If that were the fact, and if it would really be beneficial to the public, I think that still the matter would be a nuisance as it exists at present;*" and the conviction was sustained.

The case of *Vernon* v. *Vestry of St. James Westminster*, 16 Ch.D. 449, is instructive. It was a case by the trustees under the will of one Pollen and others to restrain the Vestry of the Parish of St. James, Westminster, from erecting a public urinal in certain mews, situate in the parish. At p. 471, Lord Justice Lush, in discussing what was the state of the common law before the Act in question was passed, says: "It was well established at common law that an indictment lay against any person or body, whether a vestry, or the trustees of a turnpike road, or a private individual, who obstructed any part of a public highway; and it was

not a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. You could not divert a road so as to get rid of an inconvenient angle. You could not put anything whatever upon the highway, and justify it by saying, 'It does far more good to the public than it does harm.' A telegraph company could not lay a line of posts along a public highway without the authority of Parliament." And, after dealing with an unreported case in which he had been engaged as counsel, he says: "I mention that by way of illustration to shew how strict the law was against the occupying by any permanent structure any part of that which had been dedicated to public traffic, however beneficial to the public such structure might be, and whatever collateral advantages might have accrued to the public from it. The situation of the vestry, therefore, but for this 88th section and the other enactments of this Act, was this: They could not have erected any urinal in a public street, and this Act authorises them to do so. There are other provisions of the same kind in the Act. Thus there is an express power (sec. 130) to erect lamp-posts anywhere they like in a public highway. . . . Then the 108th section, which I believe has turned out very useful, authorises them to place what are called refuges in the middle of a road. Another clause authorises drinking fountains. That they could not do without the authority of Parliament. I think that these considerations afford a key to the construction of this clause, and suggest to us what its true limitation is. The vestry are authorised to deprive the public of a portion of their right to traverse every part of the public highway in return for the accommodation which the vestry are authorised to give; and the section is confined to that. The intention is that, as these erections were for the public accommodation, the public right should be infringed to the extent necessary for the affording of that accommodation. That, in my judgment, is the true scope of the Act, and the extent of the enactment, therefore, is to authorise the erection of these conveniences upon a public thoroughfare and highway, when public rights only would be interfered with, not necessarily in every place which is public—every court, or alley, or passage—but in places where, but for the statutory powers, the erection of them would have been an obstruction to the public highway, and an indictable offence. . . . It amounts to this, that the

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vestry are to be authorised to take away from the public, in return for the accommodation which the Act enables them to offer, part of the right which the public enjoyed at common law of demanding that every foot of a public highway should be kept open for them to pass over."

Corporation of Parkdale v. *West*, 12 App. Cas. 602, further illustrates the principle that any interference with a highway is wrongful unless done in pursuance of statutory authority. In that case the defendants the Corporation of Parkdale were held liable (not having acted under any statutory authority) as wrongdoers, for their disturbance of Queen street, Toronto, and in concluding his judgment Lord Macnaghten said, at p. 616: "Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted."

Corporation of Parkdale v. *West* was followed, and the same principle applied, in the case of *North Shore R.W. Co.* v. *Pion* (1889), 14 App. Cas. 612, which was an interference with access to navigable waters. The interference was held wrongful, and damages awarded.

The foregoing cases are not in any way impugned or overruled by the decision in the case of *Rex* v. *Bartholomew*, [1908] 1 K.B. 554. In that case the verdict was clearly ambiguous and the prosecution had no "merits." Lord Alverstone, C.J., in beginning his judgment says: "This case comes before us in an unsatisfactory way, and in a form which will prevent us from laying down any ruling which will be of any service in any subsequent case." At p. 561 he says: "The finding of the jury, unexplained, seems to me to be open to the construction suggested by the defendant's counsel that it amounted to a finding that there was no appreciable obstruction to any person who desired to go along or across the street. If that be the real meaning, it would not be proper for the Judge to enter a verdict of guilty."

In this view, it does not appear that that decision has laid down any new law or infringed upon the principles previously established.

In *Campbell* v. *Paddington Corporation*, [1911] 1 K.B. 869,

Avory, J., at p. 876, says: "As the wrongful act of the defendants" (in making an erection in the highway) "constituted a public nuisance, the plaintiff, having in my opinion established the fact that she has sustained special damage over and above the general public inconvenience, has established a cause of action on this ground also."

In the case of *In re Tate and City of Toronto* (1905), 10 O.L.R. 651, the city corporation, in the exercise of its powers, closed a street called Herrick street, which ran from the east side of Manning avenue in an easterly direction to and across Bathurst street, the starting-point on Manning avenue being directly opposite the claimant's house. The claimant could, without using Herrick street, reach Bathurst street by going a comparatively short distance either north or south on Manning avenue from his house to other cross-streets. The Official Arbitrator held that the closing of Herrick street injuriously affected the value of the claiment's house, and awarded him $200 damages. The actual access of the claimant to Manning avenue was not in any way prejudiced or affected, but the convenience of his access to Bathurst street was lessened, and the distance which he had to travel to get there increased. The Official Arbitrator awarded the claimant $200 damages, and the Court of Appeal sustained the award, on the principle laid down in *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243.

The case of *In re Tate and City of Toronto* (above referred to) was followed by Sir William Mulock in *Re Taylor and Village of Belle River* (1910), 15 O.W.R. 733, 2 O.W.N. 609, and the same principle of decision was adopted and confirmed by the Court of Appeal in *Re Neal and Town of Port Hope* (1914), 7 O.W.N. 264. The most recent case in our own Courts applying the same principle is *Chadwick* v. *City of Toronto* (1914), 32 O.L.R. 111.

The cases last mentioned are not the result of an artificial or limited rule that the stopping or lessening of access to a highway gives a right of compensation, while other injurious effect does not do so. Rather, it seems to me, they are applications of the general principle that wherever the action of the municipality would, but for the statute, be wrongful, and the claimant suffers special damage to his lands, compensation will be awarded.

I also refer to *Rex* v. *Ward* (1836), 4 A. & E. 384; *Chamberlain*

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v. *West End of London and Crystal Palace R.W. Co.*, 2 B. & S. 605; *Beckett* v. *Midland R.W. Co.*,, L.R. 3 C.P. 82, at p. 99; *Wadham* v. *North Eastern R.W. Co.* (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227; and *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A.C. 111—as illustrating the principle here applicable.

But it is said that the legal rights of the municipal corporation have been so extended by sec. 433 of the Municipal Act that the appellants are now, as respects a highway, in the same position and endowed with the same rights as a private individual enjoys in lands owned by him in fee simple, and that the appellants are in the same legal position with respect to these constructions as if they had acquired the lot lying south or the lot lying west of the respondents' lands, and had constructed these lavatories on the lot so acquired. I am unable to agree in this view.

Section 433 of the Municipal Act is as follows: "Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act."

This provision was first enacted in the same words in 3 & 4 Geo. V. ch. 43, as sec. 433. Prior to that time, the governing enactments were, 3 Edw. VII. ch. 19, secs. 599 and 601, which are as follows:—

"599. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out according to law, and every road allowance reserved under original survey along the bank of any stream or the shore of any lake or other water, shall be vested in His Majesty, His Heirs and Successors."

"601. Every public road, street, bridge or other highway, in a city, township, town or village,—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor,—shall be vested in the municipality, subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway."

In England the effect of the statutory provisions is to vest in the municipal authority the property in the surface of the street or road and in so much of the actual soil below and air above as

may reasonably be required for its control, protection, and maintenance as a highway for the use of the public, and to this extent the former owner is divested of his property. But neither here nor in England, during all the years that the local authorities have owned the surface, has it ever been held that such municipal ownership in the highway is an absolute beneficial ownership, identical with the rights of private ownership. On the contrary, it was said by McLean, J., in *Town of Sarnia* v. *Great Western R.W. Co.* (1861), 21 U.C.R. 59, at p. 62, that the property thus vested in the municipalities "is a qualified property, to be held and exercised for the benefit of the whole body of a corporation. . . . They so far may be said to hold the freehold, but . . . it is only as trustees for the public." See also the remarks of Lord Fitzgerald to the like effect in *Chavigny de la Chevrotière* v. *City of Montreal* (1886), 12 App. Cas. 149, at p. 159.

It has at no time been suggested that the Act has absolved from indictment for nuisance municipal corporations liable for the repair and maintenance of highways, and who fail in that duty.

A consideration of the sections of the Municipal Act relating to highways (429-486) confirms the view that the municipal corporation are trustees for all the King's subjects of the highway so vested in them, and that it remains the right of all such subjects to pass over the highway without obstruction, and that this right is paramount, and cannot be infringed, even by the municipal authority itself, except under express statutory powers.

I refer particularly to secs. 459, 472, 473, and 491 of the Municipal Act.

The right of the public to free passage over a highway is, as I understand the law, substantially identical in principle with the right of the public to uninterrupted passage over navigable waters. It was originally held in *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch.D. 713, that a navigable river is a public highway navigable by all His Majesty's subjects in a reasonable way and for a reasonable purpose, and the public right of free passage extends to the whole of the navigable channel, which the public are entitled to use as a highway whenever it suits their convenience. In *Foreman* v. *Free Fishers and Dredgers of Whitstable* (1869), L.R. 4 H.L. 266, it was held that the right of navigation is paramount

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to the right of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate from or interfere with the public right of navigation.

In the case of *Parmeter* v. *Attorney-General* (1822), 10 Price 412, it was determined that any grant by the Crown which interferes with the public right is void as to such parts as are open to such objection, if acted upon so as to effect a nuisance by working injury to the public right; and in the case of *Rex* v. *Montague* (1825), 4 B. & C. 598, it was held that the public right in navigable waters can only be abridged by Act of Parliament or by writ *ad quod damnum*, followed by an inquisition, or by natural causes such as recession of the sea, or the accumulation of soil and mud.

The principles so established with respect to navigable waters appear to me to apply equally to highways. Applying them to the facts now before us, I think that the Ontario statute vesting the freehold of highways in the municipal corporation does not confer on such municipal corporation any jurisdiction or power to interfere with the paramount right of the public to uninterrupted and unimpeded passage over such highways.

Lastly, it is said that the Legislature has conferred on municipal corporations a new right, namely, that of erecting lavatories in the public highways, without making any provisions for compensation for the injuries inflicted on neighbouring premises, and therefore that the respondents have suffered *damnum sine injuriâ*. But, in my opinion, the terms of sec. 325 of the Municipal Act are such as to preclude the possibility of giving effect to any such argument. That section provides that, where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers, for the damages necessarily resulting therefrom. Those words are manifestly applicable to the power conferred on municipal corporations by the Municipal Act itself to erect lavatories in public highways.

The principles laid down in the foregoing authorities make it plain that at common law, and apart from the statutory authority, structures such as those in question would constitute a nuisance for which the appellant corporation would be liable to indictment;

also that it would be no defence to an indictment for such nuisance to shew that, although these structures constitute a nuisance to the highway, yet in other respects they are beneficial to the public; and further that it would not be a defence to shew that, though a part of the highway actually used by passengers is obstructed, sufficient available space is left to serve the requirements of traffic. If, in addition, I am right in the view taken above of the effect of secs. 325, 406, sub-sec. 8, and 433 of our Municipal Act, this appeal is reduced to very narrow limits, because the respondents have undoubtedly suffered particular and special damage, differing in quality and extent from any general inconvenience suffered by the public who use the highway.

It appears from the evidence that the selling value of the respondents' lands and buildings has been depreciated by the erection of these lavatories. I refer to the evidence of the experts called for the appellants, as follows:—

Mr. Ponton, at p. 136, question 17, estimates the depreciation in the respondents' property at $8,000; Mr. Poucher, at p. 166, question 42, gives his estimate as $8,000 Mr. Fielding, at p. 193, question 17, makes the depreciation $6,700; and Mr. Walker, at p. 287, question 12, makes it $5,500. Needless to say, the experts for the respondents (claimants) estimate the depreciation at much higher figures. The witnesses are therefore unanimous that there has resulted to this property, from the act of the appellants, damages of an appreciable and extensive character.

The result is that, but for the statute, the respondents would have been entitled to maintain an action for the damages so occasioned to their lands by the appellants: *Chamberlain* v. *West End of London and Crystal Palace R.W. Co.*, 2 B. & S. 605, 617; *Beckett* v. *Midland R.W. Co.*, L.R. 3 C.P. 82; *Metropolitan Board of Works* v. *McCarthy*, L.R. 7 H.L. 243; *Caledonian R.W. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259; *Regina* v. *Malcolm* (1891), 2 Can. Ex. C.R. 357.

Where the lands of the respondents have been so seriously and permanently depreciated in value, it seems to me idle to say that the respondents have not been injuriously affected by the erection of these lavatories; and the fact that the injury is done by a municipal authority acting in the general interest of the community, and not by a tramway or other company operated

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for its own gain, makes no difference in the rights of the person whose property is injuriously affected. The statutes have provided in the same way in both cases that the person so injuriously affected shall receive compensation.

For these reasons, it appears to me that the claim comes within the provisions of sec. 437 of the Municipal Act, and that the respondents are entitled to the compensation which has been awarded them by the arbitrator.

My conclusions, therefore, are: that the appellants, having erected the construction in question on a public highway, and having thereby lessened the present selling value of the respondents' lands, have subjected themselves to liability for compensation; that, in so doing, they are not in the same legal position as if they had erected these lavatories on lands which did not form a part of a public highway; and the fact that the freehold of the highway is vested in the appellants does not, in my opinion, affect these conclusions.

I should add that, in the view which I have taken of this matter, I have not overlooked the several subordinate claims for damages put forward by the respondents: (1) interference with access; (2) nuisance from smells and smoke; (3) damage from seepage of water.

Evidence regarding them was properly received and considered in estimating the quantum of damage, and I do not wish to suggest that each of them might not found a legal claim. But, in discussing the question of legal liability, these three phases of the question seem to me to be incidental and collateral to the broader basis of liability indicated above. The appellants have done an act which, but for the statute, would be illegal. That illegal act has lessened the value of the respondents' lands—it matters not whether by destroying access, by seepage, by smoke and smell, or by what cause soever. The only relevant consideration is that, whatever be the means, the appellants have injuriously affected the respondents' land.

Two further questions arising under the appeal of the city corporation remain to be considered:—

(1) Are the damages ($1,200) allowed by the arbitrator in respect of "seepage," damages caused by negligence and not such as necessarily arise out of the acts of the appellants?

(2) Is the claim of the respondents unenforceable because the "access" to their premises is not substantially interfered with?

As I have already indicated, it appears to me that both these questions are merged in the broader question already dealt with, namely, has the marketable value of the lands in question been lessened by the construction of these lavatories? But, in case that view is not maintained, it may be well to state the opinion which I entertain regarding these two questions.

On the first question it has been determined that compensation is granted only for that which is done under the Act. For wrongs done outside the Act, the common law right of action exists and must be resorted to: *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H.L.C. 600, at p. 612.

The damages for which compensation is given must be such as necessarily result from the exercise of the powers of the corporation, and therefore are not such as arise from negligence in doing the work: *per* Osler, J.A., in *McGarvey* v. *Town of Strathroy* (1885), 10 A.R. 631, at p. 638.

This law is clear and unquestioned; but, in my opinion, it does not apply to the facts of this case. If the municipal corporation adopt a reasonable scheme and carry it out, persons injuriously affected are entitled to compensation in the amount of damages necessarily resulting from the work so done, even if the municipal corporation by doing the work in a more expensive manner or by adding other improvements might have lessened the damage. Nonfeasance is not negligence or a wrong. To refuse compensation because in theory some more elaborate or complete scheme might have been adopted by the municipality to obviate the difficulty, would, in my opinion, impose on claimants an intolerable burden in establishing their case, and is not required by the statute or by the decisions.

I think that the facts of this case bring it within the category just suggested. Possibly the appellants might have done some additional thing which would have obviated this seepage, but they have not done so. What they have done was warranted by the statute, and no evidence has been adduced to shew that what was done was negligently carried out.

The second point does not, in my opinion, arise under the facts of this case. The actual access from the respondents' premises

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to the highway remains complete and continuous, exactly as before the construction. What has been done is to interfere with the highway at a point 8 or 10 feet away from the respondents' lands, and the sole question that arises is, whether the value of the respondents' lands has been injuriously affected by such construction.

The cases of *McCarthy* v. *Village of Oshawa*, 19 U.C.R. 245, *Williams* v. *City of Portland*, 19 S.C.R. 159, and *Donaldson* v. *Township of Dereham*, 10 O.W.R. 220, were cases of actions against municipal corporations for damages arising out of the failure by the defendants to provide and maintain on the highway adequate and suitable conveniences so as to facilitate the ready and safe access of the plaintiffs to the highway. It was held in the first two cases that no obligation to provide such artificial means of access was imposed on the municipalitites, and the last case went off on other grounds, so that the point was not determined.

But nothing appears in any of these cases to negative the right of a land-owner, whose access to his lands is impaired, to recover compensation for such injurious effect; and, if it were necessary to determine the question, I should be of opinion that if in any degree whatever the municipality lessens a land-owner's access to the highway, he is entitled to maintain a claim for compensation, though in many cases the damages might be merely nominal, depending as they must in each case on the extent of the interference.

With respect to the cross-appeal by the claimants, recent decisions of our higher Courts have indicated a great reluctance to increase the amount of any award. In the present case, the arbitrator is a man of great experience, particularly in regard to the value of properties in the city of Toronto and damages of the character of those here in question. He is also an officer of unlimited patience and thoroughness in investigating all matters that come before him; and no sufficient case has, in my opinion, been made by the appellants for increasing the present award. For this reason, I am of opinion that the amount awarded by him ought not to be interfered with, and I would therefore dismiss the appeal and the cross-appeal, both with costs.

The Court being divided as to the main appeal, both appeals were dismissed with costs.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

1. CONTRACTS (§ II D 4—185)—RIGHT OF BUILDING CONTRACTOR TO EXCAVATED MATERIALS—CONVERSION.

Unless the right is established by custom or usage, or is deducible from the owner's intention of abandonment, a building contract does not imply a right on the part of the contractor to appropriate excavated materials to his own use.

2. CONTRACTS (§ IV C 2—350)—SUFFICIENCY OF PERFORMANCE—ALTERNATIVE METHODS OF PERFORMING WORK.

A stipulation in a building contract, that the footings should be sunk to hard bearings, and in case where sloping rock beds are encountered the same must be levelled, affords an alternative method of performing the contract, which may be done by levelling, where rock is struck, to answer the purpose of footings.

3. COSTS (§ I—2*d*)—SUCCESSFUL COUNTERCLAIM FOR TORT—WAIVER.

The defendant's right to the costs of a successful counterclaim for conversion is not waived by adoption of the amount for which the converted materials were sold as a measure of damages.

[EDITOR'S NOTE.—Meredith, C.J.O., dissented as to the first proposition, but otherwise concurred in the judgment.]

APPEAL from the judgment of BRITTON, J. Affirmed, except as to costs. Statement.

The judgment appealed from is as follows:

The plaintiffs are contractors doing business at Sault Ste. Marie, and they had a contract with the defendants for the erection of a large public school building; the contract price being $46,300. There were some extras, but comparatively a small amount, considering the amount expended.

The plaintiffs' claim is for balance upon contract price, for extras, and for damages caused by stoppage, for a time, of the work, owing to alleged non-performance by the defendants of their part of the contract.

The defendants deny liability for some of the items charged, allege a short credit by the plaintiffs for work omitted by reason of changes as the work progressed; and they put in a counterclaim for stone taken from the defendants' land and sold without the consent of the defendants. These claims will be dealt with item by item as put forward by the respective parties.

Although the defendants contended that some of the matters in controversy were wholly for the architects, no objection was taken to my jurisdiction to try the case; and the case was fully tried out.

The work was done under the supervision of the defendants' architects, Moran & McPhail, who had prepared plans and

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specifications and detailed drawings. The plaintiffs tendered for the work, and their tender was accepted. The tender and acceptance of it—the specifications being made part of the contract—would in themselves make a complete contract between the parties. There was, however, a formal contract drawn up. It was called "Architects' Contract," drawn up in duplicate, and signed by the plaintiffs—one copy dated the 1st April, 1912, and one dated the 1st September, 1912. It was never signed or sealed by the defendants, nor was one copy of it, as signed by the plaintiffs, delivered to the plaintiffs; but the plaintiffs commenced and continued the work as if contract signed, sealed, and delivered. The contract has been executed. The plaintiffs contend that they did the work in good faith, assuming that the "Architects' Contract" was the same as embodied in the plans and specifications; but, if any difference, they decline to be bound by the "Architects' Contract," so far as there may be any difference between the real contract and the one written out.

The plaintiffs should, before signing, have satisfied themselves that the "Architects' Contract" was right, and they must now be bound by what they have signed except where differing from specifications. The specifications may be looked at as an aid to interpreting the "Architects' Contract." If they differ from the printed form of contract, the specifications should govern.

The contract price is admitted to be	$46,300.00
Extras, or rather extra contract work, are admitted to the extent of	792.00
Making	$47,092.00
Payments on account are admitted to the extent of	46,530.33
Balance	$561.67

The plaintiffs claim extras under account of small items making in all $77.42. The defendants admit that all of these were done, but dispute the amount for changing wood lath to metal lath in Kindergarten room, charged at $56.47. They admit this at $40 and dispute $16.47. The matter is a small one. Upon the evidence, the plaintiffs are entitled to that $56.47, so there should be a debit to the defendants of the whole of the claim of $77.42, making a total of $639.09, as claimed by the plaintiffs.

The $56.47 was paid in good faith by the plaintiffs—no pretence that the plaintiffs—or the person doing the work—were dealing unjustly. The fact that the amount was paid is no reason why the plaintiffs should get the allowance; but, on the other hand, when no wrong is intended, the full payment of that amount is as good evidence of value as is the statement of another that he would have done the work for $16.47 less. The plaintiffs did not know this.

The next three sums claimed by the plaintiffs are claims because of and resulting from stoppage of work for a time, so that the plaintiffs were compelled to work at a later season, and so lost these moneys by the increase in wages and cost of materials.

Increase in carpenter work	$ 77.84
Cost of lumber	58.41
Cost of glass	253.87
	$390.12

The plaintiffs lost money, and perhaps to the full extent claimed; but I am unable, upon the evidence, to find the defendants responsible therefor. The plaintiffs gave no specific notice of their intention. The defendants did not order a stoppage either all or in part. Without any analysis of or further reference to the evidence upon that point, I can only say that it does not warrant my finding in the plaintiffs' favour.

The next item is that of payment to William Don as watchman. The measure of damages in case of liability for this would not be the wages of a watchman. If the defendants are liable, single bond doors or reasonable cost for closing up would be more like it. But, looking at the contract and specifications, it will be found that all structural hardware to be used on the work was to be furnished by the contractors. It was stated and not denied that the necessity for a watchman arose because they had not furnished the hardware. A matter of that kind could and should have been adjusted by a few minutes' conversation between one of the plaintiffs and the architects. The liability for the wages of the watchman has not been established, and the plaintiffs cannot recover for the $57.

The next item of $161.82 must share the same fate. The specifications say that where for any cause the work is suspended the contractor shall protect the work. To allow this item, the

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evidence must be satisfactory that the stoppage in the work was caused by the defendants; there is not sufficient evidence to warrant that conclusion. This item must be disallowed.

The next item is a small one of only $48.39 for interest on delayed progress certificates. This was, upon the argument, admitted. The $48.39 will be allowed to the plaintiffs.

If there was nothing further in the case, the defendants would owe to the plaintiffs the sum of $687.48, for which the plaintiffs will have judgment; but the defendants counterclaim for four items: (1) that the plaintiffs should make good to the defendants for the saving to the plaintiffs in not putting in concrete footings to the walls of the school building. The saving is estimated at $600. The onus is upon the defendants to shew that they are entitled to have that amount deducted from the plaintiffs' contract price. They have not satisfied the onus; but, on the contrary, it is clearly established that the plaintiffs are not liable for that sum or any sum in regard to that saving. This contract was a lump sum for the whole building. It is true that the plaintiffs were required to price out for the different trades; that was, properly enough, asked for by the architects, to enable them to compare it with their own estimate, having agreed as to which tenders should be accepted; but the plaintiffs took their own risk, as did the defendants, as to whether the plaintiffs' estimates for material and labour were correct or not. The plaintiffs found a rock foundation, a firm foundation, and so did not require the concrete footings. It seems to me no argument to say that the architects could compel the plaintiffs to put in a concrete foundation instead of using the better rock foundation. Suppose the plaintiffs found quick-sand, so that the concrete foundations would have cost double the amount estimated, would the defendants have allowed for this extra cost? They certainly would not, and they could not be compelled to do so. The specifications appear to me to settle this point beyond reasonable controversy under the head of "excavations:" "All excavating for wall footings to be sunk to hard bearing bottoms, and in cases where sloping rock beds are encountered, the same must be levelled"—levelled, of course, in lieu of concrete footings.

A question arose about this item, as the work progressed, between the plaintiffs and the architects. The architects put in

a mild or qualified claim. The plaintiffs refused to recognise it. The work went on, the architects certified, and no more was heard of it until after disputes about other matters.

A. C. McLeod, one of the plaintiffs, who gave evidence at the trial, appeared to be a fair and candid witness. He said that, although there was a saving in expense of walls and wall footings in finding a rock foundation so near to the surface, there was to some extent a corresponding loss in having a much larger quantity of rock excavation for the lower rooms of the building.

This omission of the footings was not such a change as to addition to or reduction of cost as was provided for in the specifications—no change such as increasing or reducing size or number of rooms or storeys or anything in the structure. The plaintiffs should not be charged with this item.

As to the stone taken from the defendants' land in excavating for the building, that was the property of the defendants. The plaintiffs would become entitled to it by contract, express or implied. Such a contract might be established by custom or usage, but such would have to be established as known to the defendants or notorious in the place where the work was being done. No such evidence was given.

The defendants wanted the stone; the architects claimed it for the defendants; so the plaintiffs must pay. The proof is only by admissions of the plaintiffs, and is to the extent of—

177	loads at 85 cents		$150.45
22	"	" $1.00	22.00
			$172.45

The sum of $50 is claimed by reason of alleged reduction in cost of dealing with the wing of the old building. The original plan was to use the space occupied by the wing for part of the new building. The plan was changed, and so the wing was not torn down; and the defendants say that the plaintiffs could do the work at less net cost; and, as there would have been a loss anyway in tearing down the wing, the plaintiffs would have lost less by $50 than if the original plan had been adhered to.

That has not been made out. By the specifications the materials, except radiators and piping, were to belong to the contractors. It cannot be told whether the plaintiffs would

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have made or lost by not getting the materials. Then, had the wing been torn down and the new building in part been placed upon the site of the wing, the plaintiffs could and would have had the benefit of the cellar—or excavated part of the old—for the new. It has not been proved that the plaintiffs saved anything, even if this alteration was one within the meaning of the specifications that the plaintiffs were bound to have dealt with, as to profit or loss.

By this change of the front of the new building the whole scheme was changed, and the defendants present no material to shew the architects' computations by which the plaintiffs are sought to be made liable. The defendants' counsel, in his argument in writing, stated that it is now for the Court; and, that being so, my decision is that the plaintiffs are not liable for that item.

The item for not taking proper care of the lock, by which there was a loss to the defendants of $15, has not been satisfactorily proved. If the damage to the lock or other hardware happened after it was put in place by the plaintiffs, they would not be liable unless through their negligence or wilful act. It is common knowledge that the more expensive locks will sometimes, without apparent cause, get out of working order. Whether that was so or not in the present case I do not know; but, upon the evidence, I am not able to find the plaintiffs liable.

The remaining item is neglect to paint the name over the door the same colour as other painted work. This is a very small matter; but the plaintiffs did not have that work done. The cost, charged at $6, was not objected to, so that will be allowed to the defendants on their counterclaim.

Speaking of this whole case only from the evidence, it seems to me regrettable that litigation was necessary. The work was well done, with comparatively little friction. The only complaint as work progressed arose out of the plaintiffs' delay, by which, no doubt, the plaintiffs lost more than the defendants.

The result of my findings is, that there will be judgment for the plaintiffs for $687.48, made up as follows:—

As above	$ 639.09
	48.39
	$ 687.48

and judgment for the defendants (plaintiffs in counterclaim) for $178.45, made up:—

Stone	$ 172.45
Painting	6.00
	$ 178.45

Each judgment will be with costs, on the scale of the Supreme Court of Ontario.

H. S. White, for defendants.

A. W. Anglin, K.C., for plaintiffs.

HODGINS, J.A.:—Both parties appeal from the judgment of Britton, J., on various items. These were all disposed of at the hearing adversely to the party appealing, except three. These were: (1) (plaintiffs' appeal), $172, value of stone removed by the plaintiffs, but allowed to the defendants as belonging to them, though taken out by the plaintiffs when they were excavating for the foundation and sold as being their own property; (2) (defendants' appeal), $600, claimed by the defendants as an allowance against the contract price due to the absence of concrete footings. These footings were not put in, as a firm bottom of rock was struck, which was levelled instead; (3) (defendants' appeal, by leave), the costs of the defendants' counterclaim, which were not allowed, their demand being treated as a matter of set-off. Hodgins, J.A.

As to (1), there is no custom or usage proved, and there is nothing in the evidence nor in the contract or specifications which throws much light on this matter. By the specifications the contractors are to keep trimmed up in piles all materials delivered to the work "and all refuse, rubbish, and other materials not removed." They are also to "excavate all cellars and basements, walls . . . to full depths etc. If blasting is found necessary for the removal of rock the same must be done under their personal superintendence . . ." "The earth from all excavations shall be roughly levelled where directed over school property."

These provisions give little assistance in determining the intention of the parties. The earth is certainly to remain the property of the owner of the soil, and the only other provision is the ambiguous one first quoted in reference to piling on the ground of "other materials not removed."

In Halsbury's Laws of England, vol. 3, p. 187, the law is thus stated: "The builder, in the absence of express stipulation to the

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contrary, has a general right to dig the foundation of the building and to convert to his own use the materials dug out, provided that they are ordinary materials and not such things as antiquities etc."

In the Cyclopædia of Law and Procedure, vol. 6, p. 53, it is said that "a contract to excavate land for the erection of a building thereon does not imply that the title to valuable material removed in performing the contract is transferred to the builder."

The English statement is founded upon two cases of building leases. The earlier of these is *Robinson* v. *Milne*, 53 L.J. Ch. 1070. In it North, J., expresses his own opinion (p. 1072) that "the right to build carries with it the right to dig the necessary foundations and convert the materials dug out;" but he limits this to the case of some definite building to be erected.

In *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562, Chitty, J. (p. 569), considers that the approval of plans for a wall and gasometer, which the lessees were to erect under the lease, amounted to a license to make the excavations; and that, in the circumstances, there being no provision as to the ownership of the soil excavated, permission to dispose of it ought to be implied. The circumstances mentioned by him were the depth of the excavation and the unlikelihood that the quantity of soil taken out was to be piled upon other parts of the small plot of land.

This last decision, or opinion, is more in line with the principle indicated in the judgment in *Long Island Contracting and Supply Co.* v. *City of New York*, 204 N.Y. 73, where the Court of Appeals considered that the requirement that the contractor should remove the surplus earth, with no reservation of title to the owner, implied that the contractor could do as he liked with it. The earlier case of *Jones* v. *Wick* (1894), 62 N.Y. St. Repr. 520, is decided practically on the same principle, that intent by the owner to abandon must be shewn.

There is here no express permission or direction to the contractor to remove what he excavated, and there are two provisions looking somewhat the other way. The earth is to be spread on the owner's land, and the other material not removed is to be piled on the ground. It is sufficient, however, in order to defeat the contractors' claim, if there is nothing from which a reasonable implication might arise that conversion of the shale was authorised. I do not find anything in the circumstances which would

warrant such an implication. It is always easy to provide in the contract for the ownership of excavated material; and, where this is not done, and no abandonment of it by the owner can fairly be implied, it seems reasonable to leave the title where it belonged.

The appeal on this ground should be dismissed.

As to No. 2, the contract requires that the footings should be sunk to "hard bearing bottoms, and in cases where sloping rock beds are encountered the same must be levelled." The view of the learned trial Judge is, that this allows an alternative method of performing the contract, and that the expense of doing what was done might fairly be set off against the suggested saving of cost. I do not see how this can be reversed. The admission that the saving by reason of not laying concrete might reasonably be stated at $600 is qualified more than once by claims for additional expense owing to the cost of cutting the rock down to the requisite depth.

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I think the appeal on this ground likewise fails.

(3) As to the costs of the counterclaim; the defendants should have been allowed these, on the District Court scale, as the conversion of the stone was a tort, and the defendants do not waive it by adopting as the measure of their damages the amount for which it was sold. The price was good evidence of their damage.

As to the costs of the appeals, each side should bear its own. The judgment will stand, save as varied as to the costs of the defendants' counterclaim.

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

MACLAREN and MAGEE, JJ.A., concurred.

Meredith, C.J.O.

MEREDITH, C.J.O.:—I agree with the opinion of my brother Hodgins as to the disposition which should be made of the appeal as to the claim for a deduction of $600 from the price agreed to be paid for the work because concrete footings were not put in by the respondents.

I am unable to agree with his conclusion as to the counterclaim for the value of the shale taken out in making the excavation for the building.

