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ANNOTATED

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VOL. 46

EDITED BY

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

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ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE Co. (Annotated.)

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Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 23, 1918.

INSURANCE (§ III D—66)—COMBINED STORE AND DWELLING—INSURED WHILE OCCUPIED AS A DWELLING—HOUSE UNOCCUPIED—LIABILITY OF COMPANY.

An insurance company issued separate policies insuring a number of houses, the policy in each case containing a clause insuring the building "while occupied by . . . as a dwelling." The houses were not completed or occupied at the time the insurance became operative. The court held that the word "by" should be deleted, and that while the insured may have been entitled to recover if loss had occurred before completion or occupation, that once the houses were occupied the condition attached and that subsequent vacancy suspended the insurance during the time of such vacancy, also that a building occupied as a combined store and dwelling was not occupied as a dwelling within the meaning of the above clause.

[*Ross* v. *Scottish Union and National Ins. Co.* (1917), 39 D. L. R. 528, 41 O.L.R. 108, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1917), 39 D.L.R. 528, 41 O.L.R. 108, affirmed, reversing in part the judgment on the trial in favor of the plaintiffs.

Hugh J. Macdonald and *J. E. Lawson*, for appellants.

McKay, K.C., for respondents.

Davies, C.J.

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

Idington, J.

IDINGTON, J. (dissenting):—The respondent, on May 9, 1913, issued 10 insurance policies to the owners of a row or block of ten buildings, insuring for 3 years said owners (who paid a cash premium for each of same) against losses by fire in respect of any of said buildings.

One of said owners, with the consent of the respondent, transferred his interest in said policies to his wife, the appellant B. Langbord.

The houses were all unoccupied, and indeed not quite finished at the time when these transactions took place. None were occupied till at least 6 weeks had run from the date of the insurance thus professed to have been effected and in fact paid for.

And some further time expired before tenants were got for all. Exactly how long is not made clear. Yet, according to

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some opinions expressed below, these thrifty people were knowingly paying in advance for nothing. I cannot find on the true interpretation and construction of the contract that such was ever conceived by those concerned to be the nature of their contract.

The said policies were all in the same form and each was designed to cover the tenement corresponding with the number it was applicable to. Each contained the following clause:—

> $1,200 on the 2 story brick fronted, roughcast, shingle roof building and additions, including foundations, plumbing, steam, gas and water pipes and fixtures, while occupied by ..... as a dwelling, and situated on .....on the east side of Keele Street, Toronto, Lot 50, 51, 52, plan No. 1612, between Eglinton Avenue and Cameron Avenue, known as house Number —.

In the course of the trial many defences were set up. And as, in my opinion, each and all thereof, except two dependent upon the legal interpretation and construction of their contract, were so effectually disposed of by the findings of the jury in answer to questions submitted which upon the relevant facts they alone were entitled to pass upon, I will deal only with those excepted which I have referred to.

It seems that four, or possibly five, of the houses in question had been vacant for a considerable time before and at the time of the fire which destroyed said block and resulted in what is now in question herein.

It is urged that the said policies must be read as if the words "owner or tenant" had been written therein, where a blank space is left after the word "by," and much varying ingenuity has been displayed in filling up in imagination what the respondent, in using the printed form, deliberately left blank.

I respectfully submit we have no right to fill up anything in a contract emanating from the respondent and therefore to be rather construed as against than in favor of it. At best it stands as an ambiguous contract. In order to interpret and construe it correctly, we may summon to our aid the surrounding circumstances before and immediately succeeding its execution.

The conduct of the parties in such relation is, in my opinion, fatal to any such contention as set up and maintained on the ground of vacancy, when we consider that the insured was

paying, evidently from the outset, on the hypothesis that the policies were intended to insure against loss by fire notwithstanding vacancies of no matter how long duration, unless under circumstances giving rise to conditions beyond what the contracting parties had in that regard in view in contracting.

In such latter event there might arise a question of something material to the risk falling within the terms of statutory condition No. 2.

That possible aspect of the matter has been disposed of by verdict of the jury to whom it was submitted.

Moreover, the vacancies now claimed to have voided the policies existed at the time when the appellant paid for and got a renewal of each policy in May, 1916, for a further term of 3 years.

I know not why we should actually fill in the blank with words selected by the manager of respondent instead of what common sense would indicate in light of the conduct of the parties by inserting the word "nobody" if, as I am not, obsessed with the idea that it must be filled in.

The words "occupied by" are in themselves meaningless and should be treated, as they evidently are, as surplusage. I submit that we must ever, if possible, try to fit the language used to the actual situation with which those contracting were confronted and dealing, if we would do justice.

Can there be a shadow of doubt herein that it was the impossibility of fittingly meeting that situation by any ordinary expedient of filling in the blank in a way which could be rendered conformable with the mutual understanding of the parties, that led to the entire omission of any attempt to do so?

That being my view of the situation I forbear from inserting anything, and then the language used to be given effect to can only be rendered intelligible by treating those words "occupied by" as mere surplusage which somebody forgot to draw a pen through in filling up a printed form.

The clearly intelligible purpose was to insure dwelling-houses at the usual rate therefor as agreed upon, and not stores, which would have to pay a higher rate and could not be insurable for a 3-year term.

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If the respondent could have shewn any such difference of rates had ever been made applicable to distinguish occupied from vacant dwelling-houses, I might have been able to see the situation in another light. But no such distinction has ever been made that the experts called by respondent can tell of. Cases dependent upon the varying conditions which marine insurers have to meet and have long provided for in manifold ways can be of no help here.

No one pretends that insurance may not be made to meet conditions of any kind.

What we are asked to do here is make a contract which the parties did not make, never thought of making, and by resorting to another class of insurance business entirely outside the class of insurance business the parties were dealing with to make a series of contracts for them.

I think the appeal should be allowed and the judgment of the trial judge be restored with an amendment thereto excepting the shop or corner store of the block as furnishing any basis for recovery, and hence reducing the judgment to $10,800 with costs to appellants of the trial and in the Appellate Division, and two-thirds of the cost of their appeal here, in which they have only partially been successful.

The question of interest should not be meddled with now.

Anglin, J.

ANGLIN, J.:—At the trial the plaintiffs recovered $12,000 —$1,200 in respect of each of 10 houses insured with the defendants. On appeal, as a result of somewhat divided opinions, 39 D.L.R. 528, 41 O.L.R. 108, their recovery was restricted to their claims upon policies on such of the houses as were actually occupied as dwellings at the time of the fire, and the occupancy of one house being uncertain, a reference was directed to ascertain the amount of the plaintiffs' enforceable claim.

I think it is not possible to set aside the finding of the jury that the vacancy of the premises was not a change in their condition material to the risk within the meaning of the second statutory condition. While I should quite probably have found otherwise if trying the case myself, there are circumstances in evidence which make it impossible to say that 10 or 12 reasonable men could not honestly have reached such a conclusion. Neither,

on the other hand, in view of the fact that there was a separate policy on each house, can it be held that vacancy in any one or more of them was a change material to the risks upon others which were tenanted.

That the words, "while occupied by . . . as a dwelling-house," if, and so far as, they should be taken to form part of the contract of insurance sued upon, are not to be regarded either as a condition or a warranty but are descriptive and restrictive of the subject-matter of the risk is conclusively determined by the decision of this court in *London Assurance Co.* v. *Great Northern Transit Co.*, the *Baltic* case (1899), 29 Can. S.C.R. 577. The only possible distinction between that case and the one now at bar arises from the omission to fill in the blank following the word "by" in the policy before us.

Should the court fill in that blank by whatever word the circumstances indicate, in its opinion, as the most likely to have been in the contemplation of the parties, giving due weight to the maxim *verba chartarum fortius accipiuntur contra proferentem?* Or should the result of the omission be the excision from the policy of the entire clause in which it occurs on the assumption that the proper inference from the failure to fill in the blank is that the person issuing the policy intended not to make any use of that portion of the form? Or should only that word, or those words, be deleted which can be given no sensible application without filling in the blank?

In *Glynn* v. *Margetson & Co.* [1893] A.C. 351, at p. 358, Lord Halsbury quotes with approval the statement of Lord Ellenborough in *Robertson* v. *French* (1803), 4 East 130, 102 E.R. 779, at p. 135, that "the same rule of construction which applies to other instruments applies to . . . a policy of insurance."

In my opinion the first alternative of the three suggested should not be adopted. It involves too great a risk of making a wrong guess—too great a probability of making the description, something which neither party intended—unless perhaps the blank should be filled in with the word "somebody" or "anybody," which would be equivalent in effect to striking out the word "by." While "the law will, as much as it can, assist the

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frailties and infirmities of men in their employments, who . . . may easily make a slip (*Lord Say & Seal's* case (1712), 10 Mod. 40, 88 E.R. 617, 4 Br. P.C. 73,) the reason underlying the supplying of omitted words is *ut res magis valeat quam pereat* (*Langston* v. *Langston* (1834), 2 Cl. & F. 194, 243, 6 E.R. 1128), and a clear case of necessity to avoid apparent absurdity, repugnancy or inconsistency (*Clements* v. *Henry* (1859), 10 Ir. Ch. R. 79, 87-8), and

> such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties.

(*Coles* v. *Hulme* (1828), 8 B. & C., 568, 573, 108 E.R. 1153), are pre-requisites to the exercise of this benevolent curial function. Moreover, since the ambiguity or uncertainty is patent, the intention can be gathered only from the other parts of the instrument, as in *Flight* v. *Lake* (1835), 2 Bing. N.C. 72, 132 E.R. 28. It cannot be established by extrinsic evidence. See cases collected in 10 Hals., par. 796, notes (k) and (m), and *Turner* v. *Burrowes* (1830), 5 Wend., N.Y., 541. The policy here affords no clue to the word (if any) which should be supplied to fill the blank.

In regard to the second and third alternatives, an analysis of the clause under consideration may be helpful. Its apparent purpose is to provide for a triple restriction upon the subject matter of the risk; (a) it must be a dwelling-house as distinguished from a building of any other character; (b) it must be occupied as such; (c) assuming the blank to be restrictively filled in, the occupant must be the person designated or answer the description given. It would seem to have been intended to leave a discretion to the person issuing the policy only as to the third restriction.

In the construction of an instrument the rejection of words is sometimes permissible but only so far as they are repugnant or insensible—only so far as is necessary to make that sensible which their presence renders insensible. *Grey* v. *Pearson* (1857), 6 H.L.Cas. 61, 10 E.R. 1216, at p. 106. In delivering the opinion of the judges advising the House of Lords in *Smith* v. *Packhurst* (1742), 3 Atk. 135, 26 E.R. 881, Willes, L.C.J., said, at p. 136:—

> Before I proceed to the questions I shall lay down some general rules and maxims of the law, with respect to the construction of deeds;

first, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, *and may reject any words that are merely insensible*: these maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Hale, L.C.J., and the law commends the astutia, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel, but is very ill-becoming a judge.

Here the lacking word is the objective of the preposition "by." If that word "by" be deleted the rest of the clause makes perfect sense. The failure of the person issuing the policy to fill in the blank no doubt precludes the company invoking any restriction as to the personality of the occupant. But what possible justification can there be for rejecting or ignoring such distinct restrictions placed upon the nature of the risk assumed as the words "occupied" and "as a dwelling-house" import? I can find none. I am prepared to treat the failure of the agent issuing the policy to fill in the blank as apparently an exercise of his discretion not to place any restriction on the personality of the occupant, but I am not prepared to treat it as warranting the excision of the entire clause—something apparently not intended to be left to his discretion at all. I would strike out the word "by" to make the contract sensible; but to attain that object no further deletion is requisite; none is permissible. To excise the remainder of the clause would be to make a new contract for the parties.

The meaning of the words "while occupied as a dwelling-house," read consecutively, as I think they must be, in my opinion admits of no doubt. As the *Baltic* case, 29 Can. S.C.R. 577, establishes, the word "while" imports an intermittently suspensive negative. The quest of a difference in shades of meaning between the adverbial conjunction "while" of the policy now before us and the "whilst" of that dealt with in the *Baltic* case, 29 Can. S.C.R. 577, would be even more vain than

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pedantic. If not merely two forms of the same word, they are certainly synonymous. The Imperial Dictionary; The Century Dictionary. Vbo. "Whilst." The risk ceases to attach during periods when the subject-matter may not answer to the restrictive description "occupied as a dwelling-house." See, too, *Langworthy* v. *Oswego Ins. Co.* (1881), 85 N.Y. 632, cited by Riddell, J., and Huebner on Property Insurance, p. 20.