In considering what meaning should be given to the provision of the specifications as to keeping trimmed up in piles all materials delivered to the work and all refuse, rubbish, and other materials not removed, to which my brother Hodgins refers, it is necessary to look at some other provisions of the specifications. By one

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of them the contractors are required promptly to remove all materials rejected and all rubbish; and, in view of these provisions, the meaning of the words which require the trimming up in piles, except in so far as they refer to materials delivered to the work, was to require the contractors to trim up in piles the rubbish and rejected materials pending their removal. That this must be what is meant is, I think, manifest. The contractor had no right to leave the rejected materials or the rubbish; all of these they were bound to remove; but it was no doubt recognised that, although they were bound to remove them promptly, some time would elapse before that would be done, and the provision as to piling them up was intended to provide for what the contractors should be bound to do pending their removal. Then, too, "materials" cannot have been intended to apply to what should be taken out in making the excavation.

The word is used twice in the provision as to piling, and again in the provision as to removing rejected materials; and, in my opinion, it was always used in the same sense, i.e., as meaning materials brought on the ground for use in the construction of the building. Besides this, there is a clause which deals with what is taken out in making the excavation, and it provides that "the earth from all excavations shall be roughly levelled where directed over school property." If, however, the word "materials," as used in the piling provision, includes materials dug out in the course of excavating, the case for the contractors is, I think, strengthened. "Removed," as used in that provision, means removed from the premises on which the building was to be erected; and the fair inference from this would be that the contractors were to be entitled, if they chose to do so, to remove from the premises what was dug in the course of excavating, except what they were required, by the provision I have quoted, to level roughly over the school property.

Assuming, however, that the provision as to piling does not apply to the materials dug out in the course of excavating, the proper inference to be drawn from the specifications is, I think, that the contractors were to be entitled to all that was dug out in the course of excavating, except the earth, which they were to level roughly. *Ex hypothesi*, there is no provision for piling it. It is not included in the provision as to levelling, and it follows that

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the only thing that the parties could have contemplated was the removal of it by the contractors from the school premises. Every one knew that shale would or might be met with in excavating for the foundations of the building; and, that being present to the minds of the contracting parties and to the School Board's architect, it is significant that, while the specifications provide for what was to be done with the earth, they make no provision as to the disposition to be made of the shale, and it is therefore not an unreasonable inference that it was intended that the contractors should have the right to the shale.

There appears to be a difference between the views of the English Courts and those of the American Courts as to the right to the spoil where there is no express provision as to what is to be done with it. In the view of the English Courts, it *primâ facie* belongs to the contractor. The American Courts take the opposite view, and hold that in order to entitle the contractor to the spoil it must appear from the terms of the contract that the land-owner intended to abandon it to the contractor. We may, I think, safely adopt the view of the English Courts and the statement of the law in the third volume of Halsbury's Laws of England, p. 187, which my brother Hodgins quotes.

I would, for these reasons, allow the appeal of the plaintiffs as to the stone, with costs.

Appeal dismissed (except as to the costs); MEREDITH, C.J.O., *dissenting in part*

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REX v. FARRELL.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. March 23, 1916.

SEDUCTION (§ II—7)—SEVERAL OFFENCES—CORROBORATION—RELEVANCY OF EVIDENCE—PREVIOUS UNCHASTITY—BURDEN OF PROOF.

In a prosecution for having had illicit connection with a girl of previous chaste character (1) the onus of proving unchastity is on the defendant, (2) the girl's admission of carnal connection with the defendant on a previous occasion is not necessarily binding upon the trial Judge, and (3) evidence of occurrences on an occasion subsequent to the offence charged is not receivable as corroboration.

The charge against the defendant was, that he, on or about the 15th December, 1914, at the city of Kingston, in the county of Frontenac, did have illicit connection with one Florence Gibb,

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a girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years, and further that, at the said city, in or about the month of May, 1915, he did have illicit connection with the said Florence Gibb described as before.

The defendant, on the 29th November, 1915, came for trial before the Judge of the County Court of the County of Frontenac, in the County Court Judge's Criminal Court, without a jury, upon his election and consent to be so tried, upon the above charge, and pleaded "not guilty."

The defendant was found guilty upon the second count, but acquitted on the first count; and the learned County Court Judge stated a case for the opinion of the Court of Appeal. The stated case, after setting out the accusation as above, was as follows:—

"At the trial, the Crown offered, in corroboration of the evidence of the said Florence Gibb that the prisoner had illicit connection with her on or about the 15th December, 1914, as charged in the first count, evidence that in May, 1915, the prisoner had gone to the bed-room of the said Florence Gibb, where she was in bed with another young girl called Nellie Radwell, and had got into bed with them and stayed from about 1 a.m. until 5 a.m., the said Florence Gibb swearing that during that time he had carnal connection with her, and the said Nellie Radwell swearing that she turned her back and did not know what occurred, but felt the bed shaking.

"I held that this evidence of what occurred in May was not admissible, and acquitted the prisoner on the ground that there was no corroborative evidence as required by section 1002 of the Criminal Code.

"At the request of the Crown, I reserved for the opinion of the Court of Appeal the question as to whether I was right as a matter of law in rejecting the above as corroborative evidence.

"On the second count, I found the prisoner 'guilty' on the evidence of Florence Gibb, corroborated, as I held, by the evidence of Nellie Radwell as to what she swore occurred on the night in question, and strengthened, as I believed, by the admissions of the prisoner when sworn on his own behalf.

"I held that the evidence did not establish, as required by section 210 of the Criminal Code, that Florence Gibb was in May of previously unchaste character.

"The defence contended that Florence Gibb, having sworn to having had carnal connection with the prisoner in December, 1914, established conclusively that she was not of previously chaste character in May, 1915.

"I thought, as she was under the influence of liquor on the night in December, she might be mistaken as to what occurred; and, if not, that, being under the influence of liquor, and this being the only previous act of carnal connection alleged, I was not bound to accept it as necessarily proving previously unchaste character.

"At the request of the defence, I reserved for the opinion of the Court of Appeal the question whether I was at liberty to hold that Florence Gibb was not proved to be a girl of previously unchaste character in May, notwithstanding her evidence that she had previously in December had carnal connection with the prisoner.

"Annexed is a copy of my notes of evidence, taken at the trial."

The following sections of the Criminal Code, R.S.C. 1906, ch. 146, may be referred to:—

210. The burden of proof of previous unchastity on the part of the girl or woman under the three next succeeding sections shall be upon the accused.

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

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

* * * *

(c) Offences under Part V., sections 211 to 220 inclusive.

T. J. Rigney, for the prisoner.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—Case stated by the Judge of the County Court of the County of Frontenac. Meredith, C.J.O.

The prisoner was tried at the County Judge's Criminal Court

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of the County of Frontenac on two charges for offences under sec. 211 of the Criminal Code; the first of which was alleged to have been committed on the 15th December, 1914, and the second in or about the month of May following.

The prosecutrix was examined as a witness, and testified that the prisoner had sexual intercourse with her on both of these dates. This was denied by the prisoner, and his evidence as to the first occasion was corroborated by other witnesses. The prisoner was acquitted on the first and convicted on the second charge.

At the trial, counsel for the Crown contended that the evidence of the prosecutrix as to the first offence charged was corroborated in a material particular by the evidence which was given of the prisoner having committed the second offence charged, but the learned Judge refused to give effect to the contention; and it was contended by counsel for the prisoner that, as the prosecutrix had testified that there had been sexual intercourse between her and the prisoner on the 15th December, 1914, the burden of proof of her previous unchastity was, in respect of the second charge, satisfied, and the prisoner should have been acquitted on that charge.

Both of these questions are now presented for the opinion of the Court in the stated case. Upon the opening of the appeal, counsel for the Crown stated to the Court that he could not support the contention that was put forward by the counsel for the Crown at the trial as to corroboration; and, as we agree that it cannot be supported, the first question must be answered in the affirmative.

It does not necessarily follow that, because the prosecutrix testified that she had had sexual intercourse with the prisoner in the previous December, the Judge was bound to find as to the second charge that she was not of previously chaste character.

Dealing with that question, the learned Judge said: "I thought, as she was under the influence of liquor on the night in December, she might be mistaken as to what occurred; and, if not, being under the influence of liquor, and this being the only previous act of carnal connection alleged, I was not bound to accept it as necessarily proving previously unchaste character."

I agree with that view; and, in addition to what is there said,

I may point out that it would be an extraordinary result if the prisoner, having secured his acquittal on the first charge on the strength of his denial that he had sexual intercourse with the prosecutrix on the 15th December, 1914, should be entitled to be acquitted as to the second charge on the ground that he had proved the unchastity of the prosecutrix because of the very act of intercourse which he testified had never taken place.

There is another point to be considered. It was argued by counsel for the prisoner that the prosecutrix on her examination at the trial testified that there had been sexual intercourse between her and the prisoner on several occasions between the 15th December, 1914, and the following May. This contention is based upon the following passage from the Judge's notes of the evidence of the prosecutrix: "Farrell had connection with me, that was the first time, after that there were other occasions."

I do not think that this contention can be raised by the prisoner, in view of the form of the question submitted in the stated case; but, if it were open, I do not think that we should treat this testimony as necessarily referring to occasions before the month of May, 1915. The learned Judge did not so understand it. He says that "the defence contended that Florence Gibb, having sworn to having had carnal connection with the prisoner in December, 1914, established conclusively that she was not of previously chaste character in May, 1915." And in the passage I before quoted he refers to "the night in December . . . being the only previous act of carnal connection alleged."

The passage in the evidence which is relied on by the prisoner to establish previous unchastity is, at the most, of doubtful meaning; and, the onus of proving previous unchastity being upon the prisoner, he cannot complain because the Judge did not give to the words used by the prosecutrix the meaning for which the prisoner contends, if, as I think, it was open to the Judge to treat them, as he did, as meaning what he in effect says in his statement of the case they actually meant.

The evidence was not taken down in shorthand, but mere notes of it were made by the Judge, and he should be, I think, the best interpreter of them. Moreover, the interpretation he put upon them appears to have been the same as that put upon them by the prisoner's counsel, if the statement of his contention

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at the trial was what the learned Judge says, and we must take it correctly says, it was.

The second question, as I understand it, is confined to the single point whether or not the testimony of the prosecutrix that the prisoner had carnal intercourse with her on the 15th December, 1914, made it incumbent on the Judge to find that she was not as respects the second charge of previously chaste character.

If the question to be determined was, whether or not upon the whole evidence the prosecutrix was proved to be not of previous chaste character, my conclusion might be different.

The second question should be answered in the affirmative.

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ARMOUR v. CITY OF REGINA.

Saskatchewan Supreme Court, Elwood, J. December 31, 1915.

MUNICIPAL CORPORATIONS (§ II A 1—195)—LIABILITY FOR DAMAGES—PUBLIC WORK AUTHORIZED BY STATUTE—REMEDIES.

The fact that the Municipal Public Works Act (R.S.S. 1909, ch. 91) gives the city power to construct certain work therein mentioned in the nature of public utilities, does not preclude the corporation from constructing a subway under the Cities Act (R.S.S. ch. 84, sec. 184), which is an altogether different class of work; an individual suffering special injury by reason of the construction thereof, done in a proper manner and under statutory authority, cannot maintain an action therefor, but his only remedy is the one provided by the statute. The plaintiff is entitled to amend his claim to establish his right to an action for damages instead of arbitration under the statute.

Statement.

ACTION for damages in consequence of the construction of a subway.

P. M. Anderson, for plaintiff.

J. A. Allan, K.C., and *G. F. Blair*, for defendant.

Elwood, J.

ELWOOD, J.:—This is an action brought against the city claiming damages alleged to have been sustained by the plaintiff in consequence of the construction of a subway under the Canadian Pacific Railway Co.'s tracks on Broad St., and known as the Broad St. subway. Pending the decision of the various points raised on the argument before us, no evidence was taken except the filing of by-laws Nos. 616 and 693 of the city. It was contended on behalf of the city that no action lay against the city, and that the remedy of the plaintiffs, if any, was by arbitration as provided by sec. 245 of ch. 84 of the R.S.S.; and in the course of the argument a number of points were raised which I shall proceed to deal with.

For the plaintiffs it was contended that, in order to bring the case within the provisions of the above section, the city must

in the first place have had authority to construct the subway, and that, if it did have such authority, there must be a by-law authorizing the construction.

I am of the opinion that sec. 184 of the above Act gave the city power to construct the subway. That this is so would appear to be confirmed by a perusal of various other sections. For instance, sec. 185 provides that every by-law for performing the various works therein mentioned shall receive the assent of two-thirds of the burgesses, but there is no provision in the Act, unless it is 184, which provides for performing, at any rate, some of the works mentioned. Sec. 378 does not authorize the construction of the works therein referred to, but merely provides for a method of providing for payment of the works constructed in case the city shall determine to perform those works as local improvements. It will be noted that sec. 390 provides that:—

> all public roads, streets, bridges, highways, lanes, alleys, squares or other public places in the city shall be subject to the direction, management and control of the council for the public use of the city.

The mere fact that the Municipal Public Works Act, ch. 91 of the above statutes, gives the corporation power to construct certain works specified therein, does not seem to me to exclude the power of the corporation to construct a subway. The works mentioned in ch. 91 are works in the nature of public utilities, and seem to me to belong altogether to a class different from work such as a subway. This subway, after all, was merely extending Broad St. from South Railway to Dewdney St., and in the course of that extension an excavation had to be made, certain retaining walls built, a structure capable of supporting the tracks above the roadway constructed, and the roadway paved. It was all work for the improvement of the street, and for the purpose of rendering the street capable of being travelled. I am, therefore, of the opinion that the city had power to construct a subway. Counsel for the plaintiff referred me to *Forster* v. *City of Medicine Hat*, 9 D.L.R. 555. In a later case, however, 17 D.L.R. 391, Walsh, J., expressed his doubt as to the correctness of his decision in the former case; and I dissent from the view expressed by Walsh, J., in the former case.

In view of the conclusion that I have reached, it is unnecessary for me to express any opinion upon the question of whether or

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not a by-law was necessary; but the case of *Bernardin* v. *Munic. of North Dufferin*, 19 Can. S.C.R. 581 at 618, would seem to be strong authority for the proposition that a by-law was not necessary. The word "may" is used in sec. 184 of the Act just as it was used in the last-cited case. The by-laws submitted *inter alia* contain the following:

> Whereas by order No. 12801 of the Board of Railway Commissioners of Canada, dated the 20th day of January, 1911, it is ordered that the city of Regina be granted leave to construct a subway under the lands and tracks of the Canadian Pacific Railway Company in Regina at the point shewn upon the plans approved by the order of the Board of Railway Commissioners for Canada, dated the 4th day of January, 1911, by the extension of Broad street northerly . . .

And the by-law provides *inter alia* that

> It shall be lawful for the council of the city of Regina to construct a subway under the lands and tracks of the Canadian Pacific Railway Company in Regina, being the extension of Broad street northerly as aforesaid, and to raise certain moneys, etc. . . .

It was objected that the words "It shall be lawful" were not sufficient to authorize the council to proceed with the work, that more definite words should be used. I must confess that I cannot see the force of that contention. It seems to me that the use of those words and a perusal of the whole by-law make it abundantly apparent that the by-law intended to authorize the construction of the subway in accordance with the plans above recited and referred to. It is not contended that the subway was not constructed according to these plans, and there therefore in my opinion was exact information in the by-law as to the nature and extent of the work authorized to be constructed; and, therefore, if a by-law were necessary, the by-laws passed by the city were sufficient for the purpose.

It was further objected that the subway in the course of its construction closed South Railway St. It was conceded that South Railway St. was not actually closed, but that it was narrowed. South Railway St. intersects Broad St., and at the point of intersection on the east side of Broad St. a strip of the original street was left, including the sidewalk, I think about 30 feet, although I do not for the moment remember exactly the width. The premises of the plaintiff are situate on the east side of Broad St. and south of South Railway St. There is no property on the west side of Broad St. except the station grounds and gardens of the C.P.R. Co. To the west of this strip of Broad St. is con-

structed the subway. It was admitted that access to Broad St. from South Railway was not cut off, but that the street was simply narrowed. It was urged, as I have stated above, that this was a closing of South Railway and that a by-law for that purpose was necessary as prescribed by the Act. This, in my opinion, was not a closing of South Railway St. and at any rate, the plan approved by the Board of Railway Commissioners showed, it was admitted, the course the subway would actually take, and what was actually done was simply in accordance with this plan. So that it does not seem to me there is any force in that objection either. I may say in passing that these by-laws were admitted to have been submitted to the vote of the burgesses and to have been duly passed.

It was further objected that the building of the subway must have been performed as a local improvement under sec. 378 above-mentioned and following sections. Those sections, however, do not say that the works there enumerated must be paid for in the manner therein indicated, but merely give the council permission to provide, if they shall see fit, for raising the moneys for payment of the various local improvements in the manner therein indicated; and I am of the opinion that secs. 378 and the following sections have no application to the case of this subway.

The order of the Board of Railway Commissioners *inter alia* provided as follows:—

> 4. This order is made upon condition that the city undertakes to pass, and does pass, the necessary by-law for the closing of Hamilton street and closes up the said street and undertakes to pay and does pay all abuttal damages consequent upon such closing.

Hamilton St. is the street west of Broad St. At the time of the making of the order of the Board of Railway Commissioners, Hamilton Street crossed the tracks of the C.P.R. Co. at a level crossing. The order of the Board of Railway Commissioners was made upon the application of the city of Regina, and the only persons represented at the hearing of the application beside the city were the C.P.R. Co., the C.N.R. Co., and certain property-owners. No person would appear to be affected by the closing of Hamilton St. other than the railway companies, and the closing of Hamilton St. was for the benefit of the railway companies. It was admitted that no by-law had been passed by the city closing Hamilton St., but it was also admitted that Hamilton St. had been closed and fenced across, but it did not appear by whom. In

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my opinion, the validity of the act of the city in constructing the subway did not depend upon the closing of Hamilton St. or a passing of a by-law closing Hamilton St. It was never intended that Hamilton St. should be closed prior to the construction of the subway. The subway was intended to take the place of Hamilton St., and the provision of the order requiring the closing of Hamilton St. was merely one, in my opinion, for the protection of the railway companies. If the city did not pass the by-law and did not close the street, then the railway company would appear to me probably to have the power to close the street itself, or at any rate to take proceedings to compel the city to close the street. The order of the Board of Railway Commissioners did not empower the city to construct the subway, and the city's power did not originate in that order. The order of the Board merely empowered the city to proceed under the tracks of the railway company.

Dealing, then, with the contention of the defendant that the plaintiff has no right of action: secs. 245, 247, 253 and 258 of the City Act provide as follows:—

245. The said council or commissioners shall make to the owners or occupiers of or other persons interested in any land taken by the city in the exercise of any of the powers conferred by this Act due compensation therefor and pay damages for any land or interest therein injuriously affected by the exercise of such powers the amount of such damages being such as necessarily result from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation or damages if not mutually agreed upon shall be determined by arbitration under this Act.

247. In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking, the owner or occupier or other persons interested therein shall file with the city clerk within fifteen days after notice has been given in a local newspaper of the completion of the work his claim for damages in respect thereof stating the amount and particulars of such claim.

(2) Such notice shall be given by the city clerk forthwith after the person in charge of the work or undertaking has given his final certificate and shall state the last day on which any claim under this section may be filed.

(3) The date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

(4) Any claim under this section not made within the period hereinbefore limited shall be forever barred and extinguished.

253. Where a claim is made for compensation or damages by the owner or occupier of or other person interested in lands taken by the council or commissioners or which is alleged to have been injuriously affected in the exercise of any of the powers of the council or commissioners in the event of the coun-

cil or commissioners not being able to agree with the claimant as to the amount of compensation or damages the same shall be settled and determined by the award of a Judge or of a barrister to be appointed by him.

258. The award shall not be binding on the city unless it is adopted by the city by by-law within one month after the making of the award; and if not so adopted the property shall stand as if no arbitration had been held and the city shall pay the costs of the arbitration.

In *Preston* v. *Corporation of Camden*, 14 A.R. (Ont.) 85 at 87, I find the following:

If, therefore, the work was properly and carefully done, and the doing of it was lawful under a lawful exercise of municipal authority, the case, as is strongly urged by defendants, would appear to be one in which redress could only be obtained in the mode provided by the statute. (At. p. 89): If the work was done under the authority of the by-law, and it was done, as the jury have found, without negligence, how can the plaintiff recover in an action? If he has any remedy at all, and I am far from saying he has not, it is by arbitration to obtain compensation under the Municipal Act.

In *Foster* v. *Rural Municipality of Lansdowne*, 12 Man. L.R. 416, at p. 423, Killam, J., is reported as follows:—

Usually in conferring power to interfere with private rights, the legislature provides for the giving of compensation and a method of establishing its amount; but, while the compensation clauses may aid in construing the extent of the powers conferred, it is not the provisions for compensation which restrict legal rights of action. The principle is that that which the legislature authorizes cannot constitute a legal wrong. If damage is done in the proper exercise of the power, it is *damnum sine injuria*, and no action will lie therefor, even though no provision is made for compensation.

A number of cases are cited as authority for this proposition, and the question is very fully discussed in a very exhaustive judgment.

In *East Fremantle Corp.* v. *Annois*, 71 L.J. P.C. 39 at 41, Lord Macnaghten, in delivering the judgment, says as follows:—

The law has been settled for the last hundred years. If persons in the position of the appellants acting in the execution of a public trust and for the public benefit do an act which they are authorized by law to do, and do it in a proper manner, though the Act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

And his Lordship proceeds to discuss the principle further and cites various cases in support of it. See also *Holmested* v. *C.N.R. Co.*, 22 D.L.R. 55.

The plaintiffs contend that because sec. 258 of the Act above-quoted provides that the award shall not be binding on the city unless it is adopted by by-law within a month, that it might happen that great injustice would be done to the plaintiff unless he had the right to bring an action; and it was therefore never

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intended to deprive him of that right. If the effect of the Act is as contended, that the plaintiffs might be deprived of their rights under certain circumstances, that, in view of the above decisions, cannot affect this question, and in view of the above decisions I am of the opinion that the remedy of the plaintiff was as provided by the Act, and not by action.

There was some suggestion on the hearing before me that the plaintiff was in any event entitled to some damages for negligence. It would appear to me that the only liability of the corporation by way of action is for the negligence of the corporation itself and not for any collateral negligence. See *Hardacre* v. *Idle District Council*, [1896] 1 Q.B. 335 at 342. Just what such negligence is would depend upon the circumstances of the particular case, and in order to determine this a trial may be necessary, if the plaintiff is of the opinion that there is such negligence.

Counsel for the plaintiff asked leave to amend by pleading that the title to the lands in question was not in the defendant; and an argument with respect to allowing this amendment was had before me subsequently to the trial. I have concluded to allow the plaintiff to amend the statement of claim by pleading the amendment "6a". In consequence of this amendment it will be necessary that there should be a trial to determine the questions of fact raised by the amendment, and also to determine to what extent, if any, those questions of fact affect the plaintiff's right to claim damages by action instead of arbitration; and, therefore, there will be a trial, which I fix for the next regular non-jury sittings of this Court in Regina, and at this trial there will be tried the issues of fact raised by the amendment; and, of course, if it is held on the issues raised by the amendment that the plaintiff has the right to proceed by action and not as provided by the Act, there will be tried at the same time the question of the damage, if any, sustained by the plaintiff. At such trial the plaintiff will, in any event, have the right to have determined whether or not there was any negligence of the corporation itself, apart from collateral negligence, and the amount of damage sustained in consequence thereof.

The plaintiff will, in any event, pay to the defendant the costs of the hearing before me, including the costs of application to amend. All other costs of the action reserved to the trial Judge.

Judgment accordingly.

Re CARPENTER LIMITED: HAMILTON'S CASE.

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Ontario Supreme Court, Clute, J. February 10, 1916.

CORPORATIONS AND COMPANIES (§ V F 3—263)—CONTRIBUTORIES—INVALID SUBSCRIPTIONS—ILLEGAL DIRECTORATE.

Part VIII. of the Companies Act (R.S.O. 1914, ch. 178) is for the protection of shareholders, and non-compliance therewith will entitle subscribers for shares to cancellation of their subscriptions, and the removal of their names from the list of contributories, notwithstanding any proceedings under the Dominion Winding-up Act (R.S.C. 1906, ch. 144); a commercial company, incorporated under the above Companies Act, which elects a board of directors exceeding the number required by its charter has no validly constituted directorate, and cannot make a valid allotment of any shares.

[*Re Otto Electrical Manuf. Co. Ltd.*, [1906] 2 Ch. 390; *Garden Gully Mining Co.* v. *McLister*, 1 App. Cas. 39, followed.]

Statement.

APPEAL by D. Hamilton and four others from the report of an Official Referee, in a winding-up proceeding under the Winding-up Act, R.S.C. 1906, ch. 144, in regard to the placing of the names of the appellants on the list of contributories. Reversed.

K. F. Mackenzie, for appellants.

J. A. Macintosh, for liquidator, respondent.

Clute, J.

CLUTE, J.:—Motion by way of appeal from the report of J. A. C. Cameron, Esquire, an Official Referee, dated the 23rd November, 1915, and filed on the 8th December, 1915, placing the names of D. Hamilton, George Kneen, J. D. Martineau, Joseph Mongeau, and J. Stetson, on the list of contributories in the liquidation of Carpenter Limited, and for an order striking off the same from the list of contributories; upon the following, amongst other grounds, namely: (1) that the Ontario Companies Act, 2 Geo. V. ch. 31, Part VIII. (now R.S. 1914, ch. 178, Part VIII.) had not been complied with by the company in question; that the restrictions on allotment (sec. 110, sub-secs. (1), (3), and (4)) not having been complied with by the company in question, sec. 111, sub-sec. (1), applied, and the contributories were entitled to avoid and did avoid their subscriptions; (2) that the company was never entitled to commence business because the provisions (*a*), (*b*), and (*c*) of sec. 112, sub-sec. (1), had not been complied with, and no certificate from the Provincial Secretary, as required by sub-sec. (2), was ever obtained, and that any contract made by the company before the date at which it was entitled to commence business is provisional under sub-sec. (3), and consequently there can be no creditors of the company; (3) that the learned Referee has made no findings upon the evidence of misrepresentations inducing the subscrip-

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tions, and that after his decision he refused to open the matter to allow further conclusive evidence upon this point; (4) that the company was never organised, no board of directors was ever constituted, and there was no preference stock to issue, and no allotment thereof; (5) that there could be no allotment under the terms of the prospectus, which provided that the stock should be allotted when fully paid-up; (6) that the learned Referee erred in holding that shares were allotted to these contributories; (7) that the findings of the learned Referee were contrary to the law and evidence and weight of evidence.

In order to appreciate the bearing of these objections, having regard to what was done by the company after its incorporation and the effect of the statute relied on, it will be necessary to refer to the facts, the more important of which are really not in controversy.

The company was incorporated on the 18th February, 1913, by Ontario letters patent, to carry on a general canning business; the capital of the company to be $100,000, divided into 1,000 shares of $100 each, of which 500 shares were preferred shares. The shareholders named in the charter were Arthur Clarence Pratt, Robert Ferrier Macfarlane, Thomas Henry Pettit Carpenter, Charles Drysdale Carpenter, Robert Alexander Macfarlane, and Andrew Elsden Carpenter. The provisional directors were Arthur Clarence Pratt, Robert Alexander Macfarlane, and Thomas Henry Pettit Carpenter. The charter is issued subject to the provisions of Part VII. of the Ontario Companies Act, which refers to "prospectus and directors' liability."

The record of what was done by the company after the issue of the patent is loose and unsatisfactory; as was said by counsel, the company appears to have gone on wholly oblivious of the requirements of Part VIII. of the Act. There was no regular minute-book kept, and the minute, such as it is, was not made by the secretary, but was made by the solicitor on loose sheets, and signed by the president and secretary and fastened in a book called a minute-book. The first entry is a notice of the first general meeting as follows:—

"The first general meeting of the shareholders of the Carpenter Limited for the purpose of organisation of the company for the commencing of business and taking over all the contracts and properties set forth under an agreement dated the 1st day of

March, 1913, and made between R. F. Macfarlane and Carpenter Limited, will be held at the company's office at Winona, on Saturday the 1st day of March, 1913, at the hour of seven o'clock in the afternoon.

"By order. "Robert A. Macfarlane,
"Thomas H. P. Carpenter,
"Arthur C. Pratt, Provisional Directors."

The names of the provisional directors are typewritten.

Then follows a power of attorney, dated the 1st day of March, 1913, in which Arthur C. Pratt and R. A. Macfarlane appoint T. H. P. Carpenter to be their proxy to vote on their behalf at the meeting of the shareholders of the said company *to be held at Winona on the 1st March, 1913, or at any adjournment of the said meeting.* No meeting was held on the 1st March.

The next entry is called a waiver of notice of directors' meeting, and is as follows:—

"Know all men by these presents that each of the undersigned, being the provisional directors of the Carpenter Limited, have waived notice and by these presents do hereby waive notice of the provisional directors' meeting and meeting of directors of the said company on the 17th day of March, 1913, I hereby ratifying and confirming anything that may be done at said meeting.

"Dated at Winona the 17th day of March, 1913.

"T. H. P. Carpenter, "A. C. Pratt,
"R. Macfarlane, "C. D. Carpenter,
Witness. (name unreadable). "R. A. Macfarlane."

The provisional directors were in number three only.

That is followed by the minutes of a meeting of the directors on the same day, in which it is stated: "All the provincial (*sic*) directors being present except R. F. Macfarlane and A. C. Pratt, who waived notice of the meeting." At this meeting of the directors it was decided to call a general meeting of the shareholders of the company for the same day.

The minutes of the meeting of shareholders recite that, pursuant to a call of the "provincial" (*sic*) directors, all the shareholders of the company were present in person or by proxy, giving the names as: T. H. P. Carpenter, one share; C. D. Carpenter, one share; A. E. Carpenter, one share; R. A. Macfarlane, one share; R. F. Macfarlane, one share by proxy; A. C. Pratt, one share by proxy.

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The evidence shews that no proxy was given for R. F. Macfarlane and A. C. Pratt except the one for the meeting to be held on the 1st March, 1913, or at any adjournment thereof, and that no meeting was held on that day, and it is contended that this meeting of the shareholders was wholly illegal, because it was held without due notice, and all the shareholders were not present. This meeting purported to elect a board of six directors, which included at that time all the shareholders. There was no authority to elect six directors at this time, and no other directors were ever elected, and it is contended that all acts purporting to be done by these directors are wholly void, for that it cannot be claimed that, even if the charter directors were present, they acted by virtue of their original authority, nor had they authority otherwise to act, they not having been duly elected: *Garden Gully United Quartz Mining Co.* v. *McLister* (1875), 1 App. Cas. 39. It was at a meeting of these directors that they purported to allot and to issue to R. A. Macfarlane $50,000 "fully paid-up common stock of the said company in payment of his interest in certain contracts for the purchase of certain fruits and vegetables required by the said company, as authorised by the shareholders at a general meeting held at the head office of the company on Monday the 17th day of March, 1913" (the same day). The contestants urge that, notwithstanding this resolution disposing of the $50,000 of common stock, the president, in obtaining their subscriptions, represented to them that the whole $50,000 of common stock still remained in the treasury. In this resolution it is treated as fully paid-up. The answer which counsel for the liquidator makes to this charge is, that this transfer was merely a blind to enable the company to dispose of the common stock at less than its face value by treating it as paid-up stock; and, although the resolution speaks of an absolute transfer, it was understood, notwithstanding, that R. A. Macfarlane held the stock as fully paid-up in trust for the company.

What purports to be a further minute of the directors' meeting of the 17th March, 1913, shews that, the same directors being present, a draft of the proposed by-laws was submitted, a seal for the company was adopted, and a by-law number 50, "being a by-law to create and issue fifty thousand dollars as preference stock under the charter, be and the same is hereby approved and adopted." The directors further approved of the sale of $50,000

of stock to Macfarlane for certain options and agreements not particularised, "and that the issue of fifty thousand dollars worth of shares of the stock of this company fully paid-up and non-assessable is hereby directed to the said Macfarlane." It was further directed that the *stock-book* of the company be *opened for subscriptions*, and that *a manager be appointed to go on with the erection of buildings and purchase of machinery and erection of the factory "and to do all things necessary to get the company into first class running order;"* that is before any stock had been sold.

At an adjourned meeting of the shareholders held on the same day (17th March), by-law 50, to create $50,000 preference stock, was confirmed and adopted, and the resolution of the directors taking over the agreements and options from Macfarlane was approved and ratified, and the transfer of $50,000 of shares of the stock of the company, as consideration for the transfer of the said agreements and options, was approved, ratified, and confirmed.

A further meeting of the directors was held on the 2nd June. The secretary "presented applications for stock from the following parties, viz.: J. D. Martineau, Montreal, 5 shares; Geo. V. Kneen, Montreal, 5 shares;" and it was moved and seconded "that the amount of stock subscribed for by the said parties be allotted to them and that notice of such allotment be posted to the said parties forthwith."

On the 1st August, there was a further meeting of the directors, in which the vacancy created by the retirement of A. C. Pratt was filled by the apointment of J. C. Christie as director.

A further meeting of the directors was held on the 27th September, when it was moved and seconded that "notice of allotment of stock be mailed to the following parties for the amount of stock subscribed;" then followed the names of a number of persons, not including any of the above alleged contributories.

The next and last meeting of the directors was on the 8th October, 1913, when it was resolved to have the company wound up on account of financial difficulties.

The by-laws purport to be enacted by the directors on the 17th March, 1913, and to be adopted and passed by the shareholders on the same day.

The directors took subscriptions for stock, received payments

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thereon, bought and paid for real estate, erected buildings thereon, and the company had just commenced its canning operations when it became financially embarrassed; and, upon the application of the Long Lumber Company Limited, claiming to be a creditor to the extent of $2,800, a winding-up order was made on the 17th October, 1913.