Although the word "occupied" used alone as a word of description may only mean occupied at the date of the assumption of the risk (*O'Neil* v. *Buffalo Fire Ins. Co.* (1849), 3 N.Y. 123, *Maher* v. *Hibernia Ins. Co.* (1876), 67 N.Y. 283, 288), used as it is here with the word "while" it clearly imports continued occupation during the term of the risk, and that that occupation should be actual as distinguished from mere legal possession as the basis of the risk.

It was long since (28 Car. II.), held that:—

> Occupant and occupier are always in law taken for an actual possessor, one that useth, enjoyeth or manureth the land. *Ironmongers Co.* v. *Nayler* (1677), Poll. 207, 216, 86 E.R. 562.

Occupied means actual *de facto* occupation. *Robinson* v. *Briggs* (1870), L.R. 6 Ex. 1. To treat the word "occupied" otherwise in the present context would be to deny it all effect, just as Sedgewick, J., points out the word "running" had been denied effect by the provincial courts in the *Baltic* case, 29 Can. S.C.R. 577. The building would be insured simply as a dwelling-house, not as an occupied dwelling-house, or, "while occupied." If there could be any doubt as to the signification of the two words "while occupied," the addition of the word "by," which, although to be deleted for other purposes, may if necessary be looked at to ascertain the meaning of the word "occupied" to which it is appended, would seem to remove it. While vacant, as they were for many months prior to, and at the time of, the fire because of failure to rent them, the houses in respect of which it has been held that the plaintiffs cannot recover did not answer the description of the subject-matter in the policy and were, therefore, not covered by the insurance. Mere temporary vacancy, such for instance as that due to the whole family of the occupant being absent over night would involve entirely different considerations. See *Meeks* v. *The State* (1897), 102 Ga. 572.

The fact that the houses were uncompleted and, therefore, not occupied as dwelling-houses when the risks were assumed and for several weeks thereafter was much relied on as indicating that the parties must have intended that the restriction of actual occupation should not apply. No doubt the insurance agent knew of this state of facts; and the policy expressly provides that the risk is to begin from noon on May 8, 1913, the date of the plaintiff's application. It may be that, having regard to these circumstances, had one (or more) of the houses been burned before it had become tenanted, assuming the lapse of time not to have been greater than the parties might reasonably be taken to have contemplated for the completion of the building and the securing of a tenant, the courts would have held the plaintiffs entitled to recover in respect of it. But I am quite satisfied that as soon as each house became occupied the suspensive restriction in the policy on it applied and vacancy thereafter, so long as it lasted, took that house out of the risk. Moreover, the action is not upon the original policies, but upon renewals, which are to be regarded as new contracts; *Agricultural Savings and Loan Co.* v. *Liverpool, &c. Ins. Co.* (1901), 3 O.L.R. 127, and the evidence is not entirely clear as to the conditions as to occupation at the date of the renewals of the houses that were vacant at the time of the fire, and there is no evidence that they were made with knowledge of vacancy on the part of the company.

The controverted suggestion of counsel for the appellants that the defence based on vacancy was confined at the trial to change material to the risk not notified as required by the second statutory condition, if well founded, cannot assist him, inoccupancy as a departure from the description of the risk having been neither pleaded nor pressed. The fact of vacancy was distinctly pleaded (R. 141) and there is no suggestion that any additional evidence bearing on it could have been adduced. The defence which succeeds is purely one of law arising from the construction of the policy sued upon. It was certainly raised and passed upon by the Appellate Division, and it is not usual for this court to interfere with the discretion exercised by a provincial appellate court in regard to raising on appeal issues

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of law arising on the documents and facts in the record though not pressed at the trial. A case of surprise within r. 143 is scarcely made out. The argument based on the 8th statutory condition is answered by the Chief Justice of the Common Pleas.

I agree with the disposition made by the Appellate Division of the claims in respect of the corner building occupied as a store and of the dwelling-house as to the occupancy of which there is some uncertainty.

Counsel for the respondent pressed his plea for a reduction in the amount allowed for the loss upon each house only in the event of the court holding that the plaintiffs should recover in respect of the vacant houses.

On the claim for interest I agree with Rose, J., that the plaintiffs are entitled to succeed, but their right to interest dates from the expiry of 60 days after proofs of loss were furnished. In *Toronto R. Co.* v. *City of Toronto*, [1906] A.C. 117, 121, the Judicial Committee impliedly, if not expressly, approved the statement of Armour, C.J., in *McCullough* v. *Newlove* (1896), 27 O.R. 627, at p. 630, as to the scope of the provision of the Ontario Judicature Act which makes interest payable in all cases in which it has been usual for a jury to allow it. The Chief Justice said, p. 630:—

> Judging from my own experience, I may say that I think it has been usual to tell juries in cases where money is claimed under what were formerly called the common counts, that they might give interest from the time when the money claimed became payable, and that juries have usually given it.

In the *City of London* v. *Citizens Ins. Co.* (1887), 13 O.R. 713, 724, Ferguson, J., held that the fact that the amount to be paid had not been ascertained until the termination of the action did not prevent the plaintiffs suing on an insurance contract, from recovering interest on

> the sum now ascertained to have been, and to be, owing to the plaintiffs. The money was payable by virtue of the defendants' deed and I think the interest should be allowed.

Since the defendants no longer contest the plaintiffs' right to recover the full amount of each of the policies on the tenanted houses and since by their general repudiation of liability they precluded themselves from objecting to the sufficiency of the proofs of loss, the face amounts of such policies should be

deemed to be debts that became payable according to their terms on the expiry of sixty days after the proofs of loss were furnished. These features distinguish this case from *McCullough* v. *Clemow* (1895), 26 O.R. 467, in which a different result was arrived at by Osler, J. A.

In view of the very limited measure of success that has attended the plaintiffs' appeal our discretion as to costs will, I think, be judiciously exercised if we allow to the respondent five-sixths of its costs in this court.

BRODEUR, J. (dissenting) :—The main question on this appeal is as to the construction of the contract. Brodeur, J.

In May, 1913, ten insurance policies were issued on 10 houses built in a row of buildings in Keele St. in Toronto. When the policies were made the houses were not yet finished and were unoccupied. It took several weeks before the work was finished. However, the company, being aware of the fact that those houses were unoccupied, issued a policy for 3 years and charged the owners the usual rates for a dwelling-house for such a period. The 3 years having expired, renewal receipts were issued for another period of 3 years, during which the fire occurred on August 29, 1916.

The insurance company having denied liability, the plaintiffs had to institute the present action to recover the amounts of those ten insurance policies. At the trial the issues fought were as to the amount of the loss and as to the contention of the insurance company that the vacancy of some houses caused a change material to the risk not only for those vacant houses but also for those which were occupied at the time.

The findings of the jury were that the losses as claimed were proved and that the vacancy of some houses would not constitute a change material to the risk.

There was evidence that the fire actually started upon one of those occupied premises and there were other circumstances proved which justified the jury in finding that there was no material change in the risk, and, according to the provisions of the Insurance Act, such a question is a question of fact which should be left to the jury (s. 156 (6)).

A judgment was rendered in favor of the plaintiffs, by the trial judge, for the losses on the whole of the ten houses.

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In appeal that judgment was maintained as to the occupied houses but was reversed as to the corner house (because it was a store) and as to the houses which were vacant at the time of the fire.

The plaintiffs now appeal to this court. There is no cross-appeal on the part of the company; so we have to determine here only whether or not the losses incurred with regard to the store and the unoccupied houses are covered by the contract.

I will first deal with the unoccupied houses, which is the more important item.

The ten policies are all drafted in the same way, with the exception of the house number. Here are the material parts of the policy concerning house No. 1:—

Scottish Union and National Insurance Company . . . does insure Ross Bros. and M. Langbord *for the term of* three years, *from the* 8th *day of* May, *1913, at noon to the* 8th *day of* May, *1916, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding* Twelve hundred xx/100 *dollars to the following described property while located and contained as described herein and not elsewhere, to wit:*

Then follows the description of the subject-matter of the insurance on a printed slip pasted into a blank space in the policy, which slip is headed "Dwelling House Form":—

On the 2 story, brick fronted, roughcast, shingle *roof building and additions, including foundations, plumbing, steam, gas and water pipes and fixtures, while occupied by . . . as a dwelling, and situated No. — on the* east *side of* Keele *Street,* Lot 50, 51, 52, plan No. 1612, between Eglinton Avenue and Cameron Avenue known as House No. 1, Toronto.

The parts in italics are printed the others are written.

It is contended by the appellant that it was not necessary that those buildings should be occupied. On the other hand, it is contended by the respondent that the words "while occupied by . . . as a dwelling" are descriptive of the thing insured and they rely on the judgment rendered by this court in the case of *London Assurance Co.* v. *Great Northern Transit Co.*, 29 Can. S.C.R. 577, which is known as the *Baltic* case. That case was concerning the insurance against fire on the hull of the S.S. "Baltic"

whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building.

The "Baltic" was laid up in 1893 and was never afterwards sent to sea. In 1896, she was destroyed by fire.

The Supreme Court came to the conclusion that the ship was insured only while employed on inland waters during the navigation season or laid up in safety during the winter months.

It was pretty plain and evident in that case that what was insured was a navigating vessel and that the insurance could not cover that vessel when she was laid up, except during the winter months. For several years that vessel had been out of commission and in such a case I could understand very well the decision of this court that the assurance could not cover the time when she had ceased to be used as a navigating vessel.

But the facts in this case are very different. First, the circumstances under which the contract was made shew the intention of the parties. When the policies were issued, the houses insured were not quite finished and they were vacant and were likely to be unoccupied for weeks and months. The insurance company knew that the houses were vacant. However, the company was willing to insure them as vacant dwellings, since it was stipulated in the contract prepared by the company itself that the insurance would cover the period from May 8, 1913, to May 8, 1916.

Can it be said, in view of that formal stipulation and in view of the fact that the company knew that the houses would be unoccupied for weeks and months, and in view also of the fact that the company charged for the full three years, that it was not intended on its part to insure the dwelling-houses, whether vacant or not?

I think that those circumstances shew conclusively that the contract intended by the parties was purely and simply to insure those dwellings; and it was not absolutely necessary that they should be occupied, because if they wanted to stipulate such a condition, it was very easy for them to fill the blank which was in their policy. But they left a phrase there, "while occupied by . . . as a dwelling house," which did not mean anything by itself, except by striking out the word *by* or by adding some others, like *the owner, the tenant* or *anybody*.

The stipulation is the stipulation of the company and it was its duty to make it clear and if there is any ambiguity then it

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should be construed against the company. According to my view, those printed words, "while occupied by . . . as a dwelling house," should be considered as non-existing. *Chapman* v. *Chapman* (1876), 4 Ch. D. 800; *Gill* v. *Bagshaw* (1866), L.R. 2 Eq. 746; Cyc. vo. Accident Insurance, p. 245; *Hall* v. *American Employers Ins. Co.* (1895), 96 Ga. 413; *Merritt* v. *Yates* (1874), 71 Ill., 636.

The subject-matter of the insurance was a dwelling. Its vacancy might constitute a change material to the risk. But it would then be a question to be determined by the jury, and, in this case, we have a finding that those vacancies did not constitute a material change.

It has been suggested that the word *by* in the phrase, "while occupied by . . . as a dwelling-house," could be struck out and that the policy would then read as on a *building while occupied as a dwelling-house.*

That condition would not change the liability of the company. It would not necessarily mean that the dwelling should be vacant, but it would mean simply that this building should be used as a dwelling-house, and not as a store, as a barn, as a garage, or something different from a dwelling-house.

Now as to the store. The building was insured as a dwelling-house. It is in evidence that the property was partly occupied by a store and partly for residential purposes. By the Insurance Act of Ontario, it is provided that policies for stores should be made on a different footing. The company never intended in this case to insure a store, because the policy should have been for a period not of three years but of one year, as required by the law, and should have described the property not as a dwelling-house but as a store. We have no evidence to shew whether, when the insurance was taken out, it was considered as a store or as a dwelling. If the change was made after the policy was taken out, it became the duty of the insured to notify the company of the change, which I consider as being a material one; and, in that regard, I am of opinion that the jury came to a wrong conclusion which the evidence did not justify.

The judgment of the Court of Appeal should be maintained

as to that corner house but it should be reversed with regard to the vacant houses.

The appeal should be allowed with costs.

MIGNAULT, J.:—I concur with Anglin, J.

Appeal dismissed.

ANNOTATION.

Effect of Vacancy in Fire Insurance Risks.