The learned Referee finds that contributory number 11, D. Hamilton, signed his subscription for five shares on the 23rd May, 1913. The minute-book does not shew any allotment; the stock-ledger shews Hamilton as a shareholder for five shares, and he is credited with two payments, one on the 16th June of $100, and the other on the 16th July of $100, and the evidence shews that he made another payment of $100; so that in any event he is liable for only $200.

Re contributory number 16, George Kneen. Mr. Kneen signed his subscription for five shares on the 15th May; these shares were allotted to Mr. Kneen on the 2nd June, 1913, as appears by the minute-book of the company. The stock-register shews Mr. Kneen as a shareholder with nothing paid.

Re contributory number 21, J. D. Martineau. Mr. Martineau signed his subscription for five shares on the 15th May, 1913; these shares were allotted on the 2nd June, 1913, as appears by the minute-book of the company. The stock-register shews Mr. Martineau as a shareholder with nothing paid.

Re contributory number 22, Joseph Mongeau. Mongeau and Frere signed a subscription for five shares on the 29th May, 1913; the minute-book of the company does not shew any allotment; Joseph Mongeau is the sole partner of Mongeau and Frere. The stock-register shews Mongeau and Frere as shareholders for five shares with nothing paid. He in fact paid $100.

Re contributory number 30, J. Stetson. Stetson subscribed for five shares of the preference stock on the 1st May, 1913; the minute-book shews no allotment. The stock-register shews Stetson to be a shareholder for five shares. He paid on account on the 11th June, 1913, $100, and on the 16th June, 1913, $100; he is entitled to be credited for payment of another $100 which does not appear in the minute-books of the company. If this contributory is liable, he is liable only for $200.

The learned Referee finds: (1) that the present alleged contributories subscribed for the amount of stock for which they are

charged; (2) that they received notice of allotment; and he further holds that, in the cases of Stetson, Mongeau, and Hamilton, formal notice of allotment was not necessary, on account of the payments made by them and received by the company: see *Re Canadian Tin Plate Decorating Co.* (1906), 12 O.L.R. 594; *Re Standard Fire Insurance Co.* (1885), 12 A.R. 486; *Hill's Case* (1905), 10 O.L.R. 501; *Nelson Coke and Gas Co.* v. *Pellatt* (1902), 4 O.L.R. 481.

On the question of misrepresentation he holds that this is no defence, and it is not necessary to consider the facts on which the alleged contributories rely in proof of the same, for, even if the misrepresentation on which they rely were admitted, it would not relieve them from liability: *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325, 342.

The learned Referee held that the statute afforded no defence to the contestants, and ordered them to be placed on the list of contributories.

The statute 2 Geo. V. ch. 31, under which this company received its charter, contains provisions first appearing in the English Companies Act of 1900, and continued in the English Companies Act of 1908. The sections particularly referred to appear in Part VIII. of the Ontario Companies Act, secs. 110 to 115 inclusive.

Section 110 (1) provides that "no allotment shall be made of any share capital offered to the public for subscription unless;

"(*a*) The amount, if any, named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or,

"(*b*) If no amount is so named, the whole amount of the share capital so offered for subscription

"has been subscribed, and the sum payable on application for the amount so named, or for the whole amount offered for subscription, has been paid to and received by the company."

No amount in the prospectus is mentioned as the minimum, so that the sum payable on application for the whole amount of the share capital is required to be paid in before allotment shall be made, which, under sub-sec. (3), shall not be less than five per cent. of the nominal amount of the share. In the present case it is fixed by the prospectus as twenty per cent.

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"Any condition" (sub-sec. (6)) "requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void."

By sub-sec. (7) it is provided that "this section" (110), "except sub-section (3), shall not apply to any allotment of shares subsequent to the first allotment offered by a public company."

The prospectus states that stock is offered at par, payable twenty per cent. with the application and twenty per cent. every thirty days thereafter until fully paid, when stock will be allotted; "the right is reserved to allot such subscription and such amounts as may be approved."

It will be noticed that sub-sec. (3) is excepted from sub-sec. (7). Sub-section (3) requires that "the amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share." It is not disputed that in respect of a number of the applications no amount whatever was paid.

Sub-section (4) provides that if such conditions have not been complied with on the expiration of ninety days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within one hundred days after the issue of prospectus, the directors shall be jointly and severally liable to repay the same, unless a director proves that the loss was not due to any misconduct or negligence on his part.

Section 111 provides (sub-sec. (1)) that "an allotment made by a company to an applicant in contravention of the foregoing provisions of this Part shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company, and not later, and shall be so voidable notwithstanding that the company is in the course of being wound up." "Statutory meeting," as used in this section, is defined by sec. 115 (sub-sec. (1)): "Every company shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of its shareholders, which shall be called the statutory meeting." This statutory meeting has never been held. It could not be held until the company was entitled to commence business, and the company was never entitled to commence business, owing to the requirements of the statute, sec.

112, not having been complied with. That section provides (sub-sec. (1)):—

"A company shall not commence any business or exercise any borrowing powers unless:

"(*a*) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and,

"(*b*) Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered by a public company; and,

"(*c*) There has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors in the prescribed form, that such conditions have been complied with and the Provincial Secretary has certified as provided by subsection (2)."

No such statutory declaration has been filed, and no certificate obtained.

Sub-section (2) of sec. 12 provides for the certificate of the company's right to commence business; and sub-sec. (3) declares that "any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding."

Sub-section (5): "If any company commences business or exercises borrowing powers in contravention of this section every person who is responsible for the contravention shall, without prejudice to any other liability, incur a penalty not exceeding $50 for every day during which the contravention continues."

To shew the peremptory nature of the above requirements, reference may be made to sub-sec. (6).

Section 113 provides that "all sums received by the company or by any promoter, director, officer or agent thereof shall be held in trust . . . until deposited in a chartered bank to the credit of the company and shall be so deposited and there remain in trust until the issue of the certificate by the Provincial Secretary." There is no pretence that the money so paid in was so deposited. The money in fact was used in the business of the company, which

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was carried on without having obtained the certificate and without authority.

Section 114 is as follows:—

"(1) Where a company makes any allotment of its shares it shall, within two months thereafter, file with the Provincial Secretary:

"(a) A return of the allotments, stating the number and nominal amount of the shares comprised in each allotment, the names, addresses and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and

"(b) In the case of shares allotted in whole or in part for a consideration other than cash, a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect of which such allotment was made and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid-up, and the consideration for which they have been allotted."

These provisions were not complied with either in respect of the preferred shares or of the common stock, the whole of which, amounting to $50,000, purport to be transferred to Macfarlane for indefinite, and, so far as I can see, nominal, consideration.

Sub-section (2) of sec. 114 provides that if default is made in compliance with the requirements of this section every officer of the company who is knowingly a party to the default shall incur a penalty not exceeding $50 for every day during which the default continues.

Section 115, above referred to, provides for statutory meetings, the notice of which is provided for by sec. 42, which declares that, in default of other express provision in the special Act or letters patent or by-laws of the company, notice of the time and place for holding general meetings of every company, including the statutory meeting and the annual and special meetings, shall be given at least ten days previously by registered letter to each shareholder at his last known address, and by an advertisement in a newspaper published at or as near as may be to the place where the company has its head office and to the chief place of business of the company.

Sub-section (2) of sec. 115 provides that the directors shall, at least ten days before the day on which the meeting is to be held, send to every shareholder a report, certified by not less than

two directors, stating: (*a*) the total number of shares allotted, distinguishing the shares allotted as fully or partly paid-up; (*b*) the total amount of cash received; (*c*) an abstract of receipts and payments, etc.; (*d*) names, addresses and descriptions of directors; and (*e*) the particulars of contracts; the report is to be certified by auditors (sub-sec. (3)), and to be filed with the Provincial Secretary (sub-sec. (4)). Sub-section (8): "If default is made in filing such report or in holding the statutory meeting, then at the expiration of fourteen days after the last day on which the meeting ought to have been held any shareholder may apply to the Court for the winding-up of the company," etc.

A contract with the company is usually made by an application by the intending shareholder for so many shares, and upon an allotment being made and notified to him a binding contract is complete when the acceptance is notified to the applicant: *Nicol's Case* (1885), 29 Ch. D. 421, 426 (C.A.); *Hebb's Case* (1867), L.R. 4 Eq. 9.

The acceptance is notified when the notice is posted, even though it never reaches the applicant: Halsbury's Laws of England, vol. 5, p. 173. In the case of a conditional offer, if the condition is subsequent there is a binding agreement to take shares as soon as the company notifies its acceptance of the offer. Where the condition is a condition precedent, there is no binding agreement to take the shares until the condition is either fulfilled or waived: *Elkington's Case* (1867), L.R. 2 Ch. 511; *Pellatt's Case* (1867), *ib.* 527; Halsbury's Laws of England, vol. 5, p. 173, para. 289; see also p. 177, para. 294, referring to the English Act, where it is said that "in the case of the first allotment of shares offered to the public for subscription, no allotment must be made of any share capital of a company offered to the public for subscription, unless (1) the minimum subscription, if any, or if not, the whole amount of share capital offered for subscription, has been subscribed; and (2) the sum payable on application for the minimum subscription, or such whole amount, as the case may be, has been paid to and received by the company;" referring to sec. 85 of the Imperial Act, corresponding to sec. 110 of our Act.

The minimum subscription is the amount named in the prospectus, and if no such amount is fixed then the whole amount must be reckoned, exclusively of any amount payable otherwise

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than in cash. It is further pointed out in this section that the amount payble on application on each share must be actually paid to and received by the company. See also Palmer's Company Law, 9th ed., p. 105, where this and the following sections are considered.

I take the meaning of sub-sec. (7) of sec. 110 to be this: that it has relation to sub-sec. (1) (*a*) of sec. 110, where the prospectus names a minimum subscription upon which the directors may proceed to allotment, and where they have proceeded to allotment, having named the minimum of shares upon payment of five per cent. or more of which the company may commence business, this section, 110, does not apply, except sub-sec. (3). With regard to the application of sec. 110, the learned author of Palmer's Company Law, p. 106, says: "As to companies which invite the public to subscribe for shares, sub-secs. (1) to (6) inclusive apply." Sub-section (6) of sec. 85 of the English Act corresponds to sub-sec. (7) of sec. 110 of our Act.

The company in this case by its prospectus does invite the public by offering stock to the public at par.

The learned author further points out (p. 107), as to the minimum subscription, that the amount may be stated as so many shares, or so many pounds, or as a specified percentage of what is offered for subscription. The statement must be express: *Roussell* v. *Burnham*, [1909] 1 Ch. 127. In that case the applicant saw the prospectus, read it, and, in consequence of the statements contained in it, cut the form out of a newspaper and filled it up and sent it to the company, applying for 700 ordinary shares. These were allotted to him on the 27th November, and he paid £175. The remaining 15 shillings per share had been called up, but the plaintiff declined to pay, pending the hearing of his action. This was on the 26th November, 1906. On the 9th December, 1906, he wrote to the company repudiating the allotment and asking for the return of his money. The company refused, and brought action. The ground upon which the cancellation was sought was that the prospectus contained no statement of the minimum subscription upon which the directors could proceed to allotment, as required by sec. 4, sub-secs. (1) and (4), of the Companies Act, 1900 (corresponding to sec. 110 of our Act, 2 Geo. V. ch. 31). It will be seen that in that case subscription had been made, money paid, and what purported to be an allotment was

also made. Parker, J. (p. 130), points out that it is made unlawful for a company, in cases to which the section applies, to proceed to allotment of any share capital of the company offered to the public for subscription unless certain conditions are fulfilled—that is to say, unless either the whole amount of the capital offered is subscribed, or the memorandum or articles of association of the company fix the minimum amount upon which the directors are authorised to proceed to allotment, and that minimum amount is stated in the prospectus and is in fact subscribed. If any allotment be made to an applicant for shares contrary to the provisions of sec. 4, certain results are to follow, these results being specified in sub-sections corresponding to sub-secs. (4) and (6) (sec. 110) of our Act. He then refers to sec. 5, corresponding to sec. 111 of our Act. He further held (p. 133) that the statement which the Legislature contemplated as to the minimum subscription upon which the allotment might proceed, was an express statement, and not one which can be implied or inferred from other statements in the prospectus. As the whole amount of the capital offered was not subscribed, and there was no authorised minimum, the plaintiff's application for shares was cancelled.

Under the English Act it was held that if the company is one to which the statutory meeting section does not apply, that is, a company formed before the 1st January, 1901, there is no limit on the shareholder's right to rescind, short of his affirming the contract: *Finance and Issue Limited* v. *Canadian Produce Corporation Limited*, [1905] 1 Ch. 37. It is not necessary that the rescinding shareholder should take actual legal proceedings to avoid the contract within the month; notice of avoidance, followed by prompt legal proceedings, is enough; and, *semble*, the notice need not specify the ground of avoidance: *In re National Motor Mail-Coach Co. Limited*, [1908] 2 Ch. 228. That allotment, if once made, though irregularly, *is only avoidable at the option of the shareholder*. The company cannot insist on paying back the application-moneys, for the shareholder may prefer to keep the shares: *Burton* v. *Bevan*, [1908] 2 Ch. 240.

The result at which I have arrived, having regard to the statute and the particular facts of this case, may be shortly stated thus:—

The charter having provided for three directors only, six directors could not be legally elected; and, the company having assumed to elect six directors, they are presumed to have acted

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under that election, and not by virtue of their being directors under the charter, and, as pointed out in the judgment in *Garden Gully United Quartz Mining Co.* v. *McLister*, 1 App. Cas. at p. 50, it was not the old board who assumed to act, but the new board of directors as elected, and the new board, as such board, assumed to act, others than the original board being present. I would say, in the language of Mr. Justice Molesworth, approved by their Lordships of the Privy Council, that those, if any, who legally held office before that election, taking as under the election, could not be deemed to act under their former title: see p. 53.

But it is said that the proceedings toward election of directors, if entirely void, left the charter directors still in office under sec. 87 of the Act. The answer to that position seems to me clear: first, at the meeting in question the original board were not present, either in person or by proxy; and, secondly, that board never assumed to act; even if they were all present, it was not their act, but it was the act of them with the other members, so that in fact there never was a valid board of directors elected, and the charter directors never assumed to act, and no valid allotment was ever made of any shares.

These enactments, as above pointed out, are for the protection of the shareholders; and if, in a case of this kind, they may be held liable for their shares, the statute would appear to me to be of no effect. The creditors have no just cause to complain: they could have easily ascertained that the company was not authorised to commence business, and they are presumed to have known that any contract made by a company before the date at which it is entitled to commence business is provisional only, and shall not be binding upon the company until that date: sec. 112, sub-sec. (3).

These provisions have been held to apply so as to prevent the recovery even in winding-up proceedings: *In re Otto Electrical Manufacturing Co.* (1905) *Limited*, [1906] 2 Ch. 390, where it was held that the word "provisional" means that the contract is to be read as if it contained a provision that it should not be binding upon the company unless and until the company became entitled to commence business. It was there held that the section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business. Where, therefore, the company had gone into liquidation without having become

entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company, was disallowed. See also *New Druce-Portland Co. Limited* v. *Blakiston* (1908), 24 Times L.R. 583.

It seems to me absurd to say that, having regard to sub-sec. (4) of sec. 110, which provides for repayment where the conditions are not complied with, the stockholder can nevertheless be called upon to pay the balance of his shares, when he is entitled to have returned to him the portion that he has already paid. Here, no statutory meeting having been held, the fact of the company being wound-up does not affect the applicants' right. Their claim to have their applications for shares cancelled is within time.

It is unnecessary for me to decide whether there are any valid creditors or not, or to consider the question of misrepresentation and other questions raised by the applicants. I dispose of this case upon the broad ground that the company has never complied with the requirements of the statute, and that those persons who became subscribers are entitled, notwithstanding the winding-up proceedings, to make claim to have their subscriptions for stock cancelled and to be removed from the list of contributories.

The appeal should be allowed, and the order of the Referee placing the contestants upon the list of contributories set aside, and an order made declaring that their applications for stock are cancelled, and that their names be removed from the books of the company as stockholders or as subscribers for stock.

The applicants should have their costs of appeal and of the proceedings incident to having their names removed from the list of contributories. *Appeal allowed.*

[Leave to appeal from the above decision was refused by SUTHERLAND, J., on the 27th March, 1916: see 10 O.W.N. 122.]

COLLINGS v. CITY OF CALGARY.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. June 30, 1916.

MUNICIPAL CORPORATIONS (§ II G 2—210)—LIABILITY FOR ACTS OF OFFICERS —RECEIVING CHEQUE IN PAYMENT OF TAXES—NON-PRESENTMENT.

A municipal corporation is not bound by the act of its collector in accepting a cheque in lieu of cash in payment of taxes due to the corporation; neither is it liable for the default of the collector in not presenting the cheque for payment at the bank within a reasonable time, nor for any damage sustained by the taxpayer through the bank going into liquidation before the cheque was presented or paid.

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APPEAL by the defendant from the judgment of Simmons, J., in favour of the plaintiff. Reversed.

A. Hannah, for plaintiff, respondent.

C. J. Ford, for defendant, appellant.

SCOTT, J.:—The plaintiff sought a declaration that a certain cheque for $500 given by him in payment of certain taxes due by him to the city was a good and valid payment thereof to the amount of the cheque. He also claims for damages sustained by him by reason of the refusal of the defendant to give him credit for same on account of his taxes.

On October 8, 1914, the plaintiff drew his cheque upon the Dominion Trust Co. for $500 payable to the City of Calgary, procured its acceptance by that company and on the day of its date delivered it to a clerk in the office of the city treasurer and collector in payment to the amount thereof of taxes due by him to the city. Taxes were due by him upon four parcels and, as the amount of the cheque was insufficient to pay the full amount due by him, he instructed the clerk to apply a sufficient amount in payment in full of the taxes upon three parcels specified by him and the remainder of the cheque as a payment on account of those due upon the remaining parcel. The plaintiff was entitled to a discount upon certain portions of the taxes due in respect of each parcel, and, owing to pressure of work, the clerk was unable at that time to make the necessary apportionment of the amount of the cheque between each of the parcels. It was not until October 14 that he was able to do this and on that day receipts for the amount paid on each parcel were forwarded to the plaintiff. On the following day the assistant to the city treasurer and collector deposited the cheque in the Molsons Bank at Calgary and later on during the day or upon the following day he was notified by the teller of that bank that payment had been suspended by the company. He thereupon took the cheque to the company's office and was there informed by its accountant that payment had been suspended for 15 days. He presented it again there on the following day when payment was again refused. On October 18 or 19 he telephoned the plaintiff informing him that the cheque was unpaid to which the plaintiff replied that he could not help that and that he looked to the company for payment. The cheque was retained by the treasurer and collector until after the 15 days had expired and the cheque, being still

unpaid, he on October 30, wrote the plaintiff informing him that payment had been refused and notifying him that the receipts given him for the taxes had been cancelled. Shortly after this the company went into liquidation.

The company, though not authorized by its charter to engage in the business of banking, was accustomed to receive moneys on deposit from its customers which moneys were credited to them in a deposit ledger and were subject to withdrawal by cheque. It was not the custom of the company to pay cheques at its office in Calgary but, by an arrangement made by it with the Royal Bank of Canada at Calgary, cheques of the company deposited with other banks there were to be cleared through that bank, the course of procedure being that that bank would notify the company of all cheques so cleared and the company would then notify that bank to pay such of those cheques as the company should specify. This procedure was applicable as well to cheques which had been accepted by the company and cheques so accepted would not be paid by the bank unless it was specially authorized to do so. It follows, therefore, that if the plaintiff's cheque had been presented for payment at the company's office at any time between its date and October 16, it would not have been paid there nor would it at any time during that interval have been paid by the bank in the absence of express authority to pay it, and it does not appear that any such authority was given. On October 13, the Royal Bank notified the other Calgary banks that the company had required 15 days' notice of the withdrawal of moneys deposited in its savings bank department. It may be that, if the plaintiff's cheque had been deposited with the Royal Bank at any time before that date, authority would have been given by the company to pay it and it would have been paid.

Before the plaintiff handed in his cheque at the city collector's office he had received from the collector demands in writing under sec. 46 of the Calgary Charter for the payment of the taxes due by him and upon the face of each demand was the following notice, viz.: "All cheques in payment of taxes must be made payable to the City of Calgary and accepted by bank." These demands were handed in by the plaintiff with the cheque in order that they might be returned to him with the collector's receipt thereon.

The trial Judge held that as the plaintiff's cheque was not

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drawn upon a bank, it was not a cheque within the meaning of the Bills of Exchange Act, that it was a bill of exchange and, as such, was subject to the law merchant and the common law applicable to such instrument, that, being payable on demand, it should have been presented for payment within a reasonable time and that, not having been so presented, the city must sustain the loss thereby occasioned.

In my opinion, the payment by a ratepayer to the collector of a municipality of taxes due to the latter should not be treated as a transaction between the ratepayer as a debtor and the municipality as a creditor, but as one between the ratepayer and the collector. It is the clear duty of the latter to collect the taxes in money and I cannot find any authority which would support the view that the acceptance by him of a negotiable security in lieu of the money would bind the municipality or would constitute a payment of the taxes for which it was given. All the authorities I have been able to refer to appear to support the opposite view.

In *Spry* v. *McKenzie*, 18 U.C.Q.B. 161, which was an action of replevin, the defendants justified the taking under a distress for taxes due by the plaintiff to a school district. The plaintiff replied that the trustees had accepted his note in satisfaction of the taxes distrained for. Robinson, C.J., who delivered the judgment of the Court, says, at p. 165:

> We do not think the right to distrain was gone because the bailiff took a note instead of the money and because that very irregular proceeding was at the time sanctioned by the trustees. It would still be in their power, we think, when the debt was due to the public and not to themselves, to carry out properly the directions of the law as they ought to have done at first, and the plaintiff must seek his remedy against him (the defendant) if he should be prejudiced by reason of the note he had given.

In *Smith* v. *Barham*, 51 J.P. 581, it was held that the acceptance by the assistant overseer of a parish of a bill of exchange for poor rates due to it, did not constitute payment thereof, as the assistant overseer had no authority to take payment of them in the form of a bill of exchange.

In *Houghton* v. *Boston*, 159 Mass. 138, Field, C.J., who delivered the judgment of the Court, says, at p. 142:

> We are of opinion that the statutes contemplate that taxes should be paid to the collector of taxes in money; that, if the collector, for the convenience of taxpayers or of himself, receives cheques, in the absence of any agreement to the contrary they are to be taken as conditional payment and that if

they are not paid, the claim for taxes is not satisfied but that the taxes can still be collected according to law. If the collector has been negligent in presenting a cheque whereby the drawer has suffered loss it may be that he is personally liable therefor. We express no opinion whatever on the facts of this case, the cheque was seasonably presented so as to absolve the collector or treasurer from liability to the drawer for damages suffered by failure of the bank.

Scott, J.

The assistant overseer of a poor law parish in England is the only person authorized to collect the taxes due to the parish, (*Hornchurch Union* v. *L.T. & S. R. Co.*, 76 J.P. 385) and I cannot draw any distinction between his duty with respect to the collection of taxes and those of the collector under the city charter. Though the latter is appointed by the city council, he is not the servant of those who appointed him, but the servant of the inhabitants of the city who constitute the corporation and whose moneys he has to receive and pay over for their purposes. His duties are prescribed by the charter and he is independent of the council, which cannot interfere with him in the discharge of his duties (see sec. 1 of charter and *Reg.* v. *Smallman*, [1897] 1 Q.B. 4).

For the reasons I have stated, I am of opinion that the defendant corporation is not bound by the act of its collector in accepting the plaintiff's cheque in payment of his taxes nor is it liable for the default, if any, of the collector in not presenting the cheque for payment within a reasonable time, nor for any damage which the plaintiff may have sustained by reason of such default.

I would allow the appeal with costs and dismiss the plaintiff's action with costs.

Stuart, J.

STUART, J.:—For the reason given by Scott, J., I think the plaintiff cannot be said to have paid his taxes and is not entitled to the declaratory judgment which he asks for to that effect.

I have had, however, considerable hesitation upon the alternative claim for damages.

It seems to me that the matter cannot be immediately concluded against the plaintiff by saying that the tax collector had no authority to accept the cheque or order on the Dominion Trust Co. in payment of the plaintiff's taxes. If there is any liability at all on this ground it must be for a tort. Of course a principal is not liable for a tort committed by his agent unless the agent was acting within the scope of his employment and his authority. But an agent is never authorized, unless in case of deliberate crime or fraud, to commit a tort. The particular

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act which the agent commits amounting to a tort is of course in the strict sense never within the agent's authority. The question is whether the agent was acting *generally* within the scope of his employment when the *particular* act complained of was done. Now the collector was authorized to collect taxes and that is what he was doing when he took the cheque. The question is, did he commit any tort in the circumstances? It is very difficult for me to discover any ground of legal liability in tort. I cannot see how it could be stated. There might be something in the way of negligence on the part of a bailee of a chattel, but it seems to me that, while the collector no doubt had authority to collect taxes and was acting in that capacity at the time, he could hardly be considered as having authority to become the bailee of the plaintiff so as to be liable for negligence in not taking care of a chattel entrusted to him. It would be difficult, also, to attach liability to the principal, the corporation, on any ground of implied contract. While, therefore, I think the collector ought to have deposited the cheque at once and was not excused on the ground that he had to make calculations, because these could easily have been made and records kept even after deposit of cheques received, still I cannot discover any real ground upon which the corporation can be held liable in damages for what he did. I would allow the appeal with costs and dismiss the action with costs.

Beck, J.

BECK, J., concurred with SCOTT, J.

McCarthy, J.

MCCARTHY, J.:—I would allow the appeal with costs and dismiss the plaintiff's action.

The material facts are carefully stated in the judgment of Scott, J., and it is unnecessary to repeat them.

The duties of the tax collector are defined by statute and he is nowhere authorized to receive payment of taxes in other than legal tender unless the instructions in the demand for taxes as follows: "All cheques in payment of taxes must be made payable to City of Calgary and accepted by bank" alter his authority to that extent.

It is unnecessary to arrive at a decision in this case to determine whether or not a cheque accepted by a bank would relieve the taxpayer's obligation to the city because the document offered in payment was not accepted by a bank but by a company. Apparently, for reasons of public policy it had been decided that

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payment of taxes must be made in legal tender. The collection of taxes is for the benefit of the public and a tax collector or any other civic official has no right to determine what securities he or they shall accept for the payment of the moneys due by the taxpayer.

The payment in this case was made by the accepted order for payment of money of the Dominion Trust Co., which went into liquidation before payment. The demand for taxes was in the possession of the plaintiff for some time prior to the date of payment, and there is the strongest possible inference that he was familiar with the instructions therein contained. His account was in the Trust Co. by his own selection, and if it did not meet its outstanding orders for payment of money, the responsibility is not the city's.

McCarthy, J.

The tax collector was acting outside the scope of his employment in taking the order for the payment of money of the Trust Co. to the knowledge of the taxpayer and under the circumstances I am of the opinion the city cannot be held liable.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. May 2, 1916.

EASEMENTS (§II A—5)—PASSAGE WAY FOR CATTLE—INTERFERENCE—MINING. A conveyance of land for mining purposes does not confer upon the grantee the right to carry on the excavations in derogation of a right to a passage way for cattle reserved in the deed. (Fitzpatrick, C.J., dissented.)

[*Fitzgerald* v. *Can. Cement Co.*, 9 O.W.N. 79, affirming 7 O.W.N. 321, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 9 O.W.N. 79, affirming the judgment of the trial, 7 O.W.N. 321, in favour of the plaintiff.

The trial Judge held that the plaintiff was entitled to a perpetual right of way over the land sold for his cattle to get to water, and he sent the case to a referee to ascertain if the defendants could furnish such right of way. In case they could not, plaintiff to have judgment for $1,500 as damages.

Northrup, K.C., for the appellants.

Mikel, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—In the grant by the respondent of part of his farm to the appellant there was the following reservation:

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And the said parties of the first part reserve to themselves, their heirs and assigns forever, the right to use the roadway at present existing across the marl deposit to the Second Concession and the right to pass over for cattle, horses and other domestic farm animals for water going to and from Dry Lake.

There was some suggestion that these two rights refer to one and the same thing. I can see nothing to support such a contention. The right with which we are concerned is the second mentioned in the reservation and is entirely distinct from the first right reserved.

There was evidence that there was what is called a drift-way, that is a path or track, which was used by the cattle going from the respondent's farm to water at Dry Lake. The land surrounding the lake was, however, open marsh land and the cattle being at large, I doubt if there could be said to be any definite way, though possibly the cattle went more or less in the same direction. At any rate there is no suggestion of any such drift-way in the reservation and that in marked contrast to the reservation by the first right of the use of "the roadway at present existing across the marl deposit to the second concession."

Now, although the respondent tried to avoid answering the question, he was obliged to admit that the appellant had not prevented cattle from going from the farm to Dry Lake.

HIS LORDSHIP: Try and answer the question.

A. They could walk there.

MR. NORTHRUP: To the shore? A. Yes.

Q. There is nothing to prevent your cattle coming from the lane around the head of the dredger to the shore of Dry Lake, whatever that shore is? A. No.

Therefore, it is clear that the appellant has not prevented the respondent's cattle passing over the lands granted for water going to and from Dry Lake and that is all that the reservation in terms gives a right to.

The appellant, in pursuance of the purpose for which it purchased these lands, excavated the marl in Dry Lake and, instead of the shelving bank with two or three feet of water at which the cattle were accustomed to drink unattended, the water is now so deep at the bank that it would be unsafe to allow them to go there without someone in charge.

This is the real grievance of which the respondent complains, and it is of something outside and beyond the right of way reserved in the conveyance over the lands granted. Consequently,

we are not concerned with those innumerable cases which are governed by the well-established principle that

the servient owner cannot so deal with the tenement as to render the easement over it incapable of being enjoyed or more difficult of being enjoyed by the dominant owner.

Again, I do not think we can consider what was the intention of the respondent in making the grant to the appellant. He is very positive now that he intended to reserve the right to water his cattle as he had previously done. Perhaps he did not then consider the matter so fully as he has since done, for otherwise it must surely have occurred to him that since the purpose for which the appellant was acquiring the property was to excavate the marl some interference with the water must be inevitable, and that he could not expect to sell part of his land for such a purpose and retain the use of it for farm purposes as completely as before. It is not, however, a question of what the respondent intended, but of what he did. There would be no justification for varying the grant even if such intention were clearly shewn for if at the time the appellant had been asked to pay a further $1,500 for the rights it was acquiring it would probably have refused to proceed with the purchase. We can, therefore, only consider what are the legal rights arising as between the parties.

Now the Judge at the trial says in his judgment:—

I think the inference is when the right of way was reserved in the second part "The right to pass over, etc.," that that involves the inference and suggestion that there should be a place at the end of that right where they (*i.e.*, the cattle) could water in safety.

In the first place, I point out that we are not directly concerned here with the difference between an implied grant and an implied reservation. This difference is laid down in the well known case of *Wheeldon* v. *Burrows*, 12 Ch. D. 31, where Thesiger, L.J., states the general rules and says:

The first of these rules is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The second is that if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant.

With this, as I have said, we are not directly concerned because the grantor has made an express reservation and all that

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we have to do is to find what is the right or the extent of the right so reserved.

Nevertheless, it is only by implication or, as the Judge says, by "inference and suggestion" that the reservation can be held to bear the extended meaning he places upon it and there seems no reason why the same rule should not apply to an implied extension of a reservation as to the reservation itself. On the face of it, the reservation is of nothing but a limited right of way. It is a right to pass over the lands granted for cattle, horses and other domestic farm animals only and only for water going to and from Dry Lake. The words, "for water" are certainly capable of bearing a purely restrictive meaning. The lands may not be used for pasturing cattle, exercising horses or any other purpose than for water.

The reservation of the right of way would be just as proper in the form actually used if Dry Lake had been the property of a third party. If the respondent had then become unable to obtain a continued right to use the lake, not only would the appellant be under no liability, but the right of way over its land would have ceased with the purpose for which it was granted.

There is in the grant no reservation of Dry Lake or of any rights in its waters or of convenience of access thereto, yet these are the matters of substance to which the right of way could be only ancillary. If the parties to the conveyance had been agreed as to the reservation of any such rights we should have expected to find that they had been expressly provided for and safeguarded. Had they been so reserved we might, in the absence of a grant of right of way, have implied one. It is different, however, from the mere grant of a right of way to imply substantive rights which the appellant would probably have refused to concede. Considering the purpose for which the company purchased, a purpose of which the respondent was of course aware, I think it is reasonable to suppose that the right of way was agreed to and has to be taken for what it is worth. If the consequence of the appellant's workings renders the access to the water more difficult or were to decrease the quantity of the water or otherwise interfere with the respondent's full enjoyment of the water as he possessed it when he was the owner of the whole property, he has reserved no rights for loss of which he can maintain any claim for damages.

I do not recall any decided case presenting exactly the same

features as the present case, but perhaps some light may be gained by reference to the case of *Rhodes* v. *Bullard*, 7 East 116.

In covenant the plaintiff declared upon a lease by the defendant to the plaintiff of a messuage and a warehouse and also all that part of the yard belonging to the messuage between that and the warehouse. And the defendant covenanted that he would permit the plaintiff to have free ingress, egress and regress through the gate at the bottom of the yard belonging to the messuage to the warehouse and the use of the pump in the said yard jointly with the defendant whilst the same should remain there paying half the expenses of keeping it in repair.