BY F. J. LAVERTY, K.C., MONTREAL.

It will be noted that this decision turns on the value to be given to the words appearing in the policies "while occupied as a dwelling-house"; both the Supreme Court and the Court of Appeal considered the question as concluded by the precedent of the *Baltic* case.

It will be noted further that the jury found as a fact that the vacancy of the premises was not a change in their condition material to the risk. Anglin, J., remarks that he would probably have found otherwise if trying the case himself, but is not prepared to set aside the finding.

Riddell, J., in the Court of Appeal, found that the evidence as to the materiality of such change was overwhelming.

Although the judgment of the Supreme Court is based on the interpretation of the phrase above mentioned, the case touches the vexed question of the effect of vacancy in fire insurance risks, and a review of the relevant jurisprudence on this point may be useful.

Attention is drawn to the great number of American and Canadian decisions and to the paucity of English precedents; this is due probably to the presence on this continent of the statutory conditions, and to the fact that the English rule appears to be that increase of the risk does not discharge the insurers, unless it is shewn to have contributed to the loss. On no question of insurance law do we find more numerous, and, in many cases, more irreconcilable decisions. It is a difficult and almost impossible task to extract any generally accepted principles.

1. Is the mere mention or description of premises as occupied, or as occupied in a certain manner, equivalent to a promissory warranty that they will continue to be so occupied?

The contrary would seem to be the rule; see Cooley's Briefs on the Law of Insurance, pp. 1294-1628, quoting among other cases *Browning* v. *Home Ins. Co.* (1876), 6 Daly, N.Y. 522; *Evans* v. *Queen Ins. Co.* (1892), 31 N.E. 843; *Boardman* v. *New Hampshire Ins. Co.* (1847), 20 N.H. 551; *O'Neil* v. *Buffalo Ins. Co.* (1849), 3 N.Y. 122.

2. When is a property to be considered as vacant or unoccupied?

On this point we find the most diverse and conflicting findings, but certain general principles have been fairly well settled:

(a) Under the general rule that the construction of the contract is the province of the court, what is meant by these words, as used in the vacancy clause, is a question of law: *Phœnix Ins. Co.* v. *Tucker* (1879), 34 Am. Rep. 106; *Schuermann* v. *Dwelling House Ins. Co.* (1896), 161 Ill. 437; *Hartshorne* v. *Agricultural Ins. Co.* (1888), 50 N. J. Law 427; Cooley, p. 1663;.

(b) The two words are not synonymous: "vacant" implies total abandonment (*Whitney* v. *Black River Ins. Co.* (1876), 9 Hun (N.Y.) 37),

Annotation. and that the building is not occupied for any purpose; *Pabst* v. *Union Ins. Co.* (1895), 63 Mo. App. 663; it means "deprived of contents, empty"; *Limburg* v. *German Fire Ins. Co.* (1894), 90 Iowa 709; *Thomas* v. *Hartford Fire Ins. Co.* (1899), 53 S.W. 297; Cooley, p. 1663; *Home Ins. Co.* v. *Peterman* (1914), 165 S.W. Rep. 103. In this definition "empty" has reference to the use of the building, and though it is not empty, if the articles stored there are of a character foreign to the use of the building, it will be regarded as vacant; *Martin* v. *Rochester German Ins. Co.* (1895), 86 Hun 35.

A building may, therefore, be unoccupied by human beings and yet not be vacant (*Norman* v. *Missouri Fire Ins. Co.* (1898), 74 Mo. App. 436); on the other hand, the word "occupied" refers to occupation by human beings and implies an actual use by some person or persons according to the purpose for which the building is designed: *Stoltenberg* v. *Continental Ins. Co.* (1898), 106 Iowa 565; *Ashworth* v. *Builders' Mut. Ins. Co.* (1873), 112 Mass. 422; *Spahr* v. *North Waterloo Ins. Co.* (1899), 31 O.R. 525. The word, however, does not imply that some person must be in the building all the time without interruption, but merely that there must be no cessation of occupancy for any considerable length of time: (*Vanderhoef* v. *Agricultural Ins. Co.* (1887), 46 Hun (N.Y.) 328; *Robinson* v. *Mennonite Ins. Co.* (1914), 139 Pac. Rep. 420.)

(c) The use and occupancy which will satisfy the condition must be of such a character as ordinarily pertains to the purpose for which the building is adapted or devoted: see numerous cases cited in Cooley, p. 1664; also 19 Cyc., p. 729 *et seq.*

The purpose and intent of the clause forfeiting the policy, if the premises become vacant or unoccupied, is to secure as a precaution against loss that care and watchfulness which the owner or occupant of the building will naturally give it. The rule is that the insurer had the right to the care and supervision involved in the occupancy, in view of the use to which the building is devoted: *Bishop* v. *Norwich Union* (1893), 25 N.S.R. 492, 498; *Peck* v. *Agricultural Ins. Co.* (1890), 19 O.R. 494; *Abrahams* v. *Agricultural Mutual Ass'ce. Co.* (1876), 40 U.C.Q.B. 175, 184; which three Canadian cases follow *Ashworth* v. *Builders' Ins. Co.*, 112 Mass. 422, as pointed out by Boyd, C., in the more recent case of *Spahr* v. *North Waterloo Ins. Co.*, *supra*, in which he reviews the authorities. In this case the policy contained a condition relieving the company in the event of the house being unoccupied. The occupant ceased to reside in it for several weeks, but left furniture and clothing there, while a person entered it every day for domestic purposes and on two occasions plaintiff's husband slept there. The court found, on these facts, that the house was untenanted and vacant in the sense of this condition. Apparently the earliest Canadian decision on the point is that of *Canada Landed Credit Co.* v. *Canada Agricultural Ins. Co.* (1870), 17 Gr. 418, holding that absence for a short time, say for 3 days, would not be a fatal violation of the condition against vacancy.

The same rule was followed in the case where the son of the owner slept in the house during the day, but was absent at night at his work. (*Eureka Fire Ins. Co.* v. *Baldwin* (1900), 57 N.E. 57).

Where there is no attempt to abandon the premises and the absence was merely temporary, occasional visits and supervision will suffice to

prevent forfeiture: *Hill* v. *Ohio Ins. Co.* (1894), 99 Mich. 466; *Johnson* v. *N. Y. Bowery Fire Ins. Co.*, 39 Hun. (N.Y.) 410. **Annotation.**

It has been held in some cases that though the occupant has removed from a house, if he has left a substantial part of his furniture and household goods therein, that fact prevents it being unoccupied: *Home Ins. Co.* v. *Wood* (1891), 28 Pac. Rep. 167; *Gibbs* v. *Continental Ins. Co.* (1878), 13 Hun (N.Y.) 611.

The authority of these decisons, however, is doubtful.

A house may be vacant yet occupied: so held in *Thieme* v. *Niagara Ins. Co.* (1905), 91 N.Y. Supp. 499, where, after a tenant vacated the house, insured's husband placed a bed in it and slept there five nights a week.

In another case where the condition read "vacant or unoccupied," it was held that while the presence of furniture prevented it from being vacant, it was nevertheless unoccupied: *Herman* v. *Adriatic Ins. Co.* (1881), 85 N.Y. 162.

The intent to retain or abandon the house as a customary place of abode has been regarded as an important, if not a determining factor, in deciding whether it is unoccupied: see cases cited by Cooley, p. 1670; *Westchester Ins. Co.* v. *Redditt* (1917), 196 S.W. Rep. 334; *Roach* v. *Ætna Ins. Co.* (1909), 121 N.W. Rep. 613; *Kampen* v. *Farmers' Ins. Co.* (1911), 133 N.W. Rep. 163. However, even the intent to return will not excuse non-occupancy for 8 or 10 months: (*Sleeper* v. *New Hampshire Ins. Co.* (1876), 56 N.H. 401.)

Vacancy for a few days pending arrival of a new tenant will not forfeit the insurance; *Covey v. National Ins. Co.* (1916), 161 Pac. Rep. 35; *Scubert* v. *Fidelity-Phenix Ins. Co.* (1912), 136 N.W. Rep. 103.

A recent Alberta decision holds that the condition as to vacancy contemplates vacancy in the ordinary undestroyed condition of a building and not after it had been rendered untenantable by a previous fire: *Moran* v. *North Empire Fire Ins. Co.* (1917), 33 D.L.R. 461, 10 A.L.R. 339.

(d) The same general principles are followed in the case of buildings other than dwellings; *Limburg* v. *German Ins. Co.*, 90 Iowa 709.

If the operations of a factory are suspended temporarily only, as for the purpose of making needed repairs, and watchmen or other employees engaged in duties connected with the business are about the premises, the factory is not vacant or unoccupied; see a number of cases quoted by Cooley at p. 1672.

Even a suspension of work for lack of power or raw material is not within the meaning of the vacancy clause, in the absence of any intent to abandon: *Whitney* v. *Black River Ins. Co.* (1876), 9 Hun (N.Y.) 37; *Bellevue Roller-Mill Co.* v. *London Ins. Co.* (1895), 39 Pac. Rep. 196.

The following was the holding in *Keith* v. *Quincy Ins. Co.* (1865), 10 Allen (Mass.) 228: "It is not sufficient to constitute occupancy that the goods remained in the shop and that the plaintiff's son went through the shop almost every day to look around and see that things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time and the policy became void."

Annotation. A similar rule was followed by the Court of Appeal of Washington in *Re Brehm* v. *Svea Ins. Co.* (1905), 79 Pac. Rep. 34, where there was a warranty that the property should not be idle or shut down for more than 30 days. It was held that the actual shipment or handling of small portions of the output of the plant did not include an idea of activity in the movement of the manufacturing appliances, which was intended by the words of the policy.

In *Stone* v. *Howard Ins. Co.* (1891), 27 N.E. Rep. 6, the stoppage of machinery for four months and the discharge of employees was held to have forfeited the policy under the condition, although the insurers knew that it was the custom to stop business in the dull season.

In *Halpin* v. *Phoenix Ins. Co.* (1890), 118 N.Y. 165, and *Halpin* v. *Ætna Fire Ins. Co.* (1890), 120 N.Y. 70, it was held that a structure insured as a morocco factory is not occupied after the tenant removes and business therein is suspended, though the machinery and fixtures remain and a watchman residing next door is in charge and a key is in the possession of insured's agent, who visits the premises frequently.

Beach on Insurance (1895), in his second volume, No. 734, analyzes these two last cases and quotes with approval the remarks of the court in rendering judgment:

"This citation of authorities is sufficient to shew that to constitute occupancy of a building used for manufacturing purposes, there must be some practical use or employment of the property. Its use as a place of storage is not sufficient. The condition against non-occupancy must be construed and applied in reference to the subject-matter of the contract and of the ordinary incidents attending the use of the insured property. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in the use of the property contemplated by the parties at the time of entering into the contract."

Apparently the only Canadian case in which this point has been squarely raised is that of *Village of Masson* v. *Liverpool Ins. Co.* (1905), 35 Que. S.C. 455, where Champagne, J., considered the effect of a clause prohibiting vacancy and providing for continual operation. Manufacturing operations ceased on October 12, 1907; persons visited the premises frequently up to February 10, 1908, when it burned. On these facts the policy was declared forfeited.

See also numerous cases cited in 19 Cyc., pp. 723, 733. It is pointed out here that endeavours of the insured while the factory was shut down to prevent loss and to actually lessen the risk that would be present were the factory in operation, as by the employing of watchmen, are immaterial. Further, that if a sawmill has stopped running for the winter, although men are employed about the premises shipping lumber and the machinery has not been dismantled and put in shape for the winter, it will be held to have ceased operation: *McKenzie* v. *Scottish Union* (1896), 44. Pac. Rep. 922.

3. What is the effect of vacancy in the absence of any special condition in the policy?

It seems to be well settled that the mere fact that the dwelling house is unoccupied is not *per se* a change material to the risk; it is a question of degree and intent as to how far leaving the premises so unoccupied is so material: see *Foy* v. *Ætna Ins. Co.* (1854), 3 Allen (N.B.) 29; *Shackelton* v. *Sun Fire Office* (1884), 55 Mich. 288; *City of Fall River* v. *Ætna Ins. Co.* (1914), 107 N.E. Rep. 367.

Annotation.

The Court of Appeal of the Province of Quebec, in 1905, held that where the owner left the house insured to work in the lumber shanties, and his wife, during his absence, went to reside with her parents, the policy containing no special prohibition, this did not amount to such an increase of risk as to vitiate the policy: *Mutual Fire Ins. Co.* v. *Mercier* (1905), 14 Que. K.B. 227: see also decision of Boyd, C., in *Boardman* v. *North Waterloo Ins. Co.* (1899), 31 O.R. 525.