The defendant removed the pump unnecessarily and it was held that under the words of the covenant he might do so and consequently the breach was ill assigned. The Chief Justice, Lord Ellenborough, draws attention to the fact that there was no demise of the pump and Grose, J., says:—

> It is material to consider that there are no words of demise of the use of the pump; but the lessor covenants that the lessee shall have the use of the pump jointly with himself whilst the same shall remain there, etc.

Now, it is true that the judgment went upon the words of the covenant, but in the present case not only is there no demise of the use of the water in Dry Lake, but there is no covenant either. If a covenant is to be implied at all, is it reasonable that more should be implied than that the respondent should have the use of the water if and so long as and to the extent that the appellant's workings did not interfere with such use? I think that would be the utmost the respondent could ask.

For these reasons I am of opinion that the appeal should be allowed and the action dismissed with costs.

DAVIES, J.:—I agree in dismissing this appeal for the reasons given by Sir William Meredith, C.J., in the Appellate Division in delivering the judgment of that Court. Those reasons are quite satisfactory to me.

Davies, J.

IDINGTON, J.:—If the grantees under whom appellant claims title had executed the deed of conveyance in question the reservation of the right of way would then have been construed as a grant by the said grantees to their vendors of the right of way so reserved, as was explained in the case of *Durham and Sunderland R. Co.* v. *Walker*, 2 Q.B. 940 at 967.

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They do not seem to have executed the conveyance and at

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common law there might be some difficulty in respondent's way besides the question of uncertainty relied upon.

It seems, however, obviously to have been agreed between the parties that this right of way should be enjoyed by the vendors to serve the user by them of the remaining part of the farm.

In the case of *May* v. *Belleville*, [1905] 2 Ch. 605, Buckley, J., held the successors in title of the vendees had not signed the deed but their agent had signed the agreement for sale which provided for the right of way. The deed of conveyance there as here contained the reservation of the right of way. The learned Judge seems to have held this to be notice of the agreement and the successor in title bound thereby.

The conveyance in question herein seems to me, by its numerous provisions in the way of agreements between the parties for several other contingencies relative to the lands in question and rights in or over them, peculiarly to lend itself to such a mode of judicial treatment of the same and all it contains bearing upon this question of right of way.

Founding the respondent's claim upon his rights to relief in equity I see no difficulty in applying the law as held in the *May* case, [1905] 2 Ch. 605. In principle I cannot distinguish the cases. It is true that in that case there was an antecedent agreement but does that do more than open the inquiry?

And in this case where there are so many collateral agreements contained in the conveyance, can there be any doubt of the fact? I admit it seems assumed by both parties rather than expressly proven, but should they be driven back to try over again what they do not seem to dispute?

Moreover, there is this to be said for that manner of looking at the case, that it lets in the power of the Court, perhaps in a way otherwise difficult to maintain, to deal with the question in the way it has been dealt with by providing for an inquiry as to another way being found.

As to the difficult question of certainty I think it might be fairly arguable, if we had no other evidence than the somewhat indefinite and ambiguous language of the reservation in the deed, that it was void for uncertainty. But when, as must be in the case of such documents, that language is interpreted and construed in light of the evidence of surrounding facts and circumstances existent at the time of the execution of the deed, and the conduct

of the parties thereto immediately after such execution, there cannot be any doubt of what it means.

I think, strictly speaking, the respondent was entitled to continue using, as he had been before the deed, the right of way defined by that actual user; and that appellant had no right by constructing a railway or in course of mining to excavate that part of the land habitually trodden, and so to impair or obstruct the use thereof. The deed is not as definite as it might have been but the cattle seem to have done, of their necessities and long practice, that which roughly marked the path intended.

The contentions of appellant, as to travel by the other way defined being meant, seem to me absurd if any meaning is to be given the words used. They were entirely unnecessary if only the first way defined to the highway was that intended for the cattle to follow.

The appellant seems to have got by the judgment appealed from such relief as may ameliorate its situation, perhaps due to the improvidence of its predecessors in title.

I think the appeal should be dismissed with costs.

DUFF, J.:—The appeal should be dismissed with costs. Duff, J.

ANGLIN, J.:—The defendant appeals from a judgment of the Ontario Appellate Division, which affirmed the judgment of Falconbridge, C.J., the trial Judge, declaring the plaintiff entitled to a right of passage across the defendant's land for cattle on his farm going to and from Dry Lake for the purpose of watering, granting a reference to enable the defendant to indicate a suitable right of way, and if one can be given to assess damages for interim wrongful interference, or, if none can be given, fixing the damages for permanent deprivation at $1,500. Anglin, J.

The plaintiff sold the lands held to be servient to Messrs. Irwin and Hopper, from whom the defendant acquired them. The deed to Irwin and Hopper contained this clause:—

> The said parties of the first part reserve to themselves, their heirs and assigns forever, the right to use the roadway at present existing across the marl deposit to the second concession and the right to pass over for cattle, horses and other domestic farm animals for water going to and from Dry Lake.

This deed was not executed by the grantees.

As an admission upon a matter of law, the statement of counsel for the appellant at the trial that "the title of the plaintiff to the right of way is not in question" may not bind it. But, dis-

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regarding that admission, the plaintiff's title is, in my opinion, fully established.

Applying the ordinary rule of construction that, if possible, effect should be given to every word of a document, the language of the deed itself makes it clear that the right of passage to and from Dry Lake for cattle, etc., asserted in this action is distinct from

the right to use the roadway at present existing across the marl deposit to the second concession.

To the plaintiff's objection that the reservation relied upon is ineffectual, because a right of way can be created only by grant and Irwin and Hopper did not execute the conveyance to them from the plaintiff, the judgment of Buckley, J., in *May* v. *Belleville*, [1905] 2 Ch. 605, at 612, gives a convincing answer.

The fact that the location and width of the passage to Dry Lake over the land conveyed were not defined in the deed did not render it void for uncertainty. *Deacon* v. *South-Eastern R. Co.*, 61 L.T. 377. Whether the owners of the servient land had the right to assign the way where they could best spare it or the holder of the easement had the right to take it where most convenient for his purpose (Gale on Easements, 8th ed., p. 510; Norton on Deeds, p. 263; *Packer* v. *Wellsted*, 2 Siderfin, 39, 111, at 111), as the Chief Justice of Ontario points out, citing *Pearson* v. *Spencer*, 1 B. & S., 571, a well defined way across the land conveyed having been used by cattle from the plaintiff's farm in going to and returning from Dry Lake for many years before and after the grant to Irwin and Hopper, the plaintiff's right to that particular way was probably established. But, as the learned Chief Justice says, the judgment at the trial has recognized the appellant's right to assign any other passage way over its land which will serve the purpose intended, and of that the respondent does not complain.

That the taking away of the bank of Dry Lake at the place where the cattle had been accustomed to water without providing another suitable watering place with a proper way or passage leading to it was an unwarranted interference with the plaintiff's right is unquestionable. The right accorded to the defendant by the judgment of assigning to the plaintiff some suitable way other than that formerly used and more convenient and less prejudicial to its mining operations is probably something to which it was not

entitled. The further claim, that the fact that the land owned by it was, to his knowledge, purchased from the plaintiff by its predecessors in order to dig marl from it, gives the defendant the right in so digging to extinguish the plaintiff's easement of passage for his cattle, is so utterly in derogation of the grant of that easement, which the terms of the conveyance to its predecessors in title shew that they undertook to make—a bargain which equity will enforce, *May* v. *Belleville*, [1905] 2 Ch. 605 at 612—that the mere statement of it proves it to be untenable. The contention that the use by the cattle on the plaintiff's farm of other drinking places, not constantly but from time to time, involved an abandonment by the plaintiff of the right of passage to Dry Lake is equally hopeless.

The appeal, in my opinion, fails and should be dismissed with costs. *Appeal dismissed.*

McEWAN v. TORONTO GENERAL TRUSTS CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 17, 1916.

CONTRACTS (§ I C 1—16)—PROMISE TO PAY FOR SETTLING ACTION—WANT OF CONSIDERATION—LIABILITY OF EXECUTORS.

A verbal promise to pay a sum of money in settlement of an action in addition to the amount stated in the settlement being without consideration, cannot be enforced against the executors of the promisor.

[Sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76, considered.]

Statement.

APPEAL from the judgment of SUTHERLAND, J., for the plaintiff, in an action against executors to recover a sum of money and interest, upon an alleged agreement or promise by the deceased. Reversed.

The judgment appealed from is as follows:—

One Peter McEwan died intestate on the 28th day of January, 1904. He was at the time the owner of the Goderich Salt Works.

By lease, dated the 1st day of February, 1905, three of his sons, the plaintiff being one, assumed, as "representing" his estate, to lease the said salt works to one Ransford, for a term of five years at an annual rental of $2,000. The lessee assigned the lease to a partnership called the Dominion Salt Agency, consisting of the Canadian Salt Company Limited, the Empire Salt Company Limited, and a partnership firm of two brothers of whom the said Ransford was one.

This agency company paid the rent for two years, and during the second, namely, on the 22nd October, 1906, by a written notice

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directed to the lessors, assumed to "determine" the lease on the 31st January, 1907. The lessors declined to recognise such attempted cancellation, and, after waiting a considerable time, on the 29th May, 1909, issued a writ against the individual concerns comprising the Dominion Salt Agency, and alleged to be trading under that name, to recover the rent for the remaining three years, namely, $6,000, and interest.

The lessors by the said writ claimed to sue individually and as representing the said estate. Pleadings were filed and delivered, and the action was ripe for trial, when negotiations for settlement were begun. One James I. Carter was a large stockholder in and a director of the Empire Salt Company.

A defence had been set up in the pleading of the defendants with which he and others concerned were not in sympathy, and he was apparently anxious that a compromise of the suit should be brought about.

Mr. Proudfoot, K.C., was acting for the plaintiffs, and Mr. Hanna, K.C., for the defendants. Mr. Proudfoot was well acquainted with Mr. Carter, and had several conversations with him about the proposed settlement. He says that Carter verbally agreed with him, as representing the plaintiffs, that, if a compromise of the pending action were arranged and carried out, he personally would pay "his share," meaning thereby, apparently, the proportionate share of his company of such balance of the rent and interest as should not be provided for by the terms of the settlement.

I think it is conceded that on a settlement for $3,800 such balance would be $3,200, and that, as the alleged share of the Empire Salt Company as compared to the others would be approximately five-sixteenths, it would amount to about $1,000, for which suit is brought.

A settlement was effected and is embodied in two letters: one dated the 17th November, 1909, written by Mr. Proudfoot to Mr. Hanna, from which I quote: "I am satisfied if Mr. Carter had personally made the agreement, even if it was a loss, he would settle without a murmur. Why then should he help Ransford out, because that is what it means to reduce this claim? If, notwithstanding all I have said, you and Mr. Carter think this case should be settled and all matters between the McEwans

and defendants closed for $3,800 cash, my clients authorise me to exercise my discretion, and I do so by accepting." The other letter was a reply from Mr. Hanna, dated the 18th November, 1909, as follows: "I have before me your letter of yesterday, in which you propose to settle for $3,800 cash—each party to pay their own costs. Acting for the defendants, I accept. I have written them accordingly, and am arranging for payment at an early date."

Mr. Hanna also wrote to Mr. Carter, at the time, as follows: "Enclosed herewith I send you copy of letter from Mr. Proudfoot herein, and of my letter to him in reply, settling this at $3,800, each party to pay their own costs. I send you Proudfoot's letter as setting forth fairly the situation. You will treat it as in confidence. Be good enough to figure out how this $3,800 will divide up among the three of you." That sum was paid; each of the three partners in the Dominion Salt Agency paying a portion thereof.

Mr. Proudfoot testified that thereafter he saw Carter, who told him that he was glad the matter had been closed, and he would carry out his part of the arrangement. He said that subsequently he wrote to Carter once or twice and spoke to him several times about the matter, and that, while not repudiating the bargain at all, he put him off from time to time under one excuse or another. In the end, Carter died on the 2nd November, 1913, having first made a will, of which the defendant company are the executors, and which has been admitted to probate.

The plaintiff, Hugh J. A. McEwan, to whom letters of administration of his father's estate were issued on the 7th day of March, 1910, brought this action, by writ dated the 24th September, 1914, endorsed as follows:—

1910		
Feby. 1.	To balance of rent of the Goderich Salt Works as settled and agreed on, $3,200 of which the late J. I. Carter's share was $\frac{5}{16}$	1,000.00
Feby. 1.	To amount of costs guaranteed in suit vs. Ransford	200.00
1913		
Dec. 15.	To interest on $1,200 for 3 years, 11 months, at 5%	235.00
		$1,435.00

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The evidence of Mr. Hanna, though distinctly to the effect that, in so far as his clients, the defendants in the first named suit, were concerned, the settlement was intended to relieve them from any claim with respect to the whole debt by the payment of the $3,800, and that it was no part thereof that Carter was to be liable for the payment of any balance, nevertheless corroborates that of Mr. Proudfoot to some extent. He says that Carter said to him that, although the matter was being settled at $3,800, "it was his intention to see that, so far as the share of his company was concerned, he would see that the plaintiffs were paid."

In the statement of defence in the present action it is alleged, among other things, that the lease referred to was invalid, owing to the fact that the lessors had no power to make the same on behalf of the estate, and that the contract therein embodied was void as against public policy. During the negotiations for settlement of the first action, Carter appears to have been referred to and treated as the company in which he was so much interested, and seems to have well-nigh assumed that he was. He was in fact, as a shareholder, pecuniarily interested in the proposed settlement being brought about. The lease was apparently treated by all parties, in the negotiation for the settlement, as though the lessors and plaintiffs were legally qualified to represent the estate for which they purported to act, and to conclude a binding settlement.

At the trial, it was contended on the part of the defendants that, Carter being dead, and the action brought against his estate, there was no corroboration of the evidence of Mr. Proudfoot.* If corroboration is necessary where the evidence relied on to support the claim against the estate is that not of a person interested therein but that of his solicitor, I think that in this case the evidence of Mr. Hanna may well be considered a sufficient corroboration. But it is said that, though the three McEwan brothers brought the action which was settled, not only on their own behalf but on behalf of their father's estate, as letters of administration had not then issued to that estate, neither they nor their solicitor

*Section 12 of the Evidence Act, R.S.O. 1914, ch. 76, provides: "In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

was in a position legally to ask for or receive such a promise from Carter. I think, however, it can be properly said that, the action being framed as it was, Carter was in effect making a promise to the estate, and a promise, it is clear, on the evidence of Mr. Proudfoot, which he recognised and in effect confirmed after letters of administration had issued.

I would, therefore, in these circumstances, be disposed to think and determine that the promise is binding upon Carter's estate, unless the defence set up to the effect that, under the Statute of Frauds, it is a promise to answer the debt of another, and is not in writing, is effective. But, when the settlement referred to was made, it clearly contemplated the extinguishment of the whole debt in so far as the defendants were concerned. When the $3,800 was paid, there was no further obligation on the part of any of the defendants, and the plaintiffs could not thereafter make or enforce the claim in whole or in part against the Dominion Salt Agency or any of the three defendants comprising it. Carter, while interested in the settlement of the action in consequence of his interest in the Empire Salt Company, had no personal liability for the original debt. What he did was to make a personal promise in connection with the settlement that, if a certain sum were accepted by the plaintiffs in full of their claim against all of the defendants for the whole sum, he himself would pay a part of the balance, which would represent the additional part of the whole claim which his company would have paid if the entire debt had been paid by the defendants.

Upon the authorities I am disposed to think that this is not a promise covered by the statute. The interest of Carter in the litigation and the compromise of the suit constituted, I think, a sufficient consideration for the promise. Reference to Halsbury's Laws of England, vol. 15, paras. 889, 890, 891, 892, 893, and 894; *Goodman* v. *Chase* (1818), 1 B. & Ald. 297; *Guild & Co.* v. *Conrad*, [1894] 2 Q.B. 885; *Howes* v. *Martin* (1794), 1 Esp. 162; *Stephens* v. *Squire* (1697), 5 Mod. 205; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K.B. 778.

I am unable to find upon the evidence that the defence of the contract being void as against public policy was made out.

At the trial, it was well-nigh conceded on the part of the plaintiff that he could not succeed in so far as the claim for $200

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for costs alleged to have been guaranteed in the suit against Ransford was concerned; and this claim will be dismissed.

The plaintiff will, therefore, have judgment against the defendants for the sum of $1,000 and interest thereon as claimed, with costs.

A. Weir, for appellants.

C. Garrow, for plaintiff, respondent.

MEREDITH, C.J.C.P.:—In the year 1909, the plaintiff and his two brothers brought an action against three salt-producing and marketing concerns to recover $6,000, arrears of certain yearly payments which these concerns had agreed to make to the plaintiffs, for what was, substantially, the prevention of competition by them with these concerns in the salt markets of Canada.

A formidable defence was made, in behalf of all the defendants, in that action: it was said that the contract was an invalid one because it provided for an illegal restraint on trade, punishable as a crime under the Criminal Code of Canada.

In November, 1909, a settlement was effected between all the parties to that action, of all of the plaintiffs' claims made in it. There can be no doubt, and there is no dispute, about that. The plaintiffs accepted and were paid $3,800 in satisfaction of all their claims: all of which appears in the letters of the solicitors written for the purpose of making it plain, letters fully answering that purpose.

In the year 1914, this action was brought to recover from the estate of one Carter, deceased, $1,000 which, it is now said, the plaintiff and his brothers were to get, in addition to the $3,800, for settling their claims in the former action: as well as for a sum of $200, as to which the action was dismissed. That is, although more than six years ago such a settlement was made releasing absolutely all the debtors, the plaintiff and his brothers may now recover, from the estate of one who was in no sense personally liable for the old debt, the large sum involved in this action over and above the larger sum they, six years ago, accepted in full satisfaction of all their legal rights; and all this though Carter lived for about four years afterwards, and was at all times, according to the testimony, well off, having at one time $100,000 idle for want of investment, and although the plaintiff makes no pretence, throughout his testimony, of having known, during all these years,

of any such obligation, indeed plainly indicates that he did not, as these extracts from it shew:—

"Q. And you sued for $6,000? A. Yes.

"Q. The reason of that was, you began your action before the expiration of the term? A. Yes.

"Q. And as a result of that action what was done, so far as you know; first, do you know yourself what actual settlement took place? A. Not exactly.

"Q. Of your own knowledge? A. No, sir.

"Q. Who was acting for you in that action? A. Mr. Proudfoot.

"Q. Do you know who was acting for the defendants?

"A. The Honourable Mr. Hanna—Hanna, LeSueur, and Price, I think.

"Q. And, so far as you know, the settlement was carried out between those two gentlemen? A. Undoubtedly; yes, sir.

"Q. What money was paid to you? A. $3,800, less the costs.

"Q. You paid your own costs out of that? A. Yes.

"Q. You said, as regards the actual settlement, you know nothing about it; but has anything further been paid you? A. Beyond the $3,800?

"Q. Yes? A. No, sir."

Then, two years after Carter's death, this action was brought; and how supported? Not a line, not a word, in writing; all depends on the memory of the two solicitors, in the first action, of what was said by Carter more than six years ago: one solicitor thinking he meant to bind himself to pay the money now sued for, the other apparently quite satisfied that he did not mean to bind himself, or at all events that what he said did not enter into the consideration for the settlement then effected.

What is said by the solicitor who was acting for the plaintiffs in that action is: that Carter came to him to discuss the action with him as a personal friend; and that, in so discussing it, he expressed his disapproval of the defence of illegality, and said that he would not take advantage of it, but would pay the share which his concern might be liable for if the contract were a valid one. Nothing apparently was said as to amount or time or place of payment; nor any suggestion made—as I am sure would have been if a contract binding in law was intended—that it should be made formally

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through the man's own solicitor, not loosely through his opponent's solicitor.

The solicitor does not as much as suggest that, if it had not been for such statement by Carter, he would not have made the settlement which was made, absolutely releasing all the debtors. When asked, "What was the consideration for Carter's promise?" his answer was, not that there would have been no settlement without it, but only this:—

"Q. What was the consideration for that?

"Mr. Weir: What took place is the question? A. I suppose you gather the consideration from what Mr. Carter said. Mr. Carter said he did not want this matter to come up in Court; that he did not want a defence of that kind to appear; and that, while Ransford had got them into a contract of that kind, they felt that they were in duty bound to pay it."

There is no pretence, by any one, that any promise by Carter formed any part of the consideration for the settlement of the action.

No reasonable excuse for the great staleness of the claim is made: the plaintiff and his brothers needed money, as all men in business do, and Carter was, as I have said, apparently well off. It is impossible for me to believe that, if the plaintiff and his brothers had a legal right to the money now sued for, and knew of it, it would not have been enforced promptly; and equally impossible to believe that the solicitor would not have told them of it if he thought it then more than a moral obligation, if anything.

No kind of formal or businesslike demand was ever made upon Carter in connection with the matter: the solicitor is sure, however, that he wrote personal letters to him a few times respecting payment of the money, of which letters no copies were kept, nor were any entries made as to them or the sending of them.

All of which strengthens the view that no one deemed there was a legal liability; that all that was said by Carter was that which is sometimes called "big talk," which ninety-nine times out of an hundred refuses to act when confronted with a demand that it be made legally binding.

It would be extremely dangerous if claims such as this could be established against a man who cannot be heard in his own defence, upon such equivocal and uncertain evidence as that adduced in this case: and this, none the less, because the witnesses all spoke as fairly and as accurately as could be expected after such a lapse

of time: see *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888; and *In re Garnett* (1885), 31 Ch.D. 1.

For the two reasons: (1) that no binding promise is proved to have been made or was intended to have been made; and (2) that no consideration has been proved: I would allow the appeal, and dismiss the action.

LENNOX, J.:—I agree.

MASTEN, J.:—This is an appeal by the defendants, as executors of James I. Carter, from the judgment of Mr. Justice Sutherland dated the 15th November, 1915, in favour of the plaintiff.

The action is brought by the plaintiff, as administrator of his late father, Peter McEwan, to recover a debt which is alleged to have arisen under the circumstances following.

It is claimed by the plaintiff that in the year 1909, in consideration of the settlement of an action then pending between Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan, and the Empire Salt Company Limited, and others, carrying on business under the name of the Dominion Salt Agency, James I. Carter, now deceased (and represented in this action by the defendants), promised to pay to Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan, the moneys claimed in this action.

It is said that there was no promise made directly to these gentlemen by Carter, but that Carter was well acquainted with Mr. Proudfoot, the solicitor for the plaintiffs in that action; that Carter, being largely interested in the case, was urging Mr. Proudfoot, solicitor for the plaintiffs, to settle that action for $3,800, and in so doing expressed his intention of supplementing the settlement then under consideration, namely, $3,800, by seeing to it that the plaintiffs were paid, in addition, such further portion of the remaining $2,200 claimed by them as should proportionately be borne by the Empire Salt Company as a member of the defendant firm (the defendant firm being, as I have mentioned, the Dominion Salt Agency).

In order that the plaintiffs may recover, it is essential that they should establish: (1) such a binding and definite contract on the part of Carter as would be enforceable in a Court of law; (2) that the benefit of that contract has, by an effective legal transfer, passed to the plaintiff in this action.

I have considered the arguments and the evidence at the

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trial and have read the reasons for judgment prepared by the Chief Justice of this Court and by my brother Riddell.

I think that no contract has been established to which the Court can give effect, because Carter's statement of intention, in the circumstances under which it was made, was too vague and uncertain in its nature to be capable of enforcement in a Court of law; and not only the circumstances under which it was made, but also the subsequent conduct of the parties, convince me that it was intended as a statement of a gratuitous intention, rather than as a binding contract.

One of the statements made by Mr. Hanna in his evidence is to me most illuminating: "Mr. Proudfoot, I remember, in the conversation asked us, it came up in some way, as to how much that undertaking was worth, and I have no doubt Mr. Proudfoot puts it as I probably did—I do recall saying to Mr. Proudfoot 'You know Mr. Carter as well and longer than I do, but, knowing him as I do, I would feel very confident that that would be paid in full.'"

Carter appears to have been well known as a man of ample financial means, and the remark quoted appears to me to relate, not to financial ability, but to the likelihood of Carter's implementing his expressed intention, notwithstanding the fact that it was legally unenforceable. Mr. Proudfoot's statement at p. 29, line 9, looks in the same direction, where, in speaking of his discussion with Mr. Hanna, he says: "We had been talking about Carter paying up the balance, and I also referred to the fact that Carter expected to be able to get Mr. Henderson to do the same thing. *Then I raised some question of doubt about whether they would pay it or not.*"

For these reasons, I agree with the conclusion of my Lord that no binding promise is proved to have been made—or was ever intended to have been made.

Riddell, J.

RIDDELL, J.:—An appeal by the defendants, as executors of James I. Carter, from the judgment of Mr. Justice Sutherland of the 15th November, 1915.

In January, 1904, Peter McEwan, a salt-producer and proprietor of the Goderich Salt Works, died intestate, leaving a widow and six children, three sons and three daughters.

In February, 1905, the three sons, "Peter James McEwan, Hugh John Alexander McEwan, and William George McEwan,

representing the estate of Peter McEwan," entered into an agreement with John Ransford, from which all the difficulty of this case arose.

The McEwans agreed that for five years Ransford should have the control of the Peter McEwan Salt Works (they are called "the Salt Works of the parties of the first part")—in consideration therefor Ransford agreed to pay them $2,000 per annum, the McEwans to be at liberty to manufacture salt for local retail trade, to be sold at a price fixed by Ransford, but not elsewhere or otherwise, and also they were to discourage the erection of any other salt works at Goderich. This agreement was expressed to be binding upon Ransford and his assigns.

On the 11th April, 1905, Ransford assigned to the Dominion Salt Agency of London, a partnership consisting of (1) a firm of which Ransford was a member, (2) the Canadian Salt Company Limited, and (3) the Empire Salt Company Limited. This partnership, the Dominion Salt Agency, took possession of the property, and for some time paid as provided in the agreement. By a document under seal, the agency gave notice on the 22nd October, 1906, to the McEwans, "representing the estate of Peter McEwan," that the contract would be terminated on the 31st January, 1907.

The lessors refused to consent to the cancellation of the agreement, and on the 29th May, 1909, brought action in their individual names, but in the statement of claim the plaintiffs are set out thus: "Peter James McEwan, Hugh John A. McEwan, and William George McEwan, representing the estate of Peter McEwan." The defendants were John Ransford, and John Ransford, the Canadian Salt Company Limited, and the Empire Salt Company Limited, carrying on business under the name of "The Dominion Salt Agency"—the claim was for $6,000, balance due on the agreement.

The defendants set up that the agreement was void as against public policy; that the agreement had been obtained by the McEwans representing untruly that they represented the estate of Peter McEwan.

James I. Carter, whose estate is represented by the defendants in this action, was a large shareholder in the Empire Salt Company. He was a man of honour and business integrity—and he told Mr. Proudfoot, the solicitor for the plaintiffs in that action, that

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he did not, as a business man and a man of honour, care to press the defence. He further said: "You and Mr. Hanna" (the solicitor for the defendants) "go on and make the settlement—I will give you my word of honour, after the settlement is made, that I will pay up the balance of my share." Mr. Proudfoot told him his name did not appear on the record, that the Empire Salt Company was the defendant, and he said, "I am the Empire Salt Company." Being asked if the Empire Salt Company would be bound by any such arrangement as that, he said: "It does not make any difference, this is my promise. I am going to pay the money, and the company has nothing whatever to do with it . . . I am going to pay the money . . . You and Hanna go on and make the settlement . . . I also promise you this, after the settlement is arrived at, I will do my best to get Mr. Henderson" (who seems to have represented the Canadian Salt Company) "to pay up his share, and I think I can get him to do it; but, so far as that man Ransford is concerned, I won't have anything to say about his share." What this means is: an honest business man, being (in substance) defendant with two other defendants, does not desire to take advantage of what may be a legal but certainly not a moral defence; knowing that his co-defendants cannot be induced to waive this defence and to pay the full amount of the honest claim, he says to the plaintiffs: "Make the best settlement you can; I shall try to get one of my co-defendants to do the honest thing, and I think he will; the other is a rascal, whom I shall have nothing to do with—anyway I shall pay my share of the true amount due"—and he makes this a personal promise, not the promise of his company, the nominal defendant. Mr. Proudfoot agreed and made a settlement of the action with Mr. Hanna for a smaller sum than was claimed, being assured by Mr. Hanna that Mr. Carter was a man of his word. Carter had had conversations with Mr. Hanna which it may be well to give in Mr. Hanna's own words: "When we came to the settlement at $3,800, I think he" (i.e., Mr. Carter) "had also seen Mr. Proudfoot—he was born up in that locality and had a very friendly feeling towards all parties there—and he said, although the matter was being settled at $3,800, that it was his intention, so far as the portion of the claim represented by the Empire Salt Company was concerned, he would see to it that the McEwans were paid in full.

That was to me. While that did not enter into the settlement as part of the settlement or come into the settlement in terms at all, I recall, in discussing it, that is, after being authorised to go up to $3,800, in discussing with Mr. Proudfoot I told him very frankly what had occurred with Mr. Carter. I did not know whether Mr. Carter expressly intended that I should repeat that to Mr. Proudfoot; I did know from what occurred that there had been some discussion on that line between him and Mr. Proudfoot. Mr. Proudfoot, I remember, in the conversation asked us, it came up in some way, as to how much that undertaking was worth, and I have no doubt Mr. Proudfoot puts it as I probably did—I do recall saying to Mr. Proudfoot, 'You know Mr. Carter as well and longer than I do, but, knowing him as I do, I would feel very confident that that would be paid in full.' I felt that way about it at the time, and I have not any doubt I so stated. However, as far as I am concerned, it never entered into or was a part of the settlement beyond that."

It seems to me that we have here ample corroboration of Mr. Proudfoot's story so as to answer the statute as interpreted in such cases as *Parker* v. *Parker* (1881), 32 U.C.C.P. 113; *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Wilson* v. *Howe* (1903), 5 O.L.R. 323; &c., &c.

The result is, that there was a promise by Carter to pay a certain sum in consideration of the plaintiffs settling the action—of course, as this promise was no part of the settlement, it does not appear in the settlement.

There was delay in demanding payment, which would—or might—be suspicious in persons of less high standing than Mr. Proudfoot; the learned trial Judge gives full credence to his evidence, and we should accept it at its face value, as I do.

There is no dispute that the aliquot part of the balance unpaid should be paid, if any.

A defence is raised that this was a promise under the Statute of Frauds: but that cannot be—it was not a promise to pay the debt of another, but a direct promise to pay money in consideration of a certain thing being done.

Then we are urged to hold that the action is not properly constituted. The sole plaintiff in this action is "Hugh J. A. McEwan, administrator of the estate of Peter McEwan, deceased"—and it is claimed that he has no cause of action as administrator—

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he became such by letters of administration on the 7th March, 1910.

I cannot accede to this argument—the three McEwans affected to act for the estate of Peter McEwan, they intermeddled with and disposed of land belonging to that estate—since executors have now to do with real estate of the decedent, I think they became executors *de son tort*. They had so intermeddled long before the expiry of a year from the death of Peter McEwan, and continued that condition after the expiry of the year. Whatever may have been the effect of the statute in vesting the legal fee in the heirs—in fact (apparently with the consent of all concerned), the "estate" was kept alive with the three sons as executors *de son tort*. They were dealt with as such when they made the original agreement, and when they sued in the original action—the promise was made to them as such through their solicitor. There is no reason, I think, why the plaintiff here, who formally and legally represents the "estate," should not sue.

All parties treated the property as that of the late Peter McEwan, the amount payable under the original agreement was considered by all parties part of his estate, and so was the amount promised to be paid by Carter.

In *Sharland* v. *Mildon* (1846), 5 Hare 469, the widow, an executrix *de son tort*, who intended to take out letters of administration, employed H. to collect some of the assets of the estate—he did so, thereby becoming a debtor of the estate, if nothing more—he paid the widow, who never became administratrix. The Court, Wigram, V.-C., held that H. could not discharge himself except by paying over to the legal personal representative what he had received.

This is quoted and approved by Wood, V.-C., in *Hill* v. *Curtis* (1865), L.R. 1 Eq. 90, at pp. 99, 100. *Sykes* v. *Sykes* (1870), L.R. 5 C.P. 113, 115, distinguishes but does not overrule.

Of course payment to the legal representative would be sufficient.

As all parties considered the money to be payable to the "estate," I think it may and should be considered as part of the estate, and I can see no reason why the present plaintiff, the legally appointed representative of the "estate," should not take advantage of that promise.

Moreover, one of the promisees, the present plaintiff, entering

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into a contract in respect of the estate when executor *de son tort*, has become administrator—thereby his acts as representative of the estate when such executor *de son tort* have become validated: *Kenrick* v. *Burges* (1583), Moore (K.B.) 126: *Hill* v. *Curtis*, L.R. 1 Eq. 90, 100—the promise made to him when he was executor *de son tort* (even though others were joined as promisees) he can take advantage of as administrator—he is considered as having been administrator from the beginning.

If the objection be taken that the promise was joint, the objection would not prevail to make the action a nullity—the Court should add the necessary parties in some capacity, with their consent in writing as plaintiffs, in which case the Statute of Limitations would be ineffective: *Thompson* v. *Equity Fire Insurance Co.* (1908), 17 O.L.R. 214, 221, 222, 236: not questioned on this point in *Equity Fire Insurance Co.* v. *Thompson* (1909), 41 S.C.R. 491, and the judgment affirmed (*sub silentio* as to this point), *Thompson* v. *Equity Fire Insurance Co.*, [1910] A.C. 592. If the others refuse, the proper practice is to add them as parties defendant: *Cullen* v. *Knowles*, [1898] 2 Q.B. 380; and then the statute would not matter.