Cases have arisen where the jury has been held to have properly found that the vacating of the premises, instead of increasing the risk, have decreased it, as where the occupants of a building have been threatened with incendiarism: *City of London Fire Ins. Co.* v. *Smith* (1888), 15 Can. S.C.R. 69, 76.

The conclusion to be drawn from this jurisprudence is that if the insurers raise the defence of vacancy, as being an increase of risk, they must be careful to make affirmative proof to that effect, as the court will not take such increase for granted.

4. Is a variation relieving the company from liability in the case of vacancy just and reasonable?

The practically unanimous jurisprudence is now affirmative: see the recent decision of the Court of Appeal of British Columbia, *Pratt* v. *Connecticut Ins. Co.* (1914), 16 D.L.R. 798. Two judges out of five, however, dissented. See also *Spahr* v. *North Waterloo*, 31 O.R. 525, and cases cited in Cyc., vol. 19, p. 726; see also recent judgments in Quebec: *Cox* v. *Phoenix* (1914), 20 D.L.R. 980, 23 Que. K.B. 530; *Anderson* v. *Norwich Fire Ins. Society* (1917), 53 Que. S.C. 409; *Village of Masson* v. *Liverpool Ins. Co.* 35 Que. S.C. 455.

In *Eckardt* v. *Lancashire Ins. Co.* (1900), 31 Can. S.C.R. 72, the Supreme Court held that conditions of this nature are to be judged with reference to the facts of the particular case under consideration. Further, that there was no ground for the contention that every variation from statutory conditions should be *primâ facie* held to be unjust and unreasonable, thus confirming the dictum of Gwynne, J., in *City of London* v. *Smith*, 15 Can. S.C.R. 69, 78. See also *Abrahams* v. *Agricultural Mutual Ass'ce Co.*, 40 U.C. Q.B. 175; *Peck* v. *Agricultural Ins. Co.*, 19 O.R. 494; *Cardinal* v. *Dominion Fire Ins. Co.* (1880), 3 L.N. 367. In *Gould* v. *British American Ass'ce Co.* (1868), 27 U.C.Q.B. 473, Hagarty, J., says: "If the company desires "to make continued residence a condition precedent to right of recovery" in the case of a dwelling, it must use express language to that effect; any ambiguity would be construed against the company.

When considering whether the condition as to occupancy is just and reasonable, the circumstances at the time the policy is issued, and not those at the time of the loss, must be regarded: *Payson* v. *Equitable Ins. Co.* (1908), 38 N.B.R. 436.

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McGLYNN v. HASTIE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. December 6, 1918.

BILLS AND NOTES (§ V—145)—CHEQUE TAKEN FOR PRE-EXISTING DEBT—PRESUMPTION OF CONDITIONAL PAYMENT—DISHONOUR—REVIVAL OF DEBT—IF GIVEN IN EXCHANGE FOR GOODS—BARTER WITH ALL RISKS.

If a bill, note, or cheque is taken for or on account of a pre-existing debt, the presumption is that it is only a conditional payment, and if it is dishonoured the debt revives; but, if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill with all its risks.

Statement.

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Huron, in favour of the plaintiff, in an action for $200.10, the price of 6 hogs sold and delivered to the defendant and the expenses of protest of a cheque given in payment for the hogs, which cheque was dishonoured.

The defendant alleged that in buying the hogs he was acting as agent for one Munro, and so informed the plaintiff, and that the plaintiff on the morning of the 18th October, 1917, accepted Munro's cheque, which was the dishonoured cheque, as payment for the hogs.

Charles Garrow, for appellant.

William Proudfoot, K.C., for respondent.

Maclaren, J.A.

MACLAREN, J.A.:—The defendant appeals from a judgment of the County Court Judge of Huron condemning him to pay the plaintiff $200.10 for 6 hogs, and the cost of protest of the cheque given in payment for them. The defendant claimed that he had bought the hogs as the agent of one Munro, and had so informed the plaintiff, and that the plaintiff accepted Munro's cheque in payment.

The evidence is that the defendant called at the plaintiff's house on the evening of the 17th October, 1917, and asked him if he had any hogs for sale. The plaintiff says that he answered that he "had 4 about ready." The defendant says that he told the plaintiff he was buying for a dealer named Munro, who was giving 17½ cents a pound, and was going to ship from the Gorrie station the following morning, and had given him blank cheques to fill up. The plaintiff says that Munro's name was not mentioned that evening. The defendant asked the plaintiff if he would bring his hogs to the station in the morning. The plaintiff says that his reply was,

"If it is a fine morning I will fetch them down" (it was raining that evening). In the morning the plaintiff brought to the station 6 hogs, which were weighed, and a slip was given him by the weigher, which he presented to the defendant, who filled up a blank cheque of Munro's drawn on the Dominion Bank at Wingham for $198.50, and gave it to him.

The plaintiff admitted that he had, a few weeks previously, sold another lot of hogs to one Scott, another agent of Munro's, and received in payment a cheque of Munro's filled up by Scott, which was honoured.

A brother of the defendant swore that he was present when the plaintiff called to see his brother about the cheque, and that the plaintiff then admitted that the defendant had told him on the evening of the 17th that he was buying for Munro and not for himself.

The trial Judge, however, preferred the testimony of the plaintiff on this point, and I accept his finding.

He has further held that the sale was made on the evening of the 17th October. In this I am of opinion that he is clearly in error. The plaintiff's evidence is that he said he had about 4 hogs ready, and if the next morning was fine he would take them to the station. He himself says that he was under no obligation to take them, and he took 6, instead of the 4 he had spoken of the previous evening, and they had to be weighed and delivered before the sale was complete. It is worthy of note that the solicitor of the plaintiff, in endorsing the particulars of his claim on the back of the writ of summons, gives the proper date of the sale, viz., the 18th October. The materiality of this question of date will presently appear.

The cheque was presented at the bank on the 19th October, and noted for non-payment, and protested on the 20th. The defendant was advised of this within a reasonable time, so that no question of laches arises.

While the plaintiff denied that the name of Munro was mentioned on the previous evening, he noticed, when the defendant gave him the cheque, that it was signed by Munro and not by the defendant, and he went away without saying anything about it. He, no doubt, was satisfied, as Munro's cheque which he had received from Scott a few weeks previously had been duly paid.

The authorities shew that where a bill, note, or cheque is taken

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for or on account of a pre-existing debt, the presumption is that it is only conditional payment, and if it is dishonoured the debt revives; but, if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill, with all its risks.

In *Fydell* v. *Clark* (1796), 1 Esp. 447, one of the earliest cases where this question arose, Lord Kenyon says (p. 448): "If, in the discount of the notes, he" (plaintiff) "took the bills and notes in question, he must be bound by it: the bankers parted with them, supposing them to be good; he took them under the same impression. Having taken them without endorsement, he has taken the risk on himself."

In *Camidge* v. *Allenby*, 6 B. & C. 373, at pp. 381, 382, 108 E.R. 489, Bayley, J., says:—

"If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril."

The law on the point is, in my opinion, correctly summed up in Byles on Bills, 17th ed., p. 182, where it says that where an unendorsed bill is given "not in payment of a pre-existing debt, but by way of exchange for goods . . . such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

See also Roscoe's Nisi Prius Evidence, 18th ed., p. 699, where it says: "A distinction has been drawn between the cases in which it" (a bill) "has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks."

In my opinion, the judgment appealed from should be reversed and the action dismissed.

Meredith, C.J.O. Ferguson, J.A.

MEREDITH, C.J.O., and FERGUSON, J.A., agreed with Maclaren, J.A.

Hodgins, J.A.

HODGINS, J.A. (dissenting):—The contest is whether the appellant bought the hogs as agent for one Munro, and whether the respondent accepted Munro's cheque as payment.

I have no doubt that there was no contract made on the evening of the 17th October, 1917. The appellant called on the respondent at his farm, and the evidence of both shews that, while the rate per pound was settled at 17½ cents, neither the number of hogs nor their weight nor their certain delivery was agreed upon. The matter was left in this way: that the respondent had some hogs to sell, that about 4 were ready to go, and that if it was a fine morning he would bring them down to the station at Gorrie. There was no binding obligation to deliver entered into, and, if there had been, yet an act still required to be done in order to fix the price—i.e., weighing. This shews that no contract existed previous to weighing and delivery next morning: *Logan* v. *LeMesurier* (1847), 6 Moore P.C. 116, 13 E.R. 628.

In the morning, 6 hogs, not 4, were brought in, and the appellant was there to receive them. They were weighed by the station agent and put in the pens. The weight and price were written on the back of the weigh-slip, and this was handed to the appellant by the respondent.

Upon the weighing and delivery and the consequent ascertainment of the price, the bargain for 6 hogs was for the first time a completed agreement, and the consideration became at once payable.

The trial Judge has preferred the evidence of the respondent to that of the appellant upon the question of whether on the evening of the 17th October, 1917, the statement was made that Munro was purchasing the hogs. The respondent point blank denies that any reference to Munro was made that night or indeed that he knew him in the transaction till he saw the name on the cheque given in payment. The appellant, on the other hand, asserts that he told him that Munro was shipping at Gorrie in the morning at 17½ cents and asked if he would like to fetch the hogs out, saying he had been over to Wingham and had got the blank cheques to pay the men in the morning.

There is nothing in the testimony that would suggest that the learned trial Judge is wrong in adopting the version which he prefers. It must therefore be taken that the sale was made by the respondent to the appellant not as agent but as principal. I am not at all sure, after perusing the evidence, that the appellant was not simply picking up hogs on his own account, having some agree-

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ment with Munro to take them at a price sufficient to pay for the appellant's time and trouble. But the finding I refer to puts an end to any such question. It also renders unimportant the difference between the respondent and the appellant's brother as to the effect of a conversation between them relative to this point of disclosed agency.

Such being the case, then, upon the delivery into the pens, the price became payable by the appellant. Instead of paying cash, he filled up a blank cheque of Munro's, making it payable to the respondent, gave it to him, and he took it away with him. Nothing was said at the time by either party by way of comment or explanation.

On these facts, what is the effect of the giving and receiving of a cheque signed by Munro instead of one signed by the appellant?

If it had been the appellant's own cheque, it would be a conditional payment, and the right of action for the purchase-money would be suspended, but on the dishonour of the cheque would have revived: *Cohen* v. *Hale* (1878), 3 Q.B.D. 371.

The case of *Belshaw* v. *Bush* (1851), 11 C.B. 191, 138 E.R. 444, forms a good starting-point for ascertaining how far that principle applies where the cheque is that of a third person. There the plaintiff drew a bill upon a third party, William Bush, for part of the debt of the defendant. Maule, J., who delivered the judgment of the Court, said what follows, at pp. 206, 207:—

"If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself."

In 1858 this decision was followed in *Bottomley* v. *Nuttall* (1858), 5 C.B.N.S. 122, 141 E.R. 48. It was there decided that drawing a bill of exchange on one partner did not shew an election

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to trust him and to release the firm—nor did the making out of invoices in his name.

Williams, J., said (p. 144):—

"If the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment . . . If the bill has been returned to the creditor unpaid, without any laches on his part, the condition which was to defeat the payment has happened, and consequently it is no payment."

Crowder, J., agreed with Williams, J. Byles, J., said that taking a bill for and on account of the debt does not operate as an absolute discharge of the debt. It is at most a conditional payment.

In *Hopkins* v. *Ware* (1869), L.R. 4 Ex. 268, the plaintiff lent £250 to one Ware. After his death, the solicitor of the executor of Ware sent the plaintiff his own cheque for £258, the amount due. The solicitor's cheque was dishonoured, and the trial Judge found for the plaintiff. On appeal the Court were of opinion that the plaintiff, by laches, had lost the chance of payment and could not recover from the estate. Channell, B. (pp. 271, 272), says:—

"Certainly when the cheque was remitted it did not operate as payment; it only did so, if at all, on the duty to present in reasonable time being neglected."

The case of *Currie* v. *Misa* (1875), L.R. 10 Ex. 153, *Misa* v. *Currie* (1876), 1 App. Cas. 554, is of importance here because the majority of the Court of Exchequer Chamber point out that the true reason, as given by the Court in *Belshaw* v. *Bush*, 11 C.B. 191, and upon which its judgment is founded, is that a negotiable security given on account of a pre-existing debt is a conditional payment of the debt, the condition being that the debt revives if the security is not realised (p. 163). They then go on to add (p. 