In no case should the action be dismissed: *Roberts* v. *Evans* (1878), 7 Ch.D. 830; *Van Gelder Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (1890), 44 Ch. D. 374.

If the defendants really desire it, they may be protected by making the two other brothers parties.

In all other respects, I think the appeal should be dismissed, and with costs. *Appeal allowed;* RIDDELL, J., *dissenting.*

Re GOODMAN.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. June 9, 1916.

EXTRADITION (§ I—3)—BANKRUPTCY OFFENCES—CONCEALING PROPERTY.

Actual concealment of property in anticipation of bankruptcy, and failure to disclose the whereabouts of himself or the property, after the bankruptcy, are sufficient grounds for granting the extradition of the bankrupt, when demanded by a foreign state, upon a charge of fraudulently concealing while bankrupt, from his trustee, property of his estate. It is not necessary that the evidence should be sufficient to justify a conviction.

[*Re Goodman*, 28 D.L.R. 197, 26 Can. Cr. Cas. 84, affirmed.]

Statement.

HABEAS corpus to discharge prisoner committed for extradition by order of Galt, J., 28 D.L.R. 197, 26 Can. Cr. Cas. 84.

H. J. Symington, K.C., and *M. J. Finkelstein*, for accused.

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Richards, J.A.

H. W. Whitla, K.C., for State of Massachusetts.

HOWELL, C.J., concurred with CAMERON and HAGGART, JJ.

RICHARDS, J.A. (dissenting):—Goodman, who has been committed by Galt, J., to gaol to await his extradition, is brought before the Court under a writ of *habeas corpus*, and his discharge from custody is asked on the alleged ground that the depositions taken do not shew that he had committed a crime within the law of the United States.

The statute of the United States under which he is charged says:—

> A person shall be punished by imprisonment for a period not to exceed 2 years upon conviction of the offence of having knowingly and fraudulently (1) concealed while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy.

The charge laid under the above is that Goodman, on or about December 13, 1913, at the city of Worcester, in the State of Massachussetts, one of the United States of America, did unlawfully, knowingly and fraudulently conceal, while bankrupt, from his trustee in bankruptcy, the sum of $5,000, being part of the property belonging to his estate in bankruptcy.

From the evidence there was, I think, made out a *primâ facie* case that Goodman expected to become a bankrupt, and that so expecting he, in September, 1913, so dealt with $5,000 of his property as to shew an intent to fraudulently conceal it, so that, in case of his bankruptcy, his trustee in bankruptcy would suppose that he had lost the money in a transaction and would be unable to get possession of it. In effect he would in such case defraud the trustee of that sum.

So far as the evidence shews he shortly thereafter disappeared from the State of Massachusetts.

On November 10, 1913, he was adjudicated a bankrupt on the motion of a creditor or creditors. Frank B. Holmes was appointed trustee; and on December 12, 1913, Holmes completed security that he had been ordered to give as trustee. Apparently then, and not till then, he, Holmes, was entitled to take possession of the estate.

That Goodman's act would have been a crime under the Canadian law, if committed in Canada, is clearly shewn. Sec. 417 of the Code makes it an indictable offence for the accused to conceal any of his property with intent to defraud his creditors

or any of them. His acts in September would, if done in this country, amount to that crime, as they shew a concealment then of the $5,000 with intent to defraud creditors.

But the United States statute does not go so far. Under it, to constitute the crime, there must, in addition to what would have to be shewn under our Code, be evidence of two things existing at the time of the concealment: 1st. That the accused was adjudged a bankrupt; 2nd. That there was a qualified trustee of his estate.

It is patent, therefore, that the crime could not have been committed before December 12, the day on which the last in time of these things happened.

There is no evidence that Goodman was ever in the State of Massachusetts after the early part of October, 1913, and there is none to shew or raise the presumption that he ever learned that he had been adjudicated a bankrupt, or that a trustee had been appointed to his estate.

There is evidence that in September he intended thereafter to commit the crime if thereafter he should become a bankrupt and a trustee should be appointed. But I cannot see how he can be held to have actually committed it in the absence of knowledge of the bankruptcy and that the trustee had been appointed and had qualified.

What he did happened in September. If there had thereafter been no bankruptcy adjudication he could not have been guilty of the crime notwithstanding his evil intention. Then how can he be held to have committed the offence unless he knew of the subsequent proceedings which would make his continuing to conceal the money an offence?

If the contention of counsel for the United States is correct, then up to one minute before the trustee had qualified there was no crime, but one minute thereafter it had happened automatically without any knowledge or act on his part. I cannot follow such reasoning.

There is apparently a doctrine of continuing intention in United States decisions which if followed means that his fraudulent intention in September continued until the appointment of the trustee. Granting that, it seems to me for the reasons above stated that to make the evidence of the crime complete it should be shewn that he knew or had reason to know that

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there was a trustee and that he thereafter continued the concealment.

With regret, I think that the crime has not been proved. I would order the discharge of the accused.

PERDUE, J.A. (dissenting):—The charge relied upon is:

That the said Morris Goodman, on or about December 13, 1913, at the said city of Worcester, did unlawfully, knowingly and fraudulently, conceal, while a bankrupt, from his trustee in bankruptcy, the sum of $5,000, being part of the property belonging to the estate in bankruptcy of the said Morris Goodman, contrary to the laws of the United States of America, etc.

The actual transaction upon which the charge of unlawful concealing is founded took place in September, 1913. On November 10, 1913, he was in his absence adjudged a bankrupt. On December 12, in the same year, Mr. Holmes qualified as trustee of the estate in bankruptcy.

The expert who was called to prove the law of the United States applicable to the case gave in evidence sec. 29 (*b*) of the Acts of Congress of July 1, 1898, as amended, as being the enactment under which the above charge was laid. This enactment provides for the punishment, on conviction, of a person of "having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any property belonging to his estate in bankruptcy," etc. It would seem reasonably clear that however fraudulent the intention of the accused may have been when he entered into the transaction of September, 1913, no offence could have been committed under the above enactment until a trustee in bankruptcy was duly appointed, which did not take place until a considerable time after the above transaction was completed. The extradition Judge found that "a concealment of the money effected in September would (unless disclosed) continue to be a concealment in December when the trustee qualified." He cites the *Webber* case, 5 D.L.R. 863, 20 Can. Cr. Cas. 1, as establishing that

The essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy and the appointment of a trustee, whose title relates back to the date of the adjudication.

Foreign law is a question of fact and has to be proved as such: *Bremer* v. *Freeman*, 10 Moore P.C. 306; Taylor on Ev., 10th ed., p. 8. There was no evidence given upon the application to shew how the enactment in question has been interpreted or to prove that its operation in the United States is as stated in

the *Webber* case. The testimony of the expert is silent on the subject. The extradition Judge in the *Webber* case may have had evidence before him upon which he felt justified in coming to a conclusion as to what the foreign law was. But his finding being one of fact, a Judge in another application is not justified in taking that finding where there is not evidence upon which the last mentioned Judge can independently arrive at the same conclusion; foreign law must be proved in each particular case like any other fact: *McCormick* v. *Garnett*, 23 L.J. Ch. 777. The law of the foreign country and the interpretation of it might change from time to time.

In this case the expert's evidence only went to the extent of proving the enactment by the Congress of the United States of the section in question, and that it was applicable to the present case. This, it appears to me, is not enough. The Court must have the assistance of a lawyer skilled in the foreign law who knows how to interpret it: *Sussex Peerage Case*, 11 Cl. & Fin. 85, 114-116; *Lord Nelson* v. *Lord Bridport*, 8 Beav. 547. In the absence of expert evidence interpreting the foreign statute proved by the witness to be in force and applicable, the Court may look at the section itself and consider what is its proper meaning: *Concha* v. *Murrietta*, 40 Ch. D. 543, 550, 554. I cannot find anything in the section, standing by itself, that justifies the interpretation placed upon it in the *Webber* case and followed by the extradition Judge in the present case. There is no evidence to shew that the accused either knew that he had been adjudged bankrupt or that he carried out any intention he may have formed in September of concealing property belonging to his estate from his trustee in bankruptcy if such bankruptcy ever became a fact. He may have paid the money to a favoured creditor or disposed of it in some other manner not necessarily constituting a concealment.

I have read the judgment of Richards, J., and agree with the conclusions at which he has arrived.

Cameron, J.A.

CAMERON, J.A.:—On an application for extradition of the prisoner, Galt, J., made an order committing him to the common gaol of the Eastern Judicial District there to remain until surrendered or discharged according to law. A writ of *habeas corpus* having been granted the matter now comes before this Court on

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motion to make absolute a rule *nisi* for *certiorari* which, by consent, is taken and heard as a motion to discharge the prisoner.

The prisoner was indicted by the Grand Jury of the District Court of the District of Massachusetts, at Boston, October 6, 1914. The identity of the person indicted with the prisoner is not disputed. The prisoner was indicted for knowingly and fraudulently concealing assets from the trustee of his estate in bankruptcy under sec. 29 (*b*) of the Acts of Congress of July 1, 1898, as amended. The section in question and the facts of the case are set out fully in the judgment of Galt, J. The foreign law applicable, which must be shewn as a fact, is, in my opinion, sufficiently established by the depositions of William C. Matthews, an attorney and counsellor-at-law within and for the Commonwealth of Massachusetts and of the District Court of the United States for said Commonwealth. It is therefore unnecessary to consider the evidential value of decisions in which the foreign law has been held established.

The objection is taken that, as the evidence shewed that the $5,000 in question was concealed by Goodman in September, 1913, whereas the trustee in bankruptcy was not appointed until November 10, and did not qualify until December 12 of that year, there was consequently no offence against the laws of the United States. This objection was considered and overruled by Galt, J., and I agree with his conclusion. The circumstances surrounding the transaction concerning the house in September, 1913, and the subsequent acts and conduct of the prisoner were, as shewn by the depositions, of the most suspicious character. In such a case as this, it is only necessary that the evidence should be such as to give rise to probable cause to believe the accused guilty, and it is not necessary that it should be sufficiently conclusive to authorise his conviction, if unanswered. *Ex p. Feinberg*, 4 Can. Cr. Cas. 270. There is, to my mind, some evidence from which it may be inferred that the prisoner fraudulently concealed his assets from the trustee and that raises the question which should be determined at the trial. There is every reason to believe that the trial to be had before the District Court of Massachusetts will be fair and proper, and I see no reason for differing from the judgment of Galt, J.

Haggart, J.A.

HAGGART, J.A.:—I have perused the reasons of Cameron, J., and agree with him and with his disposition of the case.

I would observe also that any disposition made by Goodman of his property before the making of the order in involuntary bankruptcy would not be an offence against the Act of Congress which provides that

> A person shall be punished . . . upon conviction of the offence of having knowingly and fraudulently (1) concealed while a bankrupt . . . from his trustee any of the property belonging to his estate in bankruptcy.

I think it was an offence for him to make no disclosure on and after December 13, 1913. With his disappearance there disappeared the property in question. There was a statutory obligation imposed on him to make the disclosure to the trustee from and after the bankruptcy. Absconding did not relieve him. In concealing himself he concealed the property.

The United States authorities proved the disposition of the property two months prior and traced the same into the custody of Goodman. We are asked by the United States counsel to draw the inference that it still remains in his custody.

By Goodman we are asked to draw the inference that he made or may have made some legal disposition of it before December 13, 1913.

The questionable conduct of Goodman from October until he disappeared shews that his intention was to defraud his creditors and supports the contention of counsel for the United States. The whole evidence gave rise to probable cause for believing him guilty of the offence and justified Galt, J., in committing the accused for the purposes of extradition.

This case is within the law as given in *Re Gates*, 8 Can. Cr. Cas. 249, and *Ex parte Feinberg*, 4 Can. Cr. Cas. 270.

I would discharge the writ of *habeas corpus*, and affirm the judgment of Galt, J.

Prisoner remanded; habeas corpus discharged.

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Ontario Supreme Court, Masten, J. February 10, 1916.

CONTEMPT (§ V—50)—CESSATION OF ACT NOT PURGING—MOTION TO COMMIT—IRREGULARITIES—CONDONATION.

A contempt by disobedience of the Court's injunction is not purged by mere cessation from the act giving rise to it; a technical irregularity in the motion to commit by reason of non-compliance with r. 298 (Ont.) may be condoned by the Court.

[Rules 183, 184, applied; *Petty* v. *Daniel*, 34 Ch.D. 172, *Rendell* v. *Grundy*, [1895] 1 Q.B. 16, followed; *McDonald* v. *Lancaster School Trustees*, 24 D.L.R. 868, 34 O.L.R. 346, affirming 31 O.L.R. 360, referred to.]

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MOTION by the plaintiff to commit the defendants Médéric Poirier and John Ménard for contempt of Court in disobedience to the judgment pronounced by FALCONBRIDGE, C.J.K.B., on the 8th May, 1914, and affirmed by the Appellate Division on the 12th July, 1915. See 31 O. L. R. 360, 34 O. L. R. 346, 24 D.L.R. 868.

J. A. Macdonell, K. C., for applicant.

A. C. McMaster, for respondents.

J. A. McEvoy, for Department of Education for Ontario.

Masten, J.

MASTEN, J.:—Motion by the plaintiff, applicant, to commit the defendants Médéric Poirier and John Ménard (respondents) for breach of an injunction dated the 8th day of May, 1914.

Paragraphs 2 and 4 of that judgment are as follows:—

"2. This Court doth order and adjudge that the said Board of Trustees of the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and Médéric Poirier, Emérie Ouimet, and John Ménard, the trustees of such board, be and they and all of them are hereby restrained from continuing to employ the defendant Léontine Sénécal as a teacher in the Roman Catholic Separate School in School Section Number 14 in the said Township of Lancaster, so long as she is disqualified from acting as such teacher under the regulations of the Department of Education for the Province of Ontario, and that they and all of them be and they are hereby restrained from using the rates of said Roman Catholic Separate School, or any of such rates, for the payment of the said Léontine Sénécal as a teacher in said Roman Catholic Separate School, as long as she is so disqualified, or any other teacher not properly qualified according to the said regulations."

"4. And this Court doth further order and adjudge that all the said defendants, and each of them, be and they are hereby restrained from using or allowing the use of French as the language of instruction or communication in the said school, so long as the same shall not be permissible under the said regulations."

Three breaches of this judgment are alleged:—

(a) That the respondents, in breach of paragraph 2 of the judgment, have, since the month of July last, employed, as a teacher in the said school, one Florence Quesnel, a teacher not properly qualified according to the regulations.

(b) That the defendants have directed and allowed the teaching of French as a language in the school.

(c) That the defendants have allowed the use of French as the language of instruction or communication in the said school, and that such use has not been made permissible under the regulations.

The facts are plain. Florence Quesnel was employed by the respondents as teacher of the school in question down to the 27th day of December. From July, 1915, until she resigned, she was not properly qualified according to the regulations.

The defendants have directed and allowed the teaching in the school of French as a language.

This act is not prohibited by the judgment for contempt of which the motion is brought.

I find that the defendants have allowed the use of French as the language of instruction or communication in the school in connection with the teaching of the Catechism, and I find that such use has not been made permissible under the regulations.

Certain technical difficulties have, however, arisen in connection with the application, and to these I now address myself.

The motion was first argued before me on the 11th day of November, 1915, pursuant to notice dated the 16th October, 1915, the defendants by their counsel expressly waiving all irregularity in the proof of service on the respondents of the injunction order upon which the motion was founded, but objecting that there was no proof of service on the respondents of the judgment of the Court of Appeal confirming that order. In view of the fact that the judgment was not varied by the appellate Court, and that the respondents were represented on the appeal by counsel, this objection was overruled. On the hearing of that application, counsel for the respondents stated, on their behalf, their desire to conform fully and unreservedly, not only to the formal judgment, but to the views of the Court, and to the regulations of the Department. With the view of affording an opportunity of so doing, and on the suggestion of counsel for the Department of Education, the motion, after argument, stood enlarged until Tuesday the 14th December, 1915, and leave was granted to all parties to file further material, with the view of informing the Court what steps had then been taken to conform. The motion was from time to time enlarged until the 27th December, and on that date

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was reargued. At the conclusion of that argument judgment was given on certain phases of the motion as follows:—

"This is a motion based on a notice dated the 16th day of October, 1915, given on behalf of the plaintiff, asking that the defendants Poirier and John Ménard may be committed to the common gaol of the county or of the united counties in which they may be found, for breach of a judgment pronounced herein by the Chief Justice of the King's Bench, dated the 8th May, 1914.

"The grounds set forth in the notice of motion are the breach by the trustees of the judgment, in continuing to employ as a teacher in the school a person not properly qualified by the regulations of the Department, and in allowing the use of French as a language of instruction and communication in the said school. These are the only two grounds upon which the motion is based.

"The notice of motion so launched was served on the 18th October on Poirier and Ménard, and on the 19th October on the firm of Messrs. Belcourt, Ritchie, & Company, and on the 21st October it was further served.

"I observe that the affidavits filed in support of it are filed on the 9th November, some time after the service of the notice of motion.

"Rule 298 requires that affidavits upon which a notice of motion is founded shall be filed before the service of the notice of motion, and all other affidavits shall be filed before they are used.

"I have considered very carefully whether the application should be refused on this technical ground, or whether the course which the motion has taken in having, after argument, been enlarged at the suggestion of the Attorney-General, concurred in by both parties, with leave to all parties to file and serve further material, and further material having thereupon been adduced by both parties, and having come up again and having been further enlarged on the 21st instant, with leave to either party to cross-examine—the parties to facilitate by producing deponents for cross-examination on notice to solicitors—whether this course has cured the irregularity above noted. It is, naturally, of the first importance that in a motion of this kind the application should be well-founded, and that there should be no possibility

of its being subsequently determined that any order which was made was bad because all formalities had not been complied with.

"In Oswald on Contempt of Court, 3rd ed. (1910), p. 210, the rule is laid down in this way: 'Care should be observed in settling, serving, and proceeding upon a notice of motion to commit, or for leave to issue a writ of attachment, because the Court is 'jealous of the personal freedom of the subjects of the Crown;' and where the liberty of the subject is in question, always requires the utmost strictness in procedure. Applications affecting the liberty of the subject are matters *strictissimi juris;* and although an irregularity in the course of proceeding for attachment or committal does not render the proceedings void, and the Court has power to condone the irregularity, yet slips in the practice, where the liberty of the subject is concerned, are seldom allowed by the Court to be got rid of under this power, and in many cases delay and expense have been incurred, and even justice defeated, by slips and irregularity in the proceedings.'

"The above extract well states the principle which has always been applied by the Courts of this Province in dealing with such an application. Though it is possible that the irregularity which exists in this case may have been overcome by the course of events above outlined, nevertheless, for greater security, I have come to the conclusion that the proper course to pursue will be to direct that this motion stand over and be retained by the Court as at present constituted, and that a new notice of motion be served on the respondents, returnable on the 12th January next, based upon the matter now filed in support of this present application.

"I think it undesirable that an order should be pronounced at this stage and on this notice of motion, as it has been served irregularly. The present direction will therefore be as above stated.

"In doing so, I think it desirable to express the view that I now entertain regarding some of the points that have been argued, hoping that it may assist in reaching a conclusion that will be less onerous than might otherwise be the case.

"I am of the opinion that on a proper consideration of the second paragraph of the judgment above mentioned, the concluding clause, 'or any other teacher not properly qualified according to the said regulations,' relates back to the first prohibition contained in the paragraph, and applies to it as well as to the second; so

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that, for the purposes of this motion, the paragraph may be read as follows: 'This Court doth order and adjudge that the said Board of Trustees of the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and Médéric Poirier, Emérie Ouimet, and John Ménard, the trustees of such board, be and they and all of them are hereby restrained from continuing to employ . . . any other teacher not properly qualified according to the said regulations.' If that is the correct interpretation of the second paragraph, it is manifest, upon the facts here disclosed, that the defendants have committed a breach of the injunction, and have been guilty of contempt.

"Then, with respect to clause 4; as far as I am able to see, the teaching of the Catechism in the school in the French language is using the French language as a language of instruction and communication, in the terms of clause 4 of the judgment. I should be inclined, I think, to give effect to the argument of Mr. McMaster that this judgment, as at present framed, does not deal with the teaching of the French language as a language, and that the mere teaching of the French language as a language is not therefore a breach of this judgment. If the written judgments of the Court of Appeal and of the Chief Justice of the King's Bench, as they seem to do, express the opinion that the teaching of French is not permissible, the judgment may perhaps be supplemented by incorporating in it such a declaration.

"All that I have now to consider is, whether there has been a breach of the formal judgment, as it stands at present. As to the effect and result of any breach, this remains to be dealt with when the motion comes before the Court on the 12th January, and I say nothing further.

"The Rules of the Court are ample for dealing with the matter either by commitment or by fine, or partly by one and partly by the other."

The pending motion was thus enlarged until the 12th day of January, 1916, with a direction that the applicant should serve a supplementary notice of motion, returnable on that date. Accordingly, such notice was served. All the material theretofore filed in support of the pending motion is referred to in such notice. On the return of the motion, affidavits were filed on behalf of the respondents shewing that the defendants had, on the 27th December, procured Miss Florence Quesnel to resign as teacher

of the school in question, and that such resignation had, on the 30th day of December last, been notified to the solicitors for the applicant.

The motion was finally argued on the 12th day of January, and now comes up for judgment.

Counsel for the respondents takes a preliminary objection to the supplementary notice of motion, dated the 31st December, 1915, and served on the 3rd January, 1916, viz., that the notice does not specify any particular term or clause of the injunction in question for the breach of which committal is asked.

I have carefully read the cases referred to in support of this objection, viz., *Hipkiss v. Fellows* (1909), 101 L. T. R. 516; *Taylor v. Roe* (1893), 68 L. T. R. 213; *In re Seal*, [1903] 1 Ch. 87; and Halsbury's Laws of England, vol. 17, p. 295; also some other cases.

Rule 184 of our Rules of Court provides that "non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part, as irregular, or may be amended, or otherwise dealt with, as may seem just."

This Rule, for the purpose of this application, is substantially like Rule 1037 of the English Rules of Practice, under which it has been determined that the Rule applies to motions to commit or attach; that the Court has the same jurisdiction in such cases to condone irregularities as in other cases; but that such discretion will not be readily exercised in favour of an applicant where the liberty of the subject is involved. In the present case, considering the course which the motion has taken, and the provisions of Rule 183,* having regard also to the fact that this objection was not taken on either of the original arguments, though the notice was in like terms, that the original motion is still pending before me, that the present notice of motion is a formality supplemental to the original notice, and that no injustice can possibly arise to the respondents who have been fully aware for many weeks of the particular breaches complained of, I overrule this objection and condone the irregularity if any such exists. I refer

*183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

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to *Rendell v. Grundy*, [1895] 1 Q. B. 16, and to *Petty v. Daniel* (1886), 34 Ch. D. 172.

Counsel for the respondents next objected that, prior to the 3rd day of January, 1916, when the supplementary notice of motion was served, the respondents had effectually dispensed with the services of Florence Quesnel, by securing and accepting her resignation; and consequently that, at the date when this supplementary notice of motion was served, the respondents were not in contempt; that such motion is therefore irregular and unfounded, and should be dismissed with costs to be paid to the respondents.

This objection raises an important general question as to the nature of a contempt. No cases were cited in support of the respondents' contention; but, upon the best consideration that I can give the matter, I am of opinion that, where a contempt has been committed, such contempt is not cancelled, obliterated, or purged by mere cessation from the act constituting contempt. If that be the true principle, it must be capable of standing the following test. Assume that in the present case the respondents had continuously, since the date of the judgment, been not only transgressing the terms of the injunction, but blatantly stating that they defied the power of the Court, and that by their breach of the injunction the plaintiff had suffered irretrievable damage, and that on the day before the notice of motion for contempt was launched the respondents had complied with the injunction order. Would the fact of such compliance prevent the applicant from bringing to the attention of the Court the conduct of the respondents during the preceding period? Or would it prevent the Court from dealing with the contempt which had been committed?

Oswald on Contempt of Court, 3rd ed., p. 1, gives the following definition: "Contempt, in the legal acceptation of the term, primarily signifies disrespect to that which is entitled to legal regard. . . . In its origin, all legal contempt will be found to consist in an offence more or less direct against the Sovereign himself as the fountain-head of law and justice."

In *Rex v. Newton* (1903), 67 J. P. 453, Alverstone, L. C. J., said: "Quite apart from this particular case it ought to be plainly understood that applications for attachment for contempt are not proceedings taken, and ought not to be regarded as proceedings taken, by one party to redress a wrong or obtain pecun-

iary consideration." And the rule was there laid down that proceedings for contempt ought not to be settled by the parties except with the sanction of the Court.

As applied to the circumstances of this case, the contempt consists in the disregard of the law of the land as interpreted by the judgments of our Courts. It has become a question not merely of the use of French in this particular school, but whether the laws of Ontario, as interpreted by its highest Court, are to be obeyed.

If in Courts of law repentance condoned offence, offenders would multiply. On any other basis our Courts of Justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible. I am of opinion that the jurisdiction to entertain the motion now pending is not ousted by the cessation on the part of the respondents from the act complained of.

But, apart from the above considerations, it does not appear to me that this objection is well-founded on the facts of the case. I find that the respondents were guilty of contempt of the judgment of this Court in two respects: (1) By employing Florence Quesnel from July until the 27th December, 1915, she being, at the time, "a teacher not properly qualified according to the said regulations." (2) I find that they were guilty of contempt "by using or allowing the use of French as the language of instruction or communication in the said school," in teaching the Catechism. Both of these violations of the injunction continued down to the 27th day of December, 1915, and nothing appears upon this motion to indicate that the respondents, even down to the present time, have ceased to employ the French language as the language of instruction and communication in teaching the Catechism. This objection is, therefore, overruled.

Lastly, it is objected that this is not a criminal contempt, but is a contempt in procedure only in a civil action; that, in civil cases, the object of the motion to commit for contempt is only to secure the enforcement of the decree of the Court; that the matter principally complained of, viz., the employment of Florence Quesnel, has now been rectified; that, if a breach of the injunction has been committed, it has arisen through honest misinterpretation of the terms of the judgment, and was not wilful; that, when the true interpretation of the judgment was pointed out, obedience

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was rendered; and that the respondents now assert their desire to accord full and complete obedience to the judgment in every particular.

This objection might be formidable if the case was that of a money demand or other simple case, where compliance resulted in a full satisfaction of the private rights of the complainant. The present case is quasi-public in its nature, relating as it does to the rights of all the English-speaking supporters of the Separate School in question. As I have already pointed out, there has not been yet any full compliance with the terms of the judgment. Lastly, the circumstances strongly indicate to my mind that actual misconduct ought to be imputed to the respondents who have disobeyed the Court's order.

On the hearing of the motion on the 11th day of November, counsel expressed unreservedly the desire and intention of the respondents to comply fully with all the requirements of the law, whether expressly set forth in the judgment of the Court or not. In his judgment at the trial, the Chief Justice of the King's Bench says (31 O. L. R. at p. 363) "that the use and teaching of the French language in that section, as at present carried on, are . . . unauthorised." And at p. 364: "The conduct of the defendants, in disregarding and defying the rulings and remonstrances of the Department and its officers, can be described only as recalcitrant and recusant. If they are, as they claim and as they seem to be, ignorant men, they ought to have sought competent legal advice; and, having failed so to do, they cannot claim to have acted in good faith. The rulings of the Department appear to me to have been entirely according to law."

Afterwards, having specially requested the Appellate Division to determine whether they were entitled in this school as constituted to teach French as a language, and having been informed, after full argument, that in this school as constituted it was not lawful to teach French as a language, they continued teaching it exactly as before; alleging (what is quite true) that the formal judgment as issued does not cover the point.

And again, having, as above mentioned, on the 11th day of November last, stated their desire and intention to yield free and full compliance with all the requirements of the Separate Schools Act, as it had been interpreted for them, they nevertheless continued down to the 27th day of December last conducting the school

in a manner which had been determined to be illegal, and which now turns out to be in direct contravention of the terms of the formal judgment.

I cannot better indicate my view than by adapting the language of the trial Judge and saying that the conduct of the respondents in disregarding and defying the interpretation of the law by the highest Court of the Province can only be described as recalcitrant and recusant.

I think that, obsessed with a rigid and obstinate desire to carry matters on to the last ditch according to their own wishes, they have (whether there was any direct intention to disobey the order or not) disregarded not only the spirit but the letter of the Court's judgment.

In *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, Warrington, J., discussing the meaning of "wilful disobedience," says (p. 194): "In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order." And he relies upon a similar view expressed by Chitty, J., in *Attorney-General v. Walthamstow Urban District Council* (1895), 11 Times L. R. 533.

I therefore find that the defendants Médéric Poirier and John Ménard have been guilty of contempt of Court, and I should add that I base such finding solely on the breach of the formal judgment as drawn up, and have referred to other matters only in connection with their statement that they desired to yield full compliance and for the purpose of testing their *bona fides* in that regard.

The order of the Court is, that Médéric Poirier and John Ménard be fined each in the sum of $500, and do pay to the applicant, McDonald, his costs of the motion incurred as and from the 31st day of December, 1915, to be taxed, and that there be no costs to either party of the motion prior to the 31st day of December.

Having regard to the fact that the respondents claim to be ignorant men, and still assert themselves to be desirous of yielding

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compliance to the Court's order, I direct that this order imposing fine and costs as above do not issue for the space of one month from this date; and that, upon payment, within that period, by the respondents to the applicant, McDonald, of his solicitor and client costs, to be taxed, of all proceedings to commit from the 16th October, and upon the respondents each for himself executing and filing with the Registrar, within the same period, a written undertaking not to do any act tending towards the using or allowing the use of French as the language of instruction or communication in the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and further undertaking, so far as lies in his power, to prevent the use of French hereafter contrary to law, the issue of the order hereby directed be perpetually stayed.

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WAUGH v. SHAW.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. April 22, 1916.

NEW TRIAL (§ V B—40)—RIGHT EXERCISABLE BY MOTION BELOW BEFORE APPEAL—EXCESSIVE VERDICT.

An application under sec. 86 of the County Court Act (R.S.N.S. 1900, ch. 156), for a new trial or to set aside a jury's findings, must be made to the County Court Judge, and cannot in the first instance be made to the Supreme Court; it cannot be made, by way of appeal, concurrently with the motion below, and as long as the motion is pending there is no appeal. The principle, that an Appellate Court will grant a new trial where the verdict appears excessive and is not reduced by consent of the parties, has therefore no application. (Graham, C.J., and Russell, J., dissented.)

[*Watt* v. *Watt*, [1905] A.C. 115, distinguished.]

Statement.

APPEAL by the defendant from the judgment of Wallace, J., in favour of plaintiff, in an action claiming damages for injuries sustained in consequence of the negligent driving of defendant's horse and carriage on one of the public streets of the city as a result of which plaintiff was knocked down and severely injured.

H. Mellish, K.C., for appellant.

W. J. O'Hearn, K.C., for respondent.

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GRAHAM, C.J. (dissenting):—This case was tried before the County Court Judge with a jury, and the jury have made certain findings of fact. It is obvious that there was a mistrial, and that there ought to be a new trial. The counsel for the defendant, instead of moving the County Court for a new trial, has come here by way of appeal from the judgment on the findings. The question is whether we, under our discretionary powers, may incident-

ally grant a new trial, or must we dismiss the appeal, and send him back to the County Court to move for a new trial, and, in case of its refusal, come to this Court by way of appeal? I think there is a discretion given to this Court to grant a new trial, the case being before us on appeal.

By the County Court Act (R.S.N.S. 1900, ch. 156, sec. 86) it is provided as follows:—

> Every Judge of a County Court in any action at the trial of which he has presided, may, on application, set aside the verdict or finding of a jury in such action, and order a new trial of the action, or of any issue therein, in accordance with the practice of the Supreme Court; and upon like grounds, and in like manner, may set aside all orders made by him at the trial, and review and set aside his judgment, and order a new trial, and rehear all matters argued before him.

By sec. 87 it is provided:—

> In all causes . . . an appeal shall lie to the Supreme Court sitting *in banco* from every judgment, order, or decision of a County Court or of a Judge thereof . . . except an order made in the exercise of such discretion as by law belongs to a Judge.

Among the Supreme Court Judicature Rules, O. 37 makes provision for new trials, first, in cases in which the cause has been tried with a jury, by motion made to the full Court; second, where there has been a trial without a jury the unsuccessful party goes by way of appeal to this same Court—a pure appeal.

O. 57 contains the rules as to appeals.

Turning back to the County Court Act, by sec. 88 it is provided that the rules of O. 57 of the Rules of the Supreme Court in respect to appeals shall apply to and constitute the procedure in appeals from a County Court to the Supreme Court.

Turning to the title, "Appeals," O. 57 of the Rules of the Supreme Court, there is r. 5 copied bodily from the English rules, O. 58, r. (e) giving the powers on appeal, which include amendments, admission of further evidence, drawing inferences of fact and giving any judgment and making any order which ought to have been made and to deal with costs and so on.

Then r. 6, copied also from the succeeding English rule, as follows:—

> If, upon the hearing of an appeal, it appears to the Court that a new trial ought to be had, it shall be lawful for the Court to order that the verdict and judgment be set aside and that a new trial be had.

Many cases happen in which, notwithstanding the findings of a jury in favour of one party, the other party is entitled to succeed as a matter of law. Take the case of absolutely privileged occasion

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in defamation cases, no malice being suggested, or malicious prosecution cases in which there is not a want of reasonable or probable cause, or other cases in which a plaintiff as a matter of law has no case for a jury, and even cases in which the findings are capable of a different meaning than the Judge has put upon them, or there might be points of law which dispose of the case, and come on for argument at the trial. In such cases in the Supreme Court a party, if the Judge decided erroneously, would not move for a new trial; he would simply appeal from the judgment. He does not want a new trial; there is nothing to try, he contends. He takes an appeal from the judgment. And if it is found after all that perhaps some evidence is wanting in order to dispose of the case, or there is something to try, then the Court may under O. 57, r. 6, grant a new trial although there is nothing but a pure appeal asserted, and no motion was made or grounds for a new trial set forth in the notice as required by O. 37, r. 2. This has often happened in England where these rules came from. In 1 Chitty's Archbold for 1885, *i. e.*, when the rule respecting motions for new trials where the action had been tried by a jury (*i. e.*, before Finlay's Act) required one to go to a Divisional Court, it is said, p. 745:

Where, however, it is sought to review the judgment directed by the Judge on the findings the application is to the Court of Appeal.

It has sometimes happened here and two notices may be given, one of an appeal from the judgment and another of a motion for a new trial. I notice that in the case of *B.C. Electric* v. *Loach*, 19 B.C.R. 177, 16 D.L.R. 245, 23 D.L.R. 4, 85 L.J.P.C. 23, that the plaintiff instead of moving for a new trial appealed from the judgment on the findings of the jury. I also refer to *Clouston* v. *Corry*, 75 L.J.P.C. 20, p. 24, an appeal in which a new trial was ordered.

If that happens in appeals to this Court from the Court of a single Judge I see no reason why it is not permissible in the case of appeals from the County Court, the rules being the same and this very rule O. 57, r. 6, being made expressly applicable by the County Court Act, sec. 88.

Coming to this case the notice of appeal is as follows:—

Take notice that the defendant intends to appeal and hereby does appeal from the judgment and order made and given by this Court and the Judge thereof in favour of the plaintiff on the trial of this action with a jury and upon the findings of the jury, and further take notice that on Tuesday, March 14, 1916, at the hour of 10 o'clock in the forenoon, or so soon there-

after as counsel can be heard in this behalf, the Supreme Court, sitting *in banco* at the County Court House, Halifax, will be moved by counsel on behalf of the defendant for an order reversing and setting aside said judgment and order hereby appealed from and directing that judgment be had herein in favour of defendant and dismissing this action with costs including the costs of said appeal or for such other order as to said Court may seem just.

It appears that the defendant was driving a horse and carriage along Spring Garden Road. There was a tram car just ahead of him going in the same direction which stopped at the corner of a cross street, Carleton, to discharge passengers, and the defendant turned out to pass the tram car. The plaintiff had been on this same tram and instead of waiting on the corner tried to cross the street (remaining part of the way) to the opposite side where he lived, and behind the tram, and was knocked down by the team and the wheel went over him.

The findings of the jury are as follows:—

1. Q. Was the accident caused by the negligence of defendant? A. Yes. 2. If so, what was such negligence? A. That he did not use proper precaution in passing the car which was stopped to land passengers. 3. Could plaintiff by the exercise of ordinary care have avoided the accident? A. The plaintiff ought to have taken the precaution to remain on the south side of Spring Garden Road until the car started. 4. Assuming the plaintiff to have been negligent, could the defendant by the exercise of reasonable care, have avoided the accident, notwithstanding this negligence of the plaintiff? A. Yes. 5. What damage has the plaintiff suffered? A. Damages and costs, namely:—Dr. Little, $28; clothes, $45; druggist, $7; loss of time, $45; specialist, $50—$175.

The Judge thereupon entered judgment for the plaintiff.

There is another incident: the first 3 questions with another in respect to damages were framed at the instance of the defendant's counsel at the close of the evidence, not including the 4th question. The plaintiff's counsel then applied to have an additional question in the terms of question 4 and after it was discussed it was disallowed by the Judge. The jury returned and brought in the present answers. Meanwhile the counsel for the defendant had left the Court. In his absence this is what occurred on the jury returning their verdict:—

Mr. O'Hearn: I anticipated there would be some such misunderstanding in submitting these questions to the jury. Will your Honour instruct that notwithstanding that the defendant could by the exercise of care have avoided the accident—instruct them to make a finding that notwithstanding that precaution, was the accident caused by the absence of reasonable care on the part of the defendant?

His Honour: I will ask them to answer the question struck out without any instruction one way or the other — to answer that question also. (To

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the jury) I think you might also answer the question we had discussed, without any additional instruction from me.

The jury then retired to consider the question: Assuming the plaintiff to have been negligent, could the defendant by the exercise of reasonable care have avoided the accident notwithstanding this negligence of the plaintiff?

The jury returned and made the following reply: "Yes."

There were two negligent acts or omissions put forward by the jury. The defendant's act in not using proper precautions in passing the car which had stopped; the plaintiff's act in not having taken the precaution to remain on the corner until the car had started. As between those two acts or omissions, logically the ultimate or proximate cause was that of the plaintiff according to the finding of the jury and the judgment would have to be entered for the defendant.

Then there is the 4th question, which contemplates either some later act or a continuing act present at the moment of the accident.

The case of *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 85 L.J.P.C. 23, is instructive.

Lord Sumner was dealing with a case of a tram car with a defective brake (a continuing act of negligence and present at the last moment) running down Sands, the deceased, who was crossing the street negligently. Lord Sumner said, p. 5:—

> Clearly if the deceased had not got on the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

Later, p. 8:—

> If the primary negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the ultimate negligence which makes the defendant liable?

And in Beven on Negligence, 3rd ed., p. 155, it is said:—

> The peculiarity in the case of contributory negligence is that it proceeds on the assumption that both plaintiff and defendant have been guilty of some

breach of duty; and the inquiry is limited to which of the two, by exercising ordinary care, had the last opportunity of preventing the occurrence. We must trace the negligent consequences to the last responsible agent, who, either seeing the negligent consequences or negligently refusing to see them, has put into motion the force by which the injury was produced.

Now, in this case, taking the effect of the findings as they were before the fourth was submitted, it must have been this, that the plaintiff, notwithstanding the want of precaution in passing the car which had stopped, on the part of the defendant, could by the exercise of ordinary care, viz., remaining on the corner instead of attempting to cross over, have avoided the consequences of the defendant's act. They did not mean the converse. Otherwise no proximate cause has been fixed by the jury and the plaintiff could not get on.

With the defendant thus entitled to the verdict and judgment the plaintiff's counsel *ex parte* applied to have a question put which the Judge had already decided against and the fourth question was launched. And it was submitted without explanation or comment. If, in the language of Lord Sumner, the defendant's act already mentioned, namely, want of precaution in passing the tram which was stopped was "repeated or continued" or a fresh act on the defendant's part occurred, there was an occasion for its being put. Provided, however, there was evidence to be submitted of any such act on the part of the defendant, but there was not and the learned Judge did not pretend in putting it to suggest any evidence to support an answer to it in the affirmative.

Whether there is evidence to submit to a jury is a question of law for the Court. No doubt the Judge put this question for safety, tentatively, to the jury at the plaintiff's request because he had already ruled against it and he could, I think, have disregarded the finding, and this Court could do so as it does with irrelevant findings. There is nothing to try. In this case it was not as in *B.C. Electric* v. *Loach*, *supra*, a case of continuing negligence and the jury have either done what could not be done there, to use the language of the trial Judge, "charged the same negligent act up twice" against the defendant, or they have made the mistake of finding without evidence and there is nothing to try on that head.

I think from the judgment there was on the trial a pure appeal.

In *Skeate* v. *Slaters*, [1914] 2 K.B. 429, at 434, the Lord Chief Justice said:—

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Frequently at trials with a jury, the Judge, although he thinks the plaintiff has not made a case, submits it to the jury in order that their views may be ascertained, This practice very often has the advantage of making an end of the contest as to the facts and in the event of a successful appeal against the Judge's ruling enables this Court to dispose of the action without sending it for re-trial.

He afterwards adds that if the Judge would be justified in directing the jury to find a verdict for the defendant he may give a judgment the other way but not unless that condition exists.

Buckley, L.J., at p. 438:—

But where the Judge at the conclusion of the plaintiff's case is asked to rule whether there is a case to go to the jury or not, he may certainly, I think, decline to rule that there is no evidence, may allow the defendant's evidence to be taken, may allow the verdict to go, and none the less may give judgment for the defendants upon the footing that there is no case. . . . Further, if the Judge, at the conclusion of the plaintiff's case, rules as he did here, there is nothing, I think, to prevent him at the termination of the hearing from reviewing his first opinion. This he may do in my judgment (if he has not disposed of the case) by finding upon further consideration that upon the plaintiff's evidence there was after all no case. But, further, I think he may and ought upon all the evidence in the case (including the defendant's evidence) so to rule if, upon the case as a whole, he finds that the evidence fails to disclose a case upon which the jury could reasonably find a verdict for the plaintiff.

I also refer to what Phillimore, J., says at p. 447 of the report. I refer also to *Clack* v. *Wood*, 9 Q.B.D. 276.

In this case the provision as to moving in the County Court for a new trial has the word "may," so that there is nothing to exclude the application of r.6,O. LVII., giving the Court the power to order incidentally a new trial even when there is a pure appeal.

I am afraid I do not appreciate the suggestion that if a new trial may be ordered where there is a pure appeal to this Court in its discretion and a provision for a new trial before the County Court there is danger of both Courts considering at the same moment the same question, resulting perhaps in opposite conclusions. No confusion of this kind appears to have happened in England between 1873 (the Judicature Act of 1873) and 1890 (Mr. Finlay's Act) when under rules from which ours are taken new trials were obtained in a Divisional Court (Q. B. Division) of the High Court and the Court of Appeal also in its discretion had power to grant new trials on pure appeals. Counsel over there are necessarily very nimble getting from one Court to another—I have often admired them—but they never try to have the same question considered in both Courts at the same time. If the

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matter came on I am quite sure that the inferior Court would defer to the superior Court, particularly when there was, as there is here, an appeal from one to the other, and stay its hand.

Administration accounts may be taken in the Court of Probate in this province and also in the Supreme Court. There may be an appeal in the same cause to the Supreme Court of Canada and one to the Judicial Committee of the Privy Council by different parties. The Supreme Court here and the County Court have concurrent jurisdiction in many actions with only a limit as to amount, but I have never heard in any of these cases of collisions or opposite conclusions.

White v. *Hissix*, 35 N.S.R. 432, is relied on by the plaintiff, but that was a case tried by a County Court Judge who had ruled out material evidence and a pure appeal was taken to this Court from the verdict or findings of the jury, which could not of course be entertained, and in the alternative for a new trial. It does not apply to the circumstances of this case in which an appeal is asserted from the judgment and this Court has a discretion to grant incidentally a new trial on such appeal.

I have endeavoured to shew that an appeal would lie in the first instance directly to this Court from the judgment of the Judge upon the findings, I think that the provision applies to a case in which the appeal would not necessarily be successful. Appeals are not always successful, but where they are that the Court in its discretion may grant incidentally a new trial. Of course, if it only applies to a case in which the appeal would be successful, no such rule was necessary to give the Court a discretion to grant a new trial. I am taking the findings as they are. I think that in respect to them and the summing up and rulings of the Judge there has been a mis-trial and some points might be taken on an application before him for a new trial which are not available here. But I only deal with those which in my opinion are open here under r. 6, O. 57. For convenience and to save expense of argument in both Courts (the appeal book notice consists of 40 printed pages, an expense of upwards of $40 for printing alone) and perhaps resulting in another appeal, I think there is ample ground for the exercise of discretion under r. 6, O. LVII., and that a new trial should be directed.

RUSSELL, J., concurred.

Russell, J.

HARRIS, J.:—Under sec. 86 of the County Courts Act (R.S.N.S.

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1900, ch. 156) a motion for a new trial or to set aside the verdict or findings of a jury is to be made to the County Court Judge, and on such motion sec. 86 provides that the County Court Judge may

> order a new trial of the action, or of any issue therein, in accordance with the practice of the Supreme Court, and upon like grounds, and in like manner, may set aside all orders made by him at the trial, and review and set aside his judgment, and order a new trial, and re-hear all matters argued before him.

It is further provided that the application may be made either at any sittings of the Court or at Chambers.

It has been held in more than one case that an application for a new trial or to set aside the findings of the jury in a case such as this must be made to the County Court Judge and cannot in the first instance be made to the Supreme Court. *White* v. *Hissix*, 35 N.S.R. 432.

The defendant has given notice of a motion to the County Court Judge to set aside the findings and for a new trial, but he also appeals from the order for judgment to this Court and it is sought to justify this by sec. 87 of the County Courts Act which gives an appeal from every judgment, order or decision of a County Court or a Judge thereof.

In view of the fact that the motion for a new trial has to be made to the County Court Judge and under sec. 86 on such a motion the County Court Judge is specifically authorised to set aside the order for judgment and deal with the whole matter, and in view of the fact that an appeal lies to the Supreme Court from the decision of the County Court Judge on the motion to set aside the findings of the jury and from his refusal to set aside the order for judgment granted thereon, I think sec. 87 ought to be read as excluding an appeal direct to the Supreme Court from the order for judgment where there is a motion pending in the County Court to set aside the findings of the jury.

It is, in my opinion, absurd to permit an appeal to the Supreme Court from the order for judgment and a motion for a new trial to the County Court and have what is equivalent to two appeals pending at the same time, particularly where the amount involved is always small, and where, as already pointed out, the County Court Judge has jurisdiction on the motion to set aside the findings to deal with the order for judgment.

If the appeal to this Court can be heard while the motion for a

new trial is pending in the County Court, there may be three hearings, *i.e.*, this one, the motion for a new trial and to set aside the findings, and, finally, an appeal to this Court from the decision of the County Court Judge. For this reason I would construe sec. 87 as not giving any right of appeal in this case.

Even if there were an appeal to this Court from the order for judgment in such a case, it could, in my opinion, only be heard upon the supposition that the findings of the jury were correct and should be restricted to the question as to whether the proper order had been made on those findings. This Court cannot consider the question as to whether the findings are against evidence, nor whether there was misdirection nor any other question except whether, assuming the findings to be correct, the proper order has been made by the County Court Judge.

If on this appeal this Court could go into the question as to whether the case was properly left to the jury or whether there was misdirection or nondirection, or whether the verdict was against the weight of evidence we would be taking the case out of the hands of the County Court Judge, the person to whom the legislature has said the motion for a new trial shall be made. I think the provision of the County Courts Act making it necessary to first go to the Judge of that Court with a motion to set aside findings and then giving an appeal to this Court is cumbersome, expensive and useless, but I am not the legislature, and I have nothing to do with changing the law. My duty is to interpret the Act and I cannot think it was the intention of the legislature to give both the County Court and the Supreme Court power to consider, perhaps on the same day and at the same moment, the same question and perhaps to arrive at diametrically opposite conclusions. I do not think we should attribute to the legislature any such design.

This result is obviated by holding that there is no appeal to this Court from an order for judgment where there is pending a motion to the County Court for a new trial—which is the view I hold—or by holding, if there is an appeal, that it is in the interest of justice that this Court should refuse to hear the appeal while the proceedings are pending in the County Court. It is, perhaps, sufficient in this case to say that even if there is an appeal to this Court it must be restricted to the question as to whether, assuming the findings to be correct, the proper order has been made and on

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that hypothesis the defendant must fail because the order was the only one which could be made under the circumstances.

It was argued that the order was not the proper order because the plaintiff had reduced the amount of the verdict by striking out the $50 allowed by the jury for "specialist," and it was said that the House of Lords in *Watt* v. *Watt*, [1905] A.C. 115, had decided that the Court could not reduce a verdict except by consent of both plaintiff and defendant, and if there was any item in a verdict which was unauthorized by the evidence the plaintiff could not waive his right to recover that item but the defendant had the right in that case to a new trial. I do not so read that case and I do not think it has any application to this. There the verdict was for a lump sum of £5,000 and the Court of Appeal thought the verdict was excessive and unreasonable and ordered a new trial unless the plaintiff consented to reduce his verdict to £1,500 and the House of Lords said once you decide the verdict has to be set aside the defendant has a right to have a jury say how much the damages ought to be and therefore you must have the consent of the defendant as well as the plaintiff if the Court is to take the assessment of the damages out of the hands of the jury. That this is the ground of the decision is clearly apparent from a perusal of it. Halsbury, L.C., at p. 120, said:—

> Assume it to be the constitutional view that a person can only have damages assessed against him for a tort, what right has a Court to intervene and say that damages which in its judgment are appropriate shall be the amount assessed against him? The only judgment by a jury is one which the Court itself by the hypothesis says is unreasonable and excessive. Has not the defendant a right to say "I refuse to have judgment assessed against me by a Court. The law gives me the right to a jury and how does the fact that the jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, displace my right to have a verdict of a jury upon the question?"

And Lord Davey, at p. 120, says:—

> If therefore the Court takes upon itself to fix the amount of damages which the defendant is to pay, it is *primâ facie* usurping the functions of the jury and invading the right of the defendant.

In this case there is no question of the Court fixing the damages —the right of the defendant to have the jury fix the damages is not interfered with in the slightest degree. The jury has fixed the amount to be allowed and as to one item it may or may not be supported by the evidence and the plaintiff says he will waive it, and I cannot see anything in *Watt* v. *Watt*, nor on principle, to prevent his doing so.

It is said that this Court in *Morrissey* v. *Halifax Electric Tramway* (unreported, see note following case), adopted the contention set up here and in that case the jury had found specific items of damage. I have examined the opinion of the Court in that case and I find that there were four items of damage in the verdict totalling $265, and there was a large item of $1,200 for "12 weeks' suffering and inconvenience." The Court thought $60, one of the items making up the $265, could not be recovered. This would reduce the $265 to $205, and the Court thought the item of $1,200 was excessive and proposed that the case should go back for a new trial unless both plaintiff and defendant agreed that the verdict should be reduced to $600. In other words, it was proposed to reduce the $1,200 found by the jury for twelve weeks' suffering and inconvenience to $395. Clearly this would be substituting the Court for the jury and *Watt* v. *Watt* would apply. It could not be done without the consent of the defendant.

Harris, J.

In my view the *Morrissey* case was within the reason for the decision in *Watt* v. *Watt*, but this case is not. I would, therefore, dismiss the appeal.

LONGLEY, J., concurred.

Longley, J.

CHISHOLM, J.:—The defendant appeals and applies in this Court:—

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For an order reversing and setting aside said judgment and order, and directing that judgment be had herein in favour of the defendant, and dismissing this action with costs.

It was objected on behalf of the plaintiff that it is not open to the defendant to move in this Court to set aside the findings of the jury until he first asks for that relief in the Court below and it is refused. (*Belden* v. *Freeman*, 21 N.S.R. 106; *White* v. *Hissix*, 35 N.S.R. 432.)

These cases are decisive on the point so far as the findings of a jury are concerned, and I am not aware that the position has since been changed. A party complaining of the findings of the jury must exhaust his remedies in the Court below; and can come to this Court only after the Judge below has refused to set aside the verdict. If it were otherwise the aggrieved party would have not merely a choice of tribunals in which to have the findings reviewed, but he could use both tribunals as Courts of review at the same time and with the possibility of different results. I think, therefore, that we cannot at this stage set aside the findings

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of the jury however strongly we may be of opinion that they should be set aside.

It has been urged that this is only an appeal from the Judge's decision and order for judgment. It is that; and it is something more. It is an application to dismiss the plaintiff's action. But how can we dismiss the action while the findings of the jury are outstanding? It is necessary to have the findings upon which the judgment is based set aside before the action can be dismissed.

It was pointed out on the argument that the jury fixed the damages at $175, giving five items aggregating that amount. The judgment is for $125. The case of *Watt* v. *Watt*, [1905] A.C. 115, was referred to as authority that the amount cannot be reduced unless the defendant agrees to it. *Watt* v. *Watt* was an action for damages for libel and the jury returned a verdict of £5,000. The Court of Appeal was of opinion that the damages were excessive and unreasonable and made an order for a new trial unless the plaintiff consented to reduce the damages from £5,000 to £1,500. The House of Lords held that the Court of Appeal had no jurisdiction to impose the condition unless the defendant also agreed to it. It was put upon the ground that the defendant, against whom a verdict has been found, is entitled to have the damages to be paid by him assessed by the jury which found the verdict; that the Court must not take upon itself to exercise the functions of the jury. It is argued that by reason of this decision the trial Judge had no jurisdiction to reduce the amount found by the jury, namely $175, and to direct judgment for $125. This case may be distinguished from *Watt* v. *Watt* by reason of the fact that separate items of damage were given by the jury. I am not wholly convinced that the rule in *Watt* v. *Watt* does not apply; but I do not think a determination of that point is necessary.

By sub-sec. (1) County Court Act, R.S.N.S. 1900, ch. 156, sec. 86, the Judge of the County Court has jurisdiction to "set aside all orders made by him at the trial and review and set aside his judgment."

The order complained of in this appeal is "an order made at the trial," and it may be set aside by the trial Judge in the same way as findings of a jury may be set aside. This Court can review the order for judgment if the trial Judge refuses to set it aside.

The reasoning applied in the case of *White* v. *Hissix*, *supra*,

to an appeal from the verdict of a jury applies with equal force to an appeal from an order for judgment based on such verdict; and I think the defendant who informs us through his counsel that he has pending before the trial Judge a motion under the provisions of sec. 86 of the County Court Act, asking for the same relief, should for the present be left to exhaust his remedies in the Court below.

The appeal should be dismissed with costs. *Appeal dismissed.*

Note.— *Morrissey* v. *Halifax Electric Tramway Co. Ltd.*, referred to, was an action claiming damages for injuries sustained by plaintiff in the act of alighting from one of the defendant company's cars owing to the alleged negligence of the defendant company. On the trial before Ritchie, J., with a jury, the jury found that the injuries sustained by plaintiff were caused by the negligence of the company, that such negligence consisted of absence of hand grips on roof supports and excessive height of running board, that the car in question was not of the most approved design for service and comfort, that the accident was caused by reason of the car not being of such design, and that special care was exercised by plaintiff. In their assessment of damages the jury included $75 for three months' loss of salary, $60 for 12 weeks' board, drugs, etc., physician's account, $25, artificial limb and expenses to Boston, $100,and 12 weeks' suffering and inconvenience, $1,200, in all, $1,460.

Note.

The appeal was heard November 24, 1914, before a Court consisting of TOWNSHEND, C.J., GRAHAM, E.J., and RUSSELL and LONGLEY, JJ.

H. Mellish, K.C., for appellant.

Jas. Terrell, for respondent.

1915, January 2. LONGLEY, J., delivered the judgment of the Court:—

This is a case of setting aside a verdict found in favour of the plaintiff against the defendant company. The case was tried by a jury and certain matters were submitted to them, all of which they found in favour of the plaintiff. The seventh question was, "What damages did the plaintiff sustain by reason of the accident?" The jury have answered this in detail. They have said as follows: (Here follow the items as set out *supra*.) Beyond all question the charge for 12 weeks' board, $60, was unjustifiable and this would be a sufficient reason for sending the case back for a new trial. I may say, however, that the item of twelve weeks' suffering and inconvenience, $1,200, seems an extraordinary sum. The plaintiff, it seems, is obtaining $5 a week for her employment, and after twelve weeks she went back to her employment and is engaged in it at the present time. It therefore seems to me that half that amount would have been ample for that item. However, it is not necessary that this matter be dwelt upon since it is necessary that there should be a new trial of the case with costs unless the parties agree to a reduction of the damages to the amount of $660.

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CHARTERS v. McCRACKEN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. March 17, 1916.

MECHANICS' LIENS (§ III—14)—PRIORITIES—VENDOR'S LIEN.

A vendor of land to whom a portion of the purchase price is due is to be treated as if mortgagee, so far as the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, is applicable, despite the fact that the land has been conveyed to the purchaser, and mortgaged by him; a duly registered reconveyance to the vendor in payment of the unpaid purchase money, the vendor assuming the existing mortgage, has priority to any unregistered lien under the Mechanics and Wage Earners Lien Act of which the vendor had no actual notice.

Statement.

APPEAL by the plaintiff (a material-man) from the judgment of an Official Referee in an action to enforce a mechanic's lien. The Referee found the plaintiff entitled to a lien, but found also that certain of the defendants, mortgagees, had priority to a named extent, and ordered the plaintiff to pay the mortgagees' costs of proving their claims.

A. J. Russell Snow, K.C., for appellant.

R. J. Gibson, for defendants Lucas and Armstrong.

D. Urquhart, for defendants Newton, Fabian, and Alexander.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Lucas, having a contract for the sale to him of the land in question, entered into a contract with McCracken to sell it to him. McCracken bought for speculative purposes: to build upon the land and then to sell it at a profit. He did build upon it; and the "mechanics' liens" in question arose out of that work, which was done for him and on his credit; $1,300 of McCracken's purchase-money was unpaid; and, in addition to that, McCracken put a mortgage for $1,300 upon the property; the money which he received upon this mortgage, nearly but not quite the full amount, being used by him in his building operations. The speculation proved a failure; and McCracken conveyed to Lucas all his interest in the land, in consideration of the $1,300, due to Lucas, and of Lucas assuming the mortgage, made by McCracken upon the land, at its full amount.

No lien was registered against the land until some time after the later transaction between Lucas and McCracken had been carried out and the conveyance from McCracken to Lucas had been duly registered: and the Referee has found that Lucas had not actual notice of any of the liens until after the registration of his conveyance from McCracken.

In so far as the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is applicable to the first transaction between

Lucas and McCracken, Lucas is to be treated as if mortgagee, and McCracken as if mortgagor, of the land (sec. 14 (2)); and so, if within the provisions of that enactment, the later transaction had the effect of a release by the mortgagor to the mortgagee of the former's equity of redemption in the land.

And, under the provisions of that enactment, the plaintiff and other lien-holders had unregistered liens upon the land existing when the later transaction between Lucas and McCracken took place; liens which still exist—having been duly registered in time—unless they are cut out by the registration of the deed from McCracken to Lucas: and the main question raised upon this appeal is: which has priority?

The Registry Act, R.S.O. 1914, ch. 124, sec. 71, makes void, speaking generally, against any subsequent purchaser or mortgagee for valuable consideration, without actual notice, every instrument affecting land, unless registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

The interpretation clauses of the Registry Act (sec. 2) do not provide expressly that the word "instrument" shall include mechanics' liens; but do provide (clause (*c*)) that it shall include "every other instrument whereby land may be transferred, disposed of, charged, incumbered, or affected in any wise:" and sec. 21 of the Mechanics and Wage-Earners Lien Act provides that, "where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act." "So registered" means registered under the provision of the Mechanics and Wage-Earners Lien Act.

The effect of the two enactments seems to be, in such a case as this, that, if the lien-holder delays registration of his lien, he does so as the risk of being cut out under the provisions of the Registry Act. The lien may be registered before or during the performance of the contract or within 30 days after completion or abandonment of it; or before or during the furnishing or placing of the materials or within 30 days after the last of them is furnished or placed: see *McVean* v. *Tiffin*, 13 A.R. 1.

Though the circumstances of this case naturally arouse sus-

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picion as to the good faith of the transaction which, if upheld, gives priority to Lucas, enough cannot be found in the evidence to warrant a reversal of the Referee's findings, that Lucas is a subsequent purchaser for valuable consideration without actual notice, and so, having registered his instrument first, the liens are ineffectual against him: except, it may be, as to the amount not yet advanced of the $1,300 secured by the mortgage assumed by him at that amount: see *Ross* v. *Hunter* (1882), 7 S.C.R. 289; and *Rose* v. *Peterkin*, 13 S.C.R. 677.

If the lien-holders so desire, they may, within 10 days, have the matter referred back to the Referee to deal with all questions respecting the surplus mortgage-money: in other respects the appeal should be dismissed with costs.

This appeal covers also the case of another lot of land conveyed by McCracken to Armstrong, the validity and priority of which conveyance is not now questioned; the only thing in question being surplus mortgage-moneys in the same position as the surplus mortgage-moneys in Lucas's case. The dismissal of the appeal covers this branch of it as well as the other, as well as does the leave to have the question of surplus mortgage-moneys referred back.

Lennox, J.

LENNOX, J.:—The appeal is from the judgment of the learned Official Referee directing: (a) payment of $658 for debt and $40 for costs by the building owner, McCracken, to the plaintiff; (b) dismissing the lien-claims registered by the plaintiff and the Hall-Zyrd Foundry Company against the lands in question, and discharging the *lis pendens* registered in each case; (c) directing the plaintiff to pay the defendants Armstrong and Lucas the sum of $17.50 each as costs; and (d) awarding the mortgagees the sum of $25, costs of their defence—to be retained out of the balance of mortgage-moneys in the hands of their solicitors, Messrs. Urquhart & Page.

The plaintiff's claim, as an indebtedness of McCracken, for material going into the construction of the buildings in question, is not, as I understand it, disputed by anybody; and the Referee found as a matter of fact and law "that the plaintiff's lien was filed in time, that is, within 30 days after the last delivery; but I find," he says, "that the purchaser of the property, the present owner (Lucas), is an innocent purchaser for value without notice, and that all that the lien-holder is entitled to claim here is the

unadvanced portion of the mortgage-money, which has been arranged to be paid into Court."

If the judgment had been settled and entered up in accordance with this finding, there might not be much ground for complaint by the plaintiff, but this has not been done. The formal judgment dismisses the lien-claims of the plaintiff and the Hall-Zyrd Foundry Company, and leaves the field open to other creditors of McCracken, who are seeking to obtain the unadvanced mortgage-moneys above referred to, through a receiver, on garnishee and attachment proceedings, and on orders given them by McCracken; and deprives the plaintiff of the protection which he is alleged to have by reason of sec. 14 of the Mechanics and Wage-Earners Lien Act (R.S.O. 1914, ch. 140), which provides that "the lien" (under the Act) "shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien *arises* . . . or after registration of a claim for such lien . . ."

The Hall-Zyrd Foundry Company have not appealed, and they need not be considered in the matter; but, the Referee having found a valid lien by the plaintiff—subject of course to the priority, as found, of Lucas, and the undisputed rights of the mortgagees and Armstrong—the company should at least be allowed to assert, and, if they can, establish, their priority in the unadvanced mortgage-moneys or *pro tanto* in the lands in question, with whatever advantage, if any, sec. 14 confers upon them as registered lien-holders. I express myself in this tentative way, because I have come to the conclusion that the matter must go back to the Referee, and it is not expedient that I should pronounce an *á priori* judgment upon matters with which he will have to deal.

This much I may say, however, without infringing the self-denying ordinance I have laid upon myself, namely, that it will perhaps be convenient to leave the mortgages at the amount for which they have been executed, $1,300 each, if this can be done without prejudice to the rights of the plaintiff or other claimants, and perhaps at all events. Further that this, unadvanced money, or a *pro tanto* interest in the land, would appear to me, but I say no more, to belong to McCracken, subject to the rights of his creditors, according to their legal priorities under the Mechanics and Wage-Earners Lien Act or otherwise; that is not claimed by the mortgagees, and does not belong to them if the mortgages

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stand at their face value as a charge upon the land; and it does not belong either as land or money to Lucas or Armstrong, for they took in each case subject to a $1,300 mortgage charge. It seems possible, therefore (and I refrain from being definite, for the reasons I have mentioned), that this intervening estate or interest, either as land or money, can be worked out so as to make it available either for the plaintiff and other lien-holders, if they have priority under sec. 14, or for creditors of McCracken, if they have not.

This is all, of course, subject to the question which is to be dealt with upon this appeal as to priority as between the plaintiff and Lucas, with which I will now deal. I am not clear as to whether the retained mortgage-moneys come exclusively from the mortgage upon the Lucas land, or partly from both mortgages, nor do I think it important, as the lien of the plaintiff is in respect of both properties, and Urquhart & Page represent both mortgagees. This matter can be adjusted by the Referee, if necessary. Except as to the question of working out lien-holders' rights, Armstrong is in no way concerned. It is admitted that he is a *bonâ fide* purchaser for value without notice; subject, I think, to a $1,300 mortgage.

Now as to the priorities I have just mentioned. The finding that Lucas is a *bonâ fide* purchaser for value without notice is, I think, amply supported by the evidence. Both he and his solicitor gave positive and explicit evidence that they had no knowledge of the plaintiff's dealings with McCracken, or his claim, while the transaction with Lucas was being carried out, or until after the registration of his deed. The argument that Lucas was a preferred creditor is not well-founded. He had a lien for $1,300 as an unpaid vendor, and allowed McCracken to raise $1,300 on the property—pretty much all of which went into the buildings—and he purchased for the aggregate of these two sums, $2,600. It is pointed out that Armstrong paid more than this, but it is not shewn that the properties were of equal value; and Armstrong may have paid too much.

The deed to Lucas was registered weeks before the registration of the plaintiff's claim of lien. I need not quote the provisions of the Acts; but a careful reading of the provisions of the Mechanics and Wage-Earners Lien Act and the Registry Act satisfies me that Lucas obtained priority over the plaintiff by priority of

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registration. This need not have been, of course. The plaintiff's claim *arose* long before this. He could have registered before Lucas, but did not do so. It is not, in my opinion, a question of when the claim arises, but the relative dates of registration that determines priority. The statute puts the means of protecting himself well within the reach of a lien-holder or supply-man, but the plaintiff did not avail himself, to the full measure, of its provisions.

The judgment should be varied by striking out the portion dismissing the plaintiff's lien and discharging the *lis pendens*, and the action referred back to the Referee for the purposes and in the terms of the judgment of the Chief Justice; and, as an appeal could have been avoided if counsel for the appellant had adhered to the position he took, at one time, of a claim upon the money only, the appellant should pay the costs of appeal.

RIDDELL and MASTEN, JJ., concurred. *Judgment below varied.*

Riddell, J.
Masten, J.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and McKay, JJ. July 17, 1916.

HIGHWAYS (§ III B 5 — 195) — LIABILITY TO ABUTTING OWNERS FOR OBSTRUCTING HIGHWAY WITH RAILWAY — FORM OF REMEDY.

A railway company with which a municipal corporation agrees to close a certain street, and which is authorized by the Board of Railway Commissioners to construct a level crossing thereon, is liable in damages to the owners of lots on said street, if, before the street is closed by the city, the company obstructs the street by constructing a railway across it; such damages may be recovered in an action, although a claim for compensation is pending under the Railway Act (R.S.C. 1906, ch. 37, for trespass on land of the plaintiff actually taken for the purposes of the railway, or for portions of lots of which parts have been so taken.

[See also *Holmested* v. *C.N.R. Co.*, 20 D.L.R. 577, 22 D.L.R. 55, 24 D.L.R. 894.]

APPEAL by plaintiff from the judgment of Elwood, J., in Chambers. Reversed.

Statement.

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

G. A. Ferguson, for respondent (C.N.R. Co.).

The judgment of the Court was delivered by

BROWN, J.:—The plaintiff brings this action as the owner of a residential sub-division in the city of Moose Jaw known as Wellesley Park. He alleges that, on the laying-out of his sub-division, he made a general approach into the same by way of 11th Ave. His plans were approved of by the city and duly registered. In the early part of 1912, the defendants entered into

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an agreement with the city for permission to enter the city across certain streets, including among same 11th Ave. By this agreement, the city undertook to close 11th and certain other streets to be crossed by defendants' railway, and the company agreed to indemnify the city against all claims for damages by property owners consequent upon the closing of the streets.

In May 1912, the Board of Railway Commissioners, upon the application of the company, made the following order:—

> Upon the report of the assistant chief engineer of the Board approving of the said plan and profile and the undertaking by the city of Moose Jaw to close the streets in the said city particularly referred to in the agreement between the city and the railway company, dated February 22, 1912, the said agreement being filed with the Board under the said file No. 14134.39.
>
> It is ordered that the applicant company be and it is hereby authorized to cross and divert the highways in the said city of Moose Jaw, as shown on the plan and profile, and in accordance with and subject to the terms of the said agreement—the level crossings to be constructed in accordance with the standard regulations of the Board affecting railway crossings, as amended May 4, 1910.

It is alleged that the city has not as yet closed the streets, but that the company have constructed their railway and are operating same. It is further alleged that in the construction of the railway the company entered upon the streets and destroyed the embankments and grading theretofore erected thereon, and constructed its line of railway across the same on a high trestle and elevation, and caused embankments to be built which entirely close 11th Ave. and other streets, with the result that the plaintiff has been deprived of his means of ingress and egress to and from his said sub-division. The plaintiff seeks, *inter alia*, damages because of such obstruction.

The plaintiff brought a former action against the company for trespass (20 D.L.R. 577), and in that action on appeal an injunction was granted (22 D.L.R. 55), restraining the company from continuing its trespass unless they acquired title and proceeded to have the damages determined under the provisions of the Railway Act within a reasonable time. It appears that such proceedings for arbitration under the Railway Act are now pending. When the plaintiff instituted this action the company applied for a stay of proceedings on two main grounds, namely: that arbitration proceedings were pending covering the subject matter of the action, and that the matter was already *res judicata* by virtue of the former action for trespass. The matter comes

before us by way of appeal on the part of the plaintiff from an order made by Elwood, J., in Chambers, staying the action pending the arbitration proceedings.

The company, in constructing its railway, passed over and are occupying a portion of the plaintiff's said sub-division. On the arbitration proceedings the plaintiff is undoubtedly entitled to recover under the provisions of the Act for the value of the land actually taken, and, in addition, for damages to the remaining portion of these lots of which a part has been so taken. The plaintiff, in this action, claims that many lots in his sub-division—no portion of which has been taken by the railway—have been cut off from access to the city by the obstruction to the streets, and it seems clear that if, under the circumstances of this case, the plaintiff has a right to recover damages at all for such obstruction, it is not by way of arbitration. *Holditch* v. *C.N.O.R. Co.*, 27 D.L.R. 14, [1916] A.C. 536.

The company contend that they have crossed the streets in accordance with plans approved and pursuant to leave granted by the Board of Railway Commissioners. The order of the Board on which they rely, and which has been set out at length *supra*, authorises the company to cross the streets subject to the terms of the agreement entered into between the company and the city. One of the terms of this agreement, as already indicated, is that the city shall close the streets. Had the city closed the streets, then the plaintiff's right of action would have been against the city, and the city under their agreement with the company would be entitled to be indemnified by the company. This procedure undoubtedly is what was contemplated by the order of the Board. I think it clear, from a perusal of the order and the agreement, that the Board contemplated the streets being closed by the city before the company would construct its railway across the streets, and that the closing of the streets was a condition precedent to the right to construct the railway.

The order makes provision for the level crossings, but makes no mention of crossings which the Board must have known would constitute a complete obstruction, and this further emphasizes the view which I have expressed. Instead of proceeding in the way which, in my view, was contemplated, the company built its railway across the streets in such a way as to damage property owners as much as if the streets had been legally closed by the

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city. In other words, the company have closed the streets in fact, although the same have not been legally closed by the city.

To interpret the order of the Board as permissive of such a procedure is, to my mind, putting a construction on it subversive of its protective provisions, in so far as property owners affected thereby are concerned.

The company therefore, in my view, proceeded illegally. Had they proceeded legally, then I think the contention made on behalf of the company would be correct: that all damages whatever recoverable by the plaintiff would be recoverable either under the arbitration proceedings or as provided for by the order of the Board, and that this action would not lie. If, however, I am correct in my interpretation of the order, the company having adopted the procedure which they did are in no better position than if they had proceeded without obtaining any order at all, *Corpn. of Parkdale* v. *West*, 12 App. Cas. 602.

According to the facts alleged, the plaintiff owns lots from which, owing to the illegal act of the company, he has been deprived of his right of access to the city. For this he is entitled to damages as against the wrongdoer. *Corpn. of Parkdale* v. *West, supra. North Shore R. Co.* v. *Pion*, 14 App. Cas. 612.

These damages not being recoverable under the arbitration proceedings, the plaintiff would have a right to launch this action.

It is further contended on behalf of the company, that the matter is *res judicata*. If such a contention is to be upheld it must be done in the face of a previous judgment and desire on the part of this Court to the contrary effect.

When the original action for trespass, which was tried by my brother Newlands, came before this Court on review, it was admitted by counsel for all parties and assumed by the Court that the action was treated, except as to the land actually taken by the company, as if it were an arbitration proceeding under the Railway Act. At the request of counsel for all parties we consented to review it as such. The damages had been assessed as of the date of filing the railway plans. The Act provides that the date of filing the plans is to be adopted if title to the land taken is acquired by the company within 1 year thereafter; otherwise the date fixed is that of acquiring title. The fact was that title had not been as yet acquired, although more than a

year had elapsed since the railway plans had been filed. In the result, we found ourselves unable to assess the damages, and, as no evidence had been given as to damages for the land actually taken, we allowed only nominal damages for the trespass to the land so taken, and granted an injunction restraining the company from continuing the trespass unless they acquired title, and proceeded to have the compensation or damages determined under the provisions of the Act, within a reasonable time.

It is clear, I think, that counsel for all parties, as well as the Court, in error assumed that all damages to which the plaintiff would be entitled would be recoverable in the arbitration proceedings. It is also beyond question that the Court intended to preserve to the plaintiff the right to recover whatever damages he might be entitled to no matter how recoverable, other than the nominal damages for the mere trespass to the property actually taken.

Under such circumstances, the plea of *res judicata* on the part of counsel for the company cannot, in my opinion, be entertained.

In the result, therefore, the action in my opinion is properly brought and the appeal should be allowed with costs.

NEWLANDS, J. (dissenting):—This is an appeal from the judgment of my brother Elwood, staying proceedings pending arbitration proceedings under the Railway Act. Newlands, J.

In *Holmested* v. *C.N.R.*, tried before me and reported in 7 S.L.R. 200 (20 D.L.R. 577), which was a prior action to this one, one of the issues that I tried was the damage to plaintiff's land caused by defendant blocking the streets that gave entrance to the property from Moose Jaw. I gave judgment for plaintiff, giving him damages for the injury. This judgment was afterwards amended by the Court *en banc* reducing the damages to a nominal amount, on the ground—as I understood the judgment of the Court—that these damages could only be obtained by arbitration under the Railway Act. The plaintiff was evidently of the same opinion, as he applied for an order amending the judgment of the Court *en banc* by embodying therein a statement that the same was given without prejudice to the right of the plaintiff to bring a further action against the railway company alone or jointly with others for damages for deviating Main St., making a dangerous crossing at Tenth Ave. and closing other

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streets as set out in such action (these streets being the same streets for the closing of which the action is brought). This order was refused by the Court sitting *en banc*, for the following reasons given by Lamont, J.:—

In the judgment of this Court referred to, the only matter dealt with was the plaintiff's right to damages for the actual trespass. We did not deal with, nor pass upon any right of the plaintiff for compensation for lands taken, or for damages to adjoining lands through the construction of the railway, or damages for the matters referred to in the affidavit of the plaintiff in the passage above cited (for closing of streets and deviation of Main St.). The rights of the plaintiff, whatever they may be, in respect to these matters are in no way interfered with or prejudiced by the said judgment. (24 D.L.R. 894.)

As I have stated, on the trial of the action in which the above judgment was given, I gave plaintiff damages for the above matters, *i.e.*, damages to adjoining lands through the construction of the railway and for closing of streets and deviation of Main St. The judgment cited is, therefore, a reversal of my judgment, and as the plaintiff was not given leave to bring another action, that part of the statement of claim that applies to the above damages and which is the only part of the statement of claim which applies to the defendant company is *res judicata*, unless the judgment of the Court was that such damages could not be given in an action at law but must be claimed under the Railway Act by arbitration proceedings, in which case the judgment above cited would be a bar to the action, and the trial Judge was right in staying proceedings.

The appeal should, in my opinion, be dismissed with costs.

Appeal allowed.

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HAMILTON v. SHAULE.

Ontario Supreme Court, Sutherland, J. February 8, 1916.

PUBLIC LANDS (§ II—20)—PRIORITIES—BONA FIDE PURCHASER—EXECUTION—SETTING ASIDE SHERIFF'S DEED.

A sheriff's deed, in a sale of a locatee's interest in unpatented lands, under execution, conveys no title as against the rights of a bona fide purchaser who acquired them of the locatee prior to the judgment; although the purchaser failed to record the deed with or notify the Department until after the execution was lodged therein, he is entitled, so long as the Crown had not cancelled the rights of the locatee and recognized the deed as his proper assignment, to have the sheriff's deed set aside, and to be declared the owner of the property subject to the rights of the Crown.

[The Public Lands Acts, R.S.O. 1897, ch. 28, secs. 19, 31, 37; 3 & 4 Geo. V. ch. 6, secs. 16, 44 (1), considered.]

Statement.

ACTION for a declaration of the rights of the plaintiff as assignee of the locatee of unpatented Crown lands, and to set aside an

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alleged conveyance to the defendant by a sheriff of an interest in the lands, and for an injunction restraining the defendant from cutting timber, and for other relief.

Gideon Grant, for the plaintiff.

Grayson Smith, for the defendant.

Sutherland, J.

SUTHERLAND, J.:—In the year 1881, Charles Hamilton, the father of the plaintiff, bought from the Crown Lands Department of the Province of Ontario, the south-west quarter of section number 22, and the north-west quarter of section 15, in the township of Rose, in the district of Algoma, duly paid therefor, and became entitled to ask for a patent, on performance of settlement duties.

In the month of July, 1907, the plaintiff, who is his daughter, was living with him at Bruce Mines. Hamilton had previously been engaged in business elsewhere, and had incurred debts which he was unable to pay. The plaintiff, who is a school teacher, had been advancing sums of money to assist him.

In December, 1906, she advanced to him the sum of $175, and in July, 1907, a further sum of $40. Her evidence is that an agreement was made between her father and herself, that, in consideration of $200 of the moneys thus advanced, he should convey to her his interest in the property in question. This agreement was carried into effect by the execution by him on the 17th July, 1907, of a quit-claim deed of the property in her favour. The plaintiff attempted to register the deed in the office of the Local Master of Titles for Algoma, and sent it to him for that purpose, but on the 31st July, 1907, it was returned with the information that the properties therein mentioned could not be registered under the Land Titles Act. There was thus apparently a prompt and *bonâ fide* attempt to put it on record.

Among other debts owing by the father was one in favour of the Percival Plow and Stove Company, on which it obtained, on the 5th day of September, 1907, a judgment against him in the 5th Division Court in the County of Leeds and Grenville. On the 7th, a transcript of the judgment was issued to the Second Division Court in the District of Algoma, and, on the 9th, an execution was issued against the goods of Charles Hamilton, which on the 16th was returned *nulla bona*. On the 20th, an execution against the lands of Charles Hamilton was issued and filed in the office of the Sheriff for the District of Algoma, and a

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certified copy thereof was, on the 21st, forwarded to the Deputy Minister of Lands and Forests at the Parliament Buildings, Toronto, where it was received and noted on the 23rd September, 1907.

In reply to a letter written by the plaintiff's solicitor to the Department, the Deputy Minister on the 8th October, 1907, wrote as follows: "I return the enclosed writ of execution against lands in the suit of The Percival Plow and Stove Company v. Charles Hamilton, which you should send to the sheriff to whom it is addressed. I have made a note of it against N.W. ¼ section 15 and S.W. ¼ section 22, Rose, which stand in the name of Charles Hamilton, paid in full, but unpatented, because proof of performance of settlement duties has not been filed."

On the 28th October, the solicitor again wrote to the Deputy Minister as follows: "Am I to understand that our execution against Charles Hamilton is registered against the lands of Hamilton, or should I send you a copy of the execution in order to have it recorded against the lands, N.W. ¼ sec. 15 and S.W. ¼ sec. 22, Rose?" A reply was sent on the 6th November, 1907, as follows: "In reply to your letter of the 28th ulto., I have to say that your execution against the lands of Charles Hamilton is noted against N.W. ¼ section 15 and S.W. ¼ section 22, Rose."

The execution against the lands was renewed in September, 1910, and September, 1913. The defendant herein had apparently begun to inquire about the lands in question towards the end of the year 1913. The judgment obtained by the company had been assigned to one T. H. Percival.

On the 2nd February, 1914, the defendant's solicitor wrote a letter, directed to Charles Hamilton at 12 Westminster avenue, Toronto, where he and his family were apparently then residing, from which I quote in part as follows: "Some time ago, Mr. T. H. Percival, of Ottawa, obtained a judgment against you for $96.26, and the judgment and costs now amount to over $100. Mr. Percival filed an execution in the sheriff's office, and also in the Department of Lands Forests and Mines, against the two lots which you have in Rose township, and the execution has been in the sheriff's office for something over a year, and I am entitled by law to advertise the property under a sheriff's sale and sell same at once. I have a letter from the Deputy Minister to the effect that the patents will be turned over to the purchaser under

the sheriff's sale. Now, it will only delay matters to put this property up at a sheriff's sale, and the costs of advertising will be something over $25. Now, I am willing to pay you $15 if you will execute assignments of these properties and will forward same to me. . . . By executing this assignment, you are getting $15 in cash, and you are wiping off this old debt, which has been standing against you for a considerable number of years. I enclose assignments. . . . Of course, if you will not execute these assignments, why I shall proceed at once with the sheriff's sale, and you will lose the property in any event, and I consider it is to your advantage to make a little money by executing the assignment sooner than lose it altogether."

On the 6th February, the defendant's solicitor wrote to the Deputy Minister as follows: "Some time ago I filed with you an execution at the suit of T. H. Percival v. Charles Hamilton, in respect of an unpatented lot owned by Hamilton in Rose township. . . . Would you kindly inform me if the Department would permit me to have the lot sold by the sheriff so that the purchaser could take over Hamilton's interest in the lot?"

On the 9th February, the Deputy Minister replied as follows: "I have to say that, if the interest of Charles Hamilton in north-west quarter section 15 and south-west quarter section 22, Rose, is sold by the sheriff under execution, the purchaser will stand in Hamilton's place and will be required to perform the settlement duties in order to obtain patent."

I have little or no doubt that the letter of the 2nd February, written to Hamilton, was in due course received and shewn to the plaintiff, and resulted in her becoming active about her rights under the deed from her father. Up to this she has had not filed her assignment with the Department. On the 11th February, there is a letter from her solicitor, Mr. Lown, to one Murphy, an official in the Department of Crown Lands, referring to an interview which Lown or his clerk had had with Murphy on the previous Monday, and which goes on to say: "I find the reason no one was residing on the property and there was no lumber there when your Department's agent inspected the property, was the building which had been erected and the lumber there had been destroyed by a fire. My clients tell me they intend to erect fresh buildings, etc., as soon as weather permits. I find the judgment,

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etc., you mentioned is being dealt with, and there will be no sheriff's sale, and consequently no purchaser."

On the 12th February, Charles Hamilton wrote to the defendant's solicitor: "I have your favour of the 2nd inst. *re* lots in Rose township. I sold my claim on these lots some time ago to S. A. Hamilton, and same has been duly registered in Crown Lands office."

This letter apparently crossed one written by the defendant's solicitor to Hamilton on the 13th February, which in part is as follows: "I am forwarding cheque for $25 to W. H. Carney, sheriff, to-day, and he has instructions to proceed with the sale of N.W. ¼ section 15 and S.W. ¼ section 22, Rose. Mr. Aubrey White, the Deputy Minister of Lands and Forests, advised me that a Mr. A. S. Lown had stated that the judgment would be paid, and for that reason I waited on you. However, you never had the courtesy to write me, and you will now have to settle with the sheriff or lose your lots entirely. The sheriff has my instructions to sell these lots at the earliest possible date."

On the 14th February, the solicitor again wrote to the Deputy Minister and referred to his offer to Hamilton to settle his claim without having a sheriff's sale, and his reply of the 12th February, and then goes on to say: "Kindly write me and let me know just what date the assignment of Crown land respecting the above named two lots was filed with you and also the date that my execution was placed with you in the suit of Percival v. Hamilton. You can understand that, before proceeding with a sheriff's sale, I should like to get the dates of the filings of these two documents to make sure of my ground."

The Deputy Minister replied on the 17th as follows: "I have to say that the execution against Charles Hamilton was filed on 23rd September, 1907, and the assignment by Charles Hamilton to Sara Ann Hamilton is dated 17th July, 1907, but was not filed until 11th inst. Mr. A. S. Lown, who filed it, states that the judgment is being dealt with, and that there will be no sheriff's sale."

On the 16th March, the plaintiff wrote two letters, one to the Percival Plow and Stove Company, directed to Ottawa, and the other to the defendant's solicitor directed to Bruce Mines, referring to previous letters having been written to her father, and in the first letter she says: "I am anxious to pay father's debts

and willing to do all I can. Keeping up his insurance was the best plan I could think of. I might manage to make small monthly payments except in August and September, if you would take it that way; or would sell the land and pay you if a buyer could be found, but will have nothing to do with Mr. Peterson." And in a P.S. she says: "I would be only too glad to sell it and have the money used for paying you and any others holding any claims against father."

In the letter to the solicitor she says, referring to the land: "It has been mine for several years, and I have writings and proof to vouch for the fact. I paid for the land, and, although anxious to pay father's debts, cannot see how it can be sold again without my consent, and of course will not let it go without trying to get my own out of it."

On the 14th May, the defendant's solicitor again wrote the Deputy Minister in part as follows: "However I may say Mr. Lown did not correspond with me, and I have proceeded with a sheriff's sale, and the property is now being advertised by the sheriff, and it is up for sale on the 30th day of June next."

On the 27th May, the Deputy Minister wrote to the said solicitor as follows: "I send you a copy of the assignment from Charles Hamilton to Sara Ann Hamilton. You will observe that the affidavit of execution was sworn on the 20th July, 1907, just two months before the date of the *fi. fa.* If the purchaser at sheriff's sale wishes to have a good title, this assignment must be removed."

The land being exposed to public sale on the 30th June, 1914, no bid was obtained, and the sale was postponed to the 10th July following, when, by virtue of a writ of *venditioni exponas* issued out of the Second Division Court in the District of Algoma, and tested the 6th July, 1914, the interest of Charles Hamilton in the lands was again exposed to public sale on the said 10th July, when the sum of $30 was paid by N. H. Peterson for Albert Shaule, he being the highest bidder therefor.

On the 11th July, 1914, the sheriff executed a deed in favour of Shaule of the "estate, right, title, interest, claim and demand . . . which the said Charles Hamilton of right had at the time of the said delivery to him on the 17th October, 1907, of the said writ of execution, or at the time of said sale of the lands in question."

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Notwithstanding his having obtained the sheriff's deed, the defendant—it is said, without the knowledge of his solicitor—wrote to Charles Hamilton on the 9th September, 1914, as follows: "I am taking the privilege of writing you in regards to property owned by you in Rose township. Now I want to know if you will part with same, and what would be your lowest offer on same. I understand you own the S.W. ¼ of section 22 and the N.W. ¼ of section 15. Kindly let me know if this is right, and let me know if you will sell and what your terms would be."

The sheriff's deed was apparently then sent to the Department; and on the 30th October, 1914, the Deputy Minister wrote to other solicitors, namely, Messrs. Williams & Clement, as follows: "In reply to your letter of 17th inst. with sheriff's deed of north-west quarter section 15 and south-west quarter section 22, Rose, to Albert Shaule, I have to say that these lands were sold in 1881 to Charles Hamilton, who paid for them in full. On 23rd September, 1907, a copy of an execution dated 20th September, 1907, against the lands of Hamilton, was received in the Department, under which the sheriff has sold to Albert Shaule. On 19th July, 1907, Charles Hamilton assigned both parcels to Sara Ann Hamilton, but the assignment was not filed in the Department until February last, and previous to that date the Department had informed the plaintiff's solicitor that the purchaser at sheriff's sale would stand in the place of the defendant and would be entitled to ask for patent on performance of settlement duties. I am writing to the solicitor who filed the assignment to Miss Hamilton, that the Department recognises the title of Mr. Shaule, leaving it to him to take such action as he may see fit." This information seems to be at variance with the opinion expressed by the Deputy Minister in his letter of the 27th May, 1914, which of course had been written before the sheriff's sale had been consummated.

On the same day, he wrote to Mr. Lown as follows: "I have to inform you that a sheriff's deed has been filed, vesting in Albert Shaule the interest of Charles Hamilton in north-west quarter section 15 and south-west quarter section 22, Rose, and that the Department recognises the right of Mr. Shaule to perform the settlement duties and apply for patent."

On the 17th November, Lown wrote to the Deputy Minister in part as follows: "It was owing to their inexperience in dealing

with such matters that the deed was not tendered to your Department for recording earlier than it was, which I think you will find from reference to your records was done by me on the 10th of November last, and my client formally objects to the patent being issued to Mr. Shaule, and will leave that party to take the steps he threatened long ago to set aside the deed, which, notwithstanding his knowledge of its existence, he has never done. My client has always been willing to perform all settlement duties, and tells me there is a good road already to the property, and a well constructed on it, and they would have resided there this summer but for the buildings having been burned."

Lown seems to have soon changed his mind, for, on the 19th November, the writ in the present action was issued; and the plaintiff, in her statement of claim, after setting out some of the facts already referred to, says that, after having obtained the deed in July, 1907, she "paid or caused to be paid all settlers' duties and taxes payable in respect of such lands, and performed all the duties incumbent upon settlers of which she had notice or knowledge, but could not reside on the said property last summer owing to the buildings thereon having been destroyed by fire. She constructed or caused to be constructed a road to such lands, and sunk a good well thereon. . . 11. The defendant claims to be entitled to cut and remove the timber growing on the said lands, and has directed gangs of men to enter thereon for that purpose, and claims to be the owner thereof under and by virtue of the sheriff's deed alleged to have been executed in his favour in June last."

The defendant, in his statement of defence, refers to his having obtained the execution and filed it in the Department, and refers to some of the letters already quoted, and then pleads the sheriff's sale and purchase by him and the filing of his deed with the Deputy Minister and the obtaining of an acknowledgment thereof, and his willingness, as soon as this action shall have been determined, to perform the necessary duties; and by way of cross-relief he claims a declaration "that the conveyance given by the said Charles Hamilton to the plaintiff was fraudulent as against the creditors of the said Charles Hamilton;" "a declaration that the plaintiff, by reason of her non-entry upon the said lands and her non-performance of any settlement duties, has forfeited all right

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and claim to said lots;" and a declaration that, under his deed, he is entitled to be entered as locatee for the lots.

On the 25th November, Mr. Lown wrote to the Deputy Minister as follows: "Referring to my previous communication, I think it but right that you should know that Miss Hamilton has instituted an action in the Supreme Court against Mr. Shaule, asking, *inter alia*, for the sheriff's deed to be set aside as far as she is concerned, and for declaration that it conferred no property in the lands in question on the defendant, and she has obtained an interim injunction restraining him from entering upon the lands or cutting the timber thereon." This letter was acknowledged by the Deputy Minister on the 2nd December.

There can be no doubt that the plaintiff has been guilty of great delay, so far as regards performing settlement duties and putting herself thus in a position to apply for a patent, and also in recording the deed from her father to herself with the Department. She perhaps in the meantime has paid some taxes on the property. The Department, however, is apparently lenient about such matters, and no cancellation of the rights of Charles Hamilton has ever been made, though no doubt a cancellation might have been. It certainly looks as though the plaintiff had well-nigh made up her mind to abandon the property, and was stirred into activity only when she found that some one else was anxious to get the lots. She had, however, under the deed, acquired such interests or rights as her father had obtained in the property. If he had any interest at the time of the sheriff's sale, that interest might have passed thereunder. But Charles Hamilton had sold his interest to the plaintiff, and at the time of the sale, and to the knowledge of the defendant and his solicitor, a deed was in existence purporting to have transferred any interest Charles Hamilton had to his daughter.

By the Public Lands Act, R.S.O. 1897, ch. 28, sec. 19, a provision was made for the registration, in a book to be kept by the Commissioner of Crown Lands for the Province, of the particulars of any assignment made by a purchaser or locatee of public lands, and the endorsation thereon of a certificate of registration; and, by sub-sec. (2) of the said section, an assignment so registered shall be valid against one previously executed and unregistered or one subsequently registered; but it was a further provision of sub-sec. (2) of the said section that all conditions

of the sale, grant, or location, must have been complied with or dispensed with by the Commissioner before registration was made.

The plaintiff did not, of course, comply with this provision at any time, and did not attempt to file her deed until long after a note of the execution had been made in the Crown Lands Department. Section 31 of the Act is as follows: "Subject to the Land Titles Act, if a patent for land is repealed or avoided by the High Court, the judgment shall be registered in the registry office of the registry division in which the land lies."

By sec. 37, unpatented lands are liable to assessment in the municipalities in which they lie from the date of the sale to the licensee, and a purchaser at the sale of such lands for taxes shall have in the lands so sold "the same rights only as the person entitled to claim under the Crown at the time of such sale."

In *Yale* v. *Tollerton* (1867), 13 Gr. 302, it was held that the Court "will, at the instance of a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold and order him to join in the necessary conveyance to enable the purchaser under the decree to apply to the Crown Lands Department for a patent of the land as vendee or assignee of the locatee." However, this course was not taken by the execution creditor.

In *Ferguson* v. *Ferguson* (1869), 16 Gr. 309: "A debtor being a vendee of land and in default in paying the purchase-money, a creditor obtained execution against his lands, and at the sheriff's sale became the purchaser of the debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly: *Held*, that he could not afterwards repudiate the purchase and claim his debt on the ground that the debtor's interest was not saleable by the sheriff. The interest of a debtor in land, bought from the Crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase-money, and procuring the patent to issue in the names of the heirs." In this case, Mowat, V.-C., said, p. 311: "We think it clear that an interest of this kind in land can be reached by an execution creditor, through means of this Court; and that the heirs, or any one for them, cannot intercept the rights of creditors, by

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advancing what may be due to the Crown as vendor, any more than in the case of a private vendor."

Reference to *Bondy* v. *Fox* (1869), 29 U.C.Q.B. 64; *Cornwall* v. *Gault* (1863), 23 U.C.Q.B. 46; *Peebles* v. *Hyslop*, 19 D.L.R. 654, 30 O.L.R. 511; *Ruttan* v. *Burk*, 7 O.L.R. 56; *Howard* v. *Stewart*, 20 D.L.R. 991, 50 Can. S.C.R. 311.

In 1913, the Act 3 & 4 Geo. V. ch. 6, known as the Public Lands Act, was passed, and by sec. 59 it was thereby enacted that R.S.O. 1897, ch. 28, should be repealed. The Act was assented to on the 6th May, 1913. Section 16 is as follows: "If the Minister is satisfied that a purchaser, locatee or lessee of public lands, or any person claiming under or through him, has been guilty of fraud or imposition, or has violated any of the conditions of sale, location or lease, or of the license of occupation, or if the same was made or issued in error or by mistake, he may cancel such sale, location, lease or license, and resume the land and dispose of it as if the same had never been made."

And sec. 44, sub-sec. (1), provides that "neither the locatee nor any one claiming under him, shall have power, without the consent in writing of the Minister, to alienate, otherwise than by devise, or to mortgage or charge any land located as a free grant or any right or interest therein before the issue of the letters patent."

Here the conveyance to the plaintiff had been made long before the passing of this Act, though the fact had not been brought to the notice of the Department. No case has been cited to me, and I have been unable to find one expressly in point, to determine that in the circumstances in question the purchaser at the sale under the execution should take priority over the assignee under the deed. It has not been shewn that the plaintiff knew of the existence of the specific debt against her father on which the judgment was obtained and execution issued.

On the evidence I find as a fact that the sale to her by her father was a *bonâ fide* sale and for value. I do not think there was any intention on the part of the plaintiff to defeat, hinder, or delay creditors. I think, as the matter stands, the registration of the sheriff's deed in the Crown Lands Department, after due notice before the sale under which it was obtained, of the assignment of the interest of Hamilton to the plaintiff, is in effect a cloud upon the title of the plaintiff, and, while it stands, apparently

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prevents her from proceeding as she expresses her intention of doing to perform the settlement duties necessary to enable her to obtain the patent.

It is true she has been guilty of laches with respect to these duties; but the Crown has not seen fit to take advantage thereof, as it might have done, as there has been no cancellation of the rights of the purchaser or locatee which she acquired under her deed; and the Department, in their letter of the 27th May, then recognised the assignment as standing in the way of a good title to a proposed purchaser at a sheriff's sale.

The defendant himself, after the sheriff's sale, seemed to question his own title thereunder, and sought to purchase an interest he apparently still thought existing in Hamilton.

The plaintiff will, therefore, have a declaration that, as Charles Hamilton had parted with his interest in the lands in question to the plaintiff before the sheriff's deed to the defendant, the latter took no interest therein, and that the said lands are the property of the plaintiff, subject to the rights of the Crown with reference to the performance of settlement duties.

There will also be an injunction restraining the defendant, his agents or servants, from entering upon or cutting timber on the said lands. No damages were proved.

The plaintiff will have the costs of the action.

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Quebec Superior Court, Guerin, J. April 26, 1915.

CONSTITUTIONAL LAW (§ II C 4—502)—MUNICIPAL BY-LAW—CHARTER—CONSTITUTIONALITY—NOTICE TO ATTORNEY-GENERAL.

When in a suit before the Recorder's Court of the City of Montreal, the unconstitutionality of a municipal by-law and of a law of the Quebec Legislature purporting to authorise the city to adopt this by-law is raised the recorder must not give judgment on the merits unless the notice required by article 114 of the Code of Procedure (Que.) had been given to the Attorney-General of the province; and if the recorder gives a final judgment on the question without requiring that notice his judgment can be set aside on a writ of certiorari.

MOTION on certiorari to quash a judgment of the Recorder's Court of the City of Montreal which had dismissed the complaint. [Statement.

The defendant is a milkman who, on the 29th February, was prosecuted by the City of Montreal for having in his possession milk, with the intention of selling it, "which did not reach the average of 3% of butter fat and 12% of solid substance, and a specific gravity of 10.29 to 10.33 at a temperature of 60 degrees

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Fahrenheit," in contravention to the by-law of the City of Montreal in force.

The defendant filed a declinatory exception, denying the authority of the city to adopt the by-law in question, on the ground that it was in conflict with the federal statutes of Canada concerning the adulteration of foods. Consequently he submitted that the by-law was *ultra vires* and the charge illegal.

The defendant also argued the unconstitutionality of the charter of the city of Montreal (62 Vict. (1899) ch. 58) concerning the powers conferred on the city to pass by-laws concerning the quality of the milk to be sold in the city, alleging that the Parliament of Canada alone had the right, in virtue of Sec. 91 of the British North America Act, to pass laws concerning the regulation of trade and commerce, and that the Legislature of Quebec had no authority to confer upon the city of Montreal the power to determine by by-law the quality of the milk to be sold within the limits of the city.

On the 12th May 1914, Recorder Weir decided in effect that the action of the plaintiff brought before the Recorder's Court should be dismissed, and he dismissed it for the reason that the Parliament of Canada only had the power to pass laws to regulate commerce and to determine the quality of milk to be sold in Canada.

On the 11th June, 1914, the city of Montreal presented a petition to the Superior Court asking for the issue of a writ of certiorari for the reasons above mentioned, and because the constitutionality of the above mentioned laws had been argued and decided by Recorder Weir without any notice having been previously given to the Attorney-General, so as to allow him to intervene in the cause, if he deemed it necessary.

It alleged, besides these reasons, amongst other grounds, that the action in question, according to the statute of 1899 (62 Vict. ch. 58), was other than a civil action; and the provisions of the part of the Criminal Code concerning summary proceedings before magistrates apply to the Recorder's Court of the city of Montreal as regards the mode of procedure until final judgment, to execution of this judgment, and generally to all rules imposed upon magistrates for these objects, and not inconsistent with the dispositions of the law above mentioned, namely, 62 Vict. (1899) ch. 58, and

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2 Geo. V. (1912) ch. 51 sec. 25 now substituted for Art. 503 of 62 Vict. (1899) ch. 58.

The defendant asked the setting aside of the certiorari because the decree dismissing the information had been rendered on the 12th May, 1914, and that, since then, more than six months had elapsed. On the 17th June, 1914, the writ of certiorari was issued by Mr. Justice Charbonneau.

The Superior Court (Guerin, J.), maintained the certiorari, reversed the judgment of the Recorder's Court dismissing the action and sent back the record to the Recorder's Court so that the case may go before it according to law, for the following reasons:

GUERIN, J.:—"Considering that the judgment of the Recorder's Court has dismissed the information against the defendant on the ground of the unconstitutionality of the by-law of the city of Montreal for the violation of which he was brought before the Court;

Guerin, J.

"Considering that it does not appear on the record of the Recorder's Court, transmitted by the *mis-en-cause* to the Superior Court, that the notice required by Art. 114 of the Code of Civil Procedure had been given to the Attorney-General of this province before the judgment rendered by the said Court of the Recorder;

"Considering that the Recorder's Court has exceeded its jurisdiction in deciding on this constitutional question (Art. 1293 C.C.P.);

"The Court quashes the judgment of the said Recorder's Court of the 12th May, 1914, setting aside the prosecution against the defendant, and orders the prothonotary of this Court to transmit the record received in accordance with the present writ of certiorari to the said Recorder's Court, so that it may be decided on the said information against the defendant according to law."

Order of dismissal quashed.

Laurendeau, Archambeault & Co., for the city.

L. Houle, for defendant.

TRADES HALL CO. v. ERIE TOBACCO CO.

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Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron and Haggart, JJ.A. May 29, 1916.

CORPORATIONS AND COMPANIES (§ IV D 2—80)—ULTRA VIRES AS DEFENCE.

A corporation is liable for goods acquired under an *ultra vires* contract; though there can be no liability on the contract itself, there is an implied obligation to make restitution or compensation. (Critical review of authorities, Perdue, J., dissenting.)

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Howell, C.J.M.

APPEAL from a judgment upon defendants' counterclaim for the balance due on goods purchased by a corporation. Affirmed.

T. J. Murray, for appellant, plaintiff.

T. R. Robertson, K.C., and *G. C. McDonald*, for respondent, defendant.

HOWELL, C.J.M.—The contract under which the defendant's tobacco got into the plaintiff's possession was *ultra vires* the plaintiff, and was therefore void, and no action can be maintained on that contract. The fact remains, however, that the plaintiff got possession of the defendant's goods, and neither the plaintiff nor the defendant expected or intended it to be a gift. The pla ntiff, without power to do so, sold and delivered the goods to certain persons who are apparently not able to pay for them, and wishes the defendant to take these accounts in lieu of the goods.

Suppose these goods had by some mistake been placed in the plaintiff's possession by an error in address, and the plaintiff knowing the goods had come from the defendant, deliberately sold them or transferred them to an irresponsible person, which act of selling was *ultra vires*, whereby the goods were lost to the defendants, can it be possible that the defendants would have no remedy?

In this case each party thought the plaintiff had power to purchase and sell the tobacco, and so, by mutual mistake, the goods got into the plaintiff's possession, and then, acting beyond their legal powers, the plaintiff disposed of the same. There is no contract of any nature relating to the plaintiff's possession, and it seems to me the plaintiff must return the goods or pay for their value. The language of Lord Dunedin in *Sinclair* v. *Brougham*, [1914] A.C. 398 at 431, is in point. He says:—

> Now, I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B. which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A.

It is to be kept in mind that the plaintiff raised the question of *ultra vires*. They asserted that there was no contract, and to this the defendants were compelled to concede.

In the case of *Exchange Bank* v. *Fletcher*, 19 Can. S.C.R. 278, the defendants (the appellants) took from the plaintiffs Merchants Bank shares as security for a loan. The stock was placed in the name of the manager, who disposed of it and absconded. The

Exchange Bank had no power to take such stock as security for a loan, but the Court had no difficulty in holding them liable for this stock.

The plaintiffs took the defendants' tobacco according to their own case, and, without lawful right or power, they delivered it over to others, and I think they are liable. The decision of *Sinclair* v. *Brougham* above referred to, is only applicable to a case where a company borrows money beyond its power, and I should think also where winding-up proceedings were pending.

Howell, C.J.M.

It is difficult for me to distinguish as to liability between converting goods obtained under an *ultra vires* contract and converting goods obtained by violence or fraud. If a company could get possession of goods by plausible or untruthful statements, and then dispose of them without legal liability, this would be an unpleasant country to live in.

The American authorities, the chief of which are decisions of the United States Supreme Court, are fully discussed by Cameron, J., and I need not refer to them further than to say that they are authority for holding the plaintiffs.

Richards, J.A. Haggart, J.A.

RICHARDS and HAGGART, JJ.A., concurred in the judgment of the Chief Justice.

Perdue, J.A.

PERDUE, J.A. (dissenting):—This is an action brought to recover $329.43, the value of a quantity of tobacco delivered by the plaintiffs to the defendants. The plaintiffs are a company incorporated under the Manitoba Joint Stock Companies Act for the purpose of acquiring, holding, leasing, etc., the Trades Hall building in the city of Winnipeg and the land occupied by that building. It appears that the plaintiffs had established a cigar and tobacco stand in their building for the convenience of their tenants and persons visiting the building. This cigar stand was in the charge of the plaintiff's caretaker and rent collector, a man named Albert. In September, 1914, Albert, in the name of the plaintiffs, but without any authority from them, entered into a contract with the defendants by which the plaintiffs were represented as agreeing, amongst other things, to sell $1,000 worth of defendants' tobacco in each month for the period of a year. In pursuance of this agreement the defendants shipped to the plaintiffs a large quantity of tobacco and some $500 of plaintiffs' money was paid to the defendants on account. This agreement and the transaction that took place in pursuance of it were not

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known to the directors or shareholders, and were first discovered by them when the audit of the company's books was made in January, 1915. An inquiry was then instituted and Albert produced the agreement. There was at that time a large quantity of tobacco received from the defendants, and valued at $1,226.92, stored in the basement of the plaintiffs' building. This had been shipped to plaintiffs under the alleged agreement.

At a meeting of the shareholders of the plaintiff company the contract to which Albert had attempted to bind the company was repudiated. One of the directors of the defendant company, a Mr. Wigle, came to Winnipeg and an arrangement was made to protect both parties. The plaintiffs gave the defendants a cheque for $217.91, representing the cash on hand from sales of tobacco and delivered to the defendants $654.92 worth of manufactured tobacco. Plaintiffs also transferred to defendant $856.68 of accounts outstanding. Plaintiffs contend that the remainder of the tobacco on hand, to the value of $572, was to be retained by them to reimburse them for money theretofore paid to the defendants and for freight paid on the tobacco. The following document was then drawn up by Wigle and signed by both parties:—

Winnipeg, Feb. 3rd, 1915.

We hereby acknowledge cheque for $217.91 from the Trades Hall Co., and they deliver to us on demand $654.92 worth of manufactured tobacco now in their basement, free from storage, and the same to be applied on their account. Without prejudice to our claim, we take over $856.68 of outstanding accounts to be collected by their assistance, and placed to the credit of their account.

R. A. RIGG, President,
Trades Hall Co.
The Erie Tobacco Co.,
per A. Babcock.

The several details above mentioned were carried out. In April following, Babcock, the defendants' agent, requested a loan of a part of the tobacco in the plaintiffs' hands to fill some orders immediately. The defendants received from the plaintiffs $329.43 worth of tobacco as a loan, and on their refusal to return it, the plaintiffs brought this suit to recover the value of the goods. The defendants filed a counterclaim by which it is alleged that goods to the value of $1,947.15 were delivered by defendants to plaintiffs for sale on commission, that credit had been given to the plaintiffs for cash and goods returned to the amount of $1,689.64, leaving a balance of $257.51 for which defendants

claimed judgment. No credit was given for the accounts handed over by plaintiffs. At the trial an amendment to the counterclaim was permitted, by which the defendant sued for $575.98 as the balance due for goods sold and delivered by defendants to plaintiffs. Judgment was entered by the trial Judge for $246.51 in favour of the defendants.

There is nothing to be found in the powers set out in the plaintiffs' charter of incorporation which, with even the greatest latitude of construction, could be held to authorize the corporation to enter into the business of general tobacco dealers, for that would be the effect of holding it to the contract signed in its name by Albert in 1914. The company was formed to acquire and manage the Trades Hall building. It could lease parts of its premises or furnish, either for rent or freely, accommodation for unions, clubs, societies or organizations. I cannot find anything amongst its powers as enumerated which would authorize it to engage in a business of buying and selling goods.

The alleged contract under which the tobacco in question came to the plaintiff company was beyond its powers. It does not appear that the directors were aware of the contract. The transaction seems to have been entered into and carried on by Albert without authority from the corporation. The officers of the plaintiff company had no lawful authority to pay out money of the company for the purpose of purchasing the tobacco. The contract being void it cannot be ratified: *Ashbury Railway Carriage Co.* v. *Riche*, L.R. 7 H.L. 653, 672, 673; *Baroness Wenlock* v. *River Dee Co.*, 10 A.C. 354; *Great North-West Cen. R. Co.* v. *Charlebois*, [1899] A.C. 114. I think the document of February 3, 1915, did not and could not bind the plaintiffs as a ratification of the pretended contract made by Albert in their name. In the *Great North-West Cen. R. Co.* case, *supra*, it was held that even a judgment entered by consent of the parties would not operate so as to validate an *ultra vires* contract. There was, I think, no legal liability on the part of the plaintiffs to pay for the tobacco consigned to them by the defendants and stored on the plaintiffs' premises, and the plaintiffs were justified in repudiating the pretended contract.

When the directors and shareholders of the plaintiff company were made aware of the transactions in which Albert had tried to involve them, they appear to have honestly endeavoured to

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do what they could to disentangle the affair with as little loss as possible to themselves and the defendants. They handed over to the defendants the money and accounts in their hands coming from sales. They delivered to the defendants all the tobacco in their hands except only enough to secure the money plaintiffs had actually paid to the defendants. This tobacco they intended to retain and dispose of in order to reimburse themselves. I think the evidence clearly shews that the directors of the plaintiff company had no intention when they signed the receipt of February 3, of attempting to ratify the agreement made between Albert and the defendants. But whatever their intentions were, they could not bind the company by an attempted ratification of a transaction that was *ultra vires*.

Some time after this arrangement had been entered into and had been performed by the plaintiffs upon their part, Babcock, the defendants' agent, came to the plaintiffs' directors and asked them for a loan of tobacco to fill certain orders from customers who required immediate delivery. The plaintiffs' directors made the loan requested and the defendants having got the goods into their possession refused to repay the loan either in goods or money. The question then arises, can the plaintiffs maintain an action for the value of the goods loaned?

Although the company could not embark in a mercantile business, I think it possessed the power to receive security for the return of money paid out of its funds and to realize upon that security. By the unauthorized act of their servant it found itself possessed of certain goods purchased with its money. Although the acts of its servant in this matter were repudiated, the company was, I think, entitled to hold the goods purchased with its money and dispose of them in order to protect itself. It is also shewn that the goods in question were left with the plaintiffs by the defendants in return for the money paid by the plaintiffs. Even if it was beyond the powers of the company to trade in any commodity, there was nothing to prevent it from becoming the owner of goods fully and completely vested in it. It would also possess the usual incidents of ownership where its money had been used in buying the goods, and it might sell them to the purchaser in order to replace the money so used.

In support of the view above set forth, I would refer to the following cases: *Ayers* v. *South Australian Banking Co.*, L.R.

3 P.C. 548, was a case where a banking company incorporated by charter, which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in actual possession of the sheep, though a part owner and the agent of the other owners for whose benefit the advances had been made. There was at the time a statute in force enabling a proprietor of sheep to make a valid pledge of the wool of his next clip although no possession was given, and trover was maintainable by the party to whom a preferential lien was given under the statute. It was held in the Privy Council that the banking company might maintain an action of trover and that it was entitled to recover the value of the wool on such preferential lien, notwithstanding the prohibition in the charter against advancing money on the security of merchandise. Mellish, L.J., in giving the judgment of the Board, expressed the opinion:

> Whatever effect such a clause (prohibiting the lending of money on merchandise), may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it.

In *Great Eastern R. Co.* v. *Turner*, L.R. 8 Ch. App. 149, the chairman of the plaintiff company, with the assent of the company, held in his name shares in another company which had been purchased with the money of the plaintiff company. The chairman became bankrupt. It was held that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct. In giving judgment, Lord Selborne said (p. 152):

> True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir Richard Baggallay, but there is no difference between an unauthorized investment of the money of a public company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the moneys of *cestuis que trust* has been laid out in an unauthorized manner, that therefore they are not to have the benefit of whatever value there is in the property bought with their money.

In *Stavert* v. *McMillan*, 24 O.L.R. 456, the money of a chartered bank was used in purchasing its own stock. The directors,

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in order to save the bank, divided the shares which had been thus acquired in violation of the Bank Act, sec. 76, among themselves and their friends, the transferees giving promissory notes to the bank for the shares. These notes were indorsed by the bank to the plaintiff, who sued the makers. It was held that the plaintiff was entitled to recover upon the notes. Garrow, J.A., giving the judgment of the Court of Appeal, said that he could see nothing in law to prevent the bank, while repudiating the purchases and demanding repayment, from also asserting a lien upon the shares upon the principle applied by Lord Selborne in *Great Eastern R. Co.* v. *Turner, supra.*

Upon these authorities it appears to me that the ownership of the tobacco in question had passed to the plaintiff company and had become its property, even though the transaction in which the company had originally acquired the goods was *ultra vires.* If the plaintiff had become the actual owner of the goods, as I think it had, then a usual incident of ownership would follow and the plaintiffs might sell the goods in order to reimburse itself the money it had paid out. The defendant company has obtained the goods on a promise to restore them or to return similar goods of equal value. The defendant is a trading corporation and no question is raised as to its capacity to purchase goods. Upon defendant's refusal to carry out its promise, the plaintiff might sue for goods sold and delivered, treating the matter as a sale.

The trial Judge seems to have been of opinion that the plaintiff had power to purchase the goods, but he does not deal with the question whether it had power to enter into the contract to deal in tobacco on commission, being the contract under which the goods were received. His judgment was based upon the document of 3rd February which he regarded as a ratification by the directors. I have already dealt with the question of ratification.

Turning now to the counterclaim, it appears to me that the defendant has utterly failed to shew that the plaintiff had authority to enter into the contract. The only means by which the verdict for the defendant can be supported is, it appears to me, by applying the rule that

a corporation must account for and pay to the other party the benefits it receives from *ultra vires* engagements: Brice on Ultra Vires, 3rd ed., pp. 641-643.

This rule was founded upon the *Phœnix Life Assurance Co.* case and other cases referred to in the text book. It will be necessary

to revise the rule in view of the late decision of the Privy Council in *Sinclair* v. *Brougham*, [1914] A.C. 398. But, assuming the existence and force of the rule as stated, the evidence as to what took place between plaintiff and defendant during the February negotiations shews that the plaintiff was willing to, and actually did, carry out the obligation imposed. The plaintiff handed over the money received for goods, also the goods remaining on hand (except only those retained to secure money previously paid to defendant) and the accounts for goods sold where the purchase money had not been received. The plaintiff made over to the defendant the benefits received from the transaction. The defendant cannot take these benefits and at the same time hold the plaintiff liable for the value of the goods represented by the accounts, as if the transaction were a valid purchase by the plaintiff which the plaintiff was entitled to make. But we must, in applying the rule above cited, apply also the qualification by the same author that

a corporation is liable in respect of an *ultra vires* engagment only to the extent of the benefits it may have received therefrom: Brice, 3rd ed., p. 650.

It must be shewn that the corporation has benefited by the property or money received in the *ultra vires* transaction: *Re National Permanent Benefit Bldg. Soc.*, L.R. 5 Ch. 309; *Blackburn Bldg. Soc.* v. *Cunliffe Brooks & Co.*, 22 Ch. D. 61, affirmed, 9 App. Cas. 857. Much light is thrown upon this question by the late decision in *Sinclair* v. *Brougham*, [1914] A.C. 398. That was a case which arose out of the winding-up of the Birkbeck Permanent Benefit Building Society. The society had carried on a banking business which it was not authorized to carry on and was *ultra vires*. It was held that the depositors were not entitled to recover moneys paid by them on an *ultra vires* contract on the footing of money had and received by the society to their use. Lord Haldane, after referring to *Re Phœnix Life Assurance* Co., 2 J. & H. 441, and *Flood* v. *Irish Provident Assce. Co.*, [1912] 2 Ch. 597, n., proceeded as follows:—

My Lords, if these decisions had related to the recovery of borrowed money I should find it difficult to reconcile them with principle. If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would on principle appear to be one *in rem* and not *in personam*, a claim to follow and recover specifically any money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie *in personam* against a statutory society, which by

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hypothesis cannot in the case in question have become a debtor or entered into any contract for repayment, is to strike at the root of the doctrine of *ultra vires* as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure. It is, therefore, binding both at law and in equity. . . . I think it excludes from the law of England any claim *in personam* based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is *ultra vires*.

The counterclaim in the present action is a proceeding *in personam* and the judgment on the counterclaim is for the recovery of the price of goods sold in a transaction which was clearly *ultra vires*. If the goods or any of them remained in the plaintiff's hands, then an action *in rem* would have lain to recover the specific goods, but when the plaintiff no longer has the goods the above authority shews that no action can be brought *in personam* based upon the *ultra vires* contract.

I would allow the appeal and enter judgment for plaintiff for $329.43, and I would dismiss the counterclaim. The plaintiff should get costs in the County Court and in this Court.

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CAMERON, J.A.:—The defendant company sold to the plaintiff company the tobacco comprised in the November consignments on orders, and the tobacco was forwarded to and received and stored by the plaintiff company. It is for the balance due on these transactions that the defendant company, in this action, brings its counterclaim or set-off, in which the plaintiff company's claim is credited and a claim is set up for a balance.

The investigations by the directors of the plaintiff company into these transactions were made some time after these sales, and, as a consequence, the agreement of February 3 was entered into. By that agreement the plaintiff paid $217.91 cash, returned $654.92 worth of tobacco and agreed to pay whatever balance was due, less what might be collected on the outstanding accounts transferred by the plaintiff. I cannot say that there is to be found in the agreement any express promise to pay that balance. Such a promise might readily enough be inferred from the words used, but, for the purposes of this argument, I assume that the plaintiff company had no power to make it, or to enter into the transaction for the purchase of the tobacco. This transaction in question was, so far as the November consignments were concerned, wholly completed on the part of the defendant company. The tobacco was shipped by the defendant and received in due course by the

plaintiff company, and the only part of the contract remaining to be performed was payment by the plaintiff. These facts were recognized and emphasized by the agreement of February 3. The plaintiff company has received and still holds the benefits of a contract which it was beyond its powers to make. Is it now open to that company to refuse to account to the defendant company for these benefits on the ground that the transaction was *ultra vires*.

In the United States, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defence that it had no power to make it. Cyc. X, 1156-7. The corporation will not be allowed to receive the fruits of a contract, and then, when sued for performance on its part, while keeping the fruits, set up the defence that it had no power. The doctrine is frequently applied where there is nothing to be done by the corporation but to pay the money. *Ib.* 1163.

Cook on Corporations, p. 2253, quotes this from a decision of the New York Court of Appeals:—

> That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this State.

In the federal, as opposed to the State, Courts, however, the old rule against *ultra vires* contracts is upheld in all its rigour. But

> Even in the federal Courts, if property or services have been received by a corporation *ultra vires*, a suit based on *quantum meruit* will lie, and the same result is often accomplished in that way. *Ib.* pp. 2254-5.

In *Citizens National Bank* v. *Appleton*, 216 U.S. 196 (1909), it was held that

> Although a contract made by a corporation may be illegal as *ultra vires*, an implied contract may exist compelling it to account for the benefits actually received. A national bank which guarantees a loan made by another bank in pursuance of an agreement that it be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability for the amount actually received by it pursuant to the arrangement on the ground simply of *ultra vires;* it may be liable for money had and received.

Harlan, J., delivering the judgment of the Court, refers to *Logan County National Bank* v. *Townsend*, 139 U.S. 67. There a bank purchased certain bonds which it agreed to return to the seller upon demand. When the return was demanded and the

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bank was sued for the value of the bonds it pleaded its absence of authority to make any such contract. There the Court held:

From the time of such demand and its refusal to return the bonds to the vendor or owner, *it* (the bank) *becomes liable for their value upon grounds apart from the contract under which it obtained them.* If the bank's want of power, under the statute, to make such a contract of purchase, may be pleaded in bar of all claims against it based *on the contract*—and we are assuming, for the purposes of this case, that it may be—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the Act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the National Banking Act. "The obligation to do justice," this Court said in *Marsh* v. *Fulton County*, 10 Wall 678, 684, "rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution." p. 203.

Harlan, J., cites *Aldrich* v. *Chemical National Bank*, 176 U.S., an instructive case, and *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U.S. 24, where Gray, J., says, p. 205:—

A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract.

He (Harlan, J.) also refers to *Pullman's Car Co.* v. *Transportation Co.*, 171 U.S. 138, where Peckham, J., said:—

The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it.

And he concludes by holding that even if the guaranteeing bank had gone beyond its powers the judgment of the New York Court against it was consistent with sound legal principles and intrinsically right.

Rankin v. *Emigh*, 218 U.S. 27, the Court, speaking by White, J., (now White, C.J.) affirmed the judgment in *Citizens Central National Bank* v. *Appleton*, and the cases there cited.

Although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged, by force of the illegal contract, yet as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law

independently of express authority, will compel restitution or compensation: p. 35.

Brice, in his work on Ultra Vires, asks the question at p. 691:

> Does not the fact that such an (*ultra vires*) engagement has been acted on, and *a fortiori* that one side has completed his share, prevent each party thereto, either by reason of estoppel or upon equitable grounds, from setting up the defence of want of power in the corporation?

To this he replies:—

> The answer given by the English authorities is that in every case an *ultra vires* engagement, executed or not, is not as such enforceable against the corporation or against the opposite party, *by an action directly upon the engagement itself—the most that the party complaining can obtain is an account of the benefits received by the opposite side from the consideration given by the other side.*

Now this does not seem to me to vary greatly from the doctrine laid down by the United States Supreme Court. The remedy is one for accounting not for money had and received—a difference in procedure not in principle.

At p. 640, Brice says,—

> Though a corporation cannot be sued, any more than an ordinary citizen, directly upon a transaction which does not bind it, yet if it sets up this defence it must restore to the other party what it has obtained from him. It may, indeed its officials for their own protection must, repudiate the transaction, but if so it must repudiate it altogether—it cannot repudiate and approbate —it cannot reject and yet keep what in another form it has rejected.
>
> The principle is that a person not directly liable must account for benefits which he has received from an invalid transaction, and pay to the other party the amount of value of the benefits received by him.
>
> This well-known equitable doctrine applies to persons under disability, to corporate transactions objected to as irregular or informal, and "to transactions in themselves invalid, which have resulted in transferring goods, materials or labour to a corporation."

I refer to Brice at p. 694, *et seq.* He says that the correct view in the United States Courts—(he does not refer to the Supreme Court cases I have cited, all of which, with the exception of the *Logan County National Bank* case, which is not mentioned, are later in date than the 3rd edition of his work)—is the same as in England, viz., that there is no difference between executed and executory *ultra vires* transactions with respect to actions directly upon them or to rights and liabilities arising directly out of them. Brice discusses the United States decisions and thus re-asserts the rule in England at p. 697:

> But unquestionably in this country as long as a transaction remains an agreement only, however much it may be perfected on the one side, the other side is entitled to repudiate it on the ground of its being *ultra vires* of the

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corporation, subject of course to the liability of the side repudiating to account for any benefits it may have received.

Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. Parker & Clark, 93.

In my opinion the reasoning of their Lordships in *Sinclair* v. *Brougham*, [1914] A.C. 398, bears out this view of the law. There the Birkbeck Society, originally a building society, empowered to borrow to an unlimited extent, developed a banking business, and became known as, and used the name of, Birkbeck Bank. A winding-up order was made and questions arose as to the status of the depositors. It was held that the banking business was *ultra vires*, but the depositors, though lending to the society in *ultra vires* transactions, were given a right to share in the assets after payment of the outside creditors.

Accepting this principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies.

It was held they had another remedy, notwithstanding the *ultra vires* nature of the transaction, and notwithstanding the impossibility of imputing a promise to repay, and the depositors or lenders, on these *ultra vires* contracts, were given the right to rank upon the remaining assets of the society. This was carrying the depositors' remedy further than the usual tracing order, because the moneys belonging to the depositors had become so merged in the assets of the company so as no longer to be capable of being identified or distinguished or traced into actual securities or assets.

Now, it can be contended that the result of the decision in *Sinclair* v. *Brougham*, *supra*, is that in this case the only remedy the defendant company has is in the nature of a tracing order the effect of which would be the transfer to the defendant company of the plaintiff company's claims for the amounts as yet unpaid on the sales to the various purchasers of the tobacco.

Sinclair v. *Brougham*, *supra*, involved a contract, or rather an alleged contract, of borrowing money. Lord Haldane (with whom Lord Atkinson agrees) holds that there is no remedy *in personam* against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into any contract for repayment.

I think it (the doctrine of *ultra vires*) excludes from the law of England any claim *in personam* based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is *ultra vires*, p. 415.

The fiction underlying the remedy for money had and received, in many cases, has no application where it would have been *ultra vires* to give such a promise.

It follows, (therefore), that the depositors (lenders) will not succeed unless they are able to trace their money into the hands of the society or its agents as actually existing assets. Their claim cannot be *in personam* and must be *in rem*, a claim to follow and recover property with which, in equity, at all events, they had never really parted, p. 418.

He goes on to hold that there was no fiduciary relationship in the case but that the principle of following is not to be restricted to cases where there was such relationship, p. 422.

Accordingly, the Lord Chancellor reached the conclusion that the remaining assets of the company should be distributed *pari passu* amongst the depositors and the unadvanced shareholders.

Lord Sumner attains the same result but he finds it difficult to describe the principle on which this conclusion is based, p. 458. It is, he says, a question of administration, when the liquidator has to distribute the assets under the supervision of the Court. Therefore, in the absence of precedent, the most just distribution must be directed, so only that no recognized rule of law or equity be disregarded, p. 458.

As to the main questions he agrees with the Lord Chancellor, p. 452. No promise to pay can be imputed, and there is no right to recover *in personam*. His conclusion also is that the principle in *Hallett's* case can be extended to follow the assets further than actual identification where only two groups of persons, having equal equities, are left to be considered.

Lord Parker says it is clear on the authorities he cites, that an *ultra vires* borrowing by persons affecting to act on behalf of a company does not give rise to any indebtedness at law or in equity on the part of such company. No implied promise to repay can arise. He says,—

It appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through an agent be party to an *ultra vires* act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, *the money borrowed is in their hands the property of the lender*, p. 441.

His conclusion is identical with that of the other members of the House, that the equities of the lenders and the society are equal and the assets should be divided ratably.

Now, to what extent does that case govern this? That was a

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case of borrowing money. This is the case of sale of goods. That was a case of administration in winding-up, where the Court, as Lord Sumner says, has peculiar authority. This is an action against a solvent corporation.

In the case of an *ultra vires* loan transaction the property in the money remains in the lender. Therefore it became necessary to adopt and enlarge the equity rule as to a tracing order, in order to give the depositors a just and adequate remedy. But in this case the property in the goods did not remain in the vendor, but passed to the purchaser. I find authority for that statement in the judgment of the Privy Council in *Ayers* v. *South Australian Banking Co.*, L.R. 3 P.C. 548. There the Banking Co., whose charter contained a provision declaring it unlawful for the company to advance money on merchandise, advanced money on the faith of receiving an agreement to give a preferential lien on wool of an ensuing clip. It was held that an action by the company on such an agreement was maintainable and the company entitled to recover for the value, notwithstanding the prohibitory clause in its charter. Lord Mellish holds:—

> Whatever effect such a clause may have, it does not prevent property passing, either in goods or lands, under a conveyance or instrument which under the ordinary circumstances of law would pass it.

Otherwise, he says, the consequence might be most lamentable. In this case the tobacco was sold and delivered pursuant to written orders, though the form of the contract cannot surely be material. In this case, as in the Privy Council case, unless the property passed to the first purchaser it could not pass to the second. It seems to me the same reasoning applies in both cases.

Now, as we have seen, the reasoning in *Sinclair* v. *Brougham*, [1914] A.C. 398 is based on the principle that in an *ultra vires* loan transaction, there being no power to borrow, there has been no transfer of property in the money which remains that of the lender. Here the property in the tobacco has undoubtedly passed to the purchaser, the plaintiff company. The distinction is manifest and its results important. In the case of an *ultra vires* borrowing there can by no possibility be an imputation of a promise to repay, as the property in the money is still that of the lender, according to the judgment in *Sinclair* v. *Brougham*, to which I have referred. In the other case, the property having

passed, there is every implication of a promise either to return the goods or to pay compensation therefor. The machinery of the tracing order, as in the case of a fiduciary relationship, or as in the case of a depositor in an *ultra vires* loan transaction, who still holds the property in his money, is inapplicable. There is here no fiduciary relationship and the property has passed.

I am aware that this view may seem to be strictly not in accord with the broad statements of Lord Haldane, some of which I have cited. But he was dealing simply with an *ultra vires* loan transaction, purporting to transfer money by way of loan to a society which had no power to repay. There was no intention to deal with *ultra vires* contracts of another character. This is made clear by Lord Parker, who, at p. 440, says:—

> It has been settled in the cases of *National Permanent Benefit Building Soc.*, L.R. 5 Ch. 309; *Blackburn and District Benefit Building Soc.* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 61; 9 App. Cas. 857; and *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, that an *ultra vires* borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make. At the same time there seems to be nothing in those decisions which would bind the House, if they were considering whether an action would lie in law or in equity to recover money paid under any *ultra vires* contract which was not a contract of borrowing; for example, money paid to a company or association for the purchase of land which the company had no power to sell and the sale of which was therefore void, or money paid to the company or association by way of subscription for shares which it had no power to issue. In such cases the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the *ultra vires* contract. It will, therefore, be well to postpone consideration of such cases as the *Phœnix Life Ass. Co.*, 2 J. & H. 441, and *Flood* v. *Irish Provident Assur. Co.*, 46 Ir. L.T. 214, till the question actually arises.

The case of *Flood* v. *Irish Provident*, [1912] 2 Ch. 597, 599, is not therefore to be taken as overruled. There it was held that premiums paid on a void life policy could be recovered.

Now, it seems to me fairly clear that Lord Parker was of opinion that the decisions he cites and follows were confined to *ultra vires* borrowing transactions and that in other cases of money paid on an *ultra vires* transaction, where the promise was not part

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of the contract but collateral to it, then an implied promise to repay might well be raised.

Then, in the case of goods sold on an *ultra vires* contract, we are surely *a fortiori* justified in imputing a promise to make restitution or compensation. The property has passed and as pointed out in the decisions of the Supreme Court of the United States above cited, the action is not maintained on the original contract but on an implied and collateral contract to return or make compensation for property it (the corporation) has no right to retain. "To maintain such an action is not to affirm, but to disaffirm the unlawful contract." The action is not *in personam* to enforce the terms of the contract of sale. And the property having passed proceedings *in rem* and the equitable remedy of the tracing order are inapplicable. In the result, in my opinion, the plaintiff, having disposed of the goods, must make compensation.

It would follow, if we adopted the rule applicable to *ultra vires* loan transactions, as laid down, to *ultra vires* transactions involving the sale of goods, that a perfectly solvent corporation could be held liable only if it had retained the goods or obtained their proceeds, if sold, in some form such as promissory notes into which the goods could be traced. If, on the other hand, that solvent corporation received the proceeds in cash and applied them in payment of its own current obligations, then it would have no liability whatever. The result would be a manifest injustice.

I have, therefore, come to the conclusion that the plaintiff company must account to the defendant company as set out in the defendant company's set-off. The result is that I would affirm the judgment appealed from. Whenever the defendant company's claim is liquidated by payment, the accounts held by it should be re-assigned to the plaintiff company. Any sums received by the defendant company on those accounts, in addition to those for which credit is given in the set-off, should be applied on its claim.

Appeal dismissed.

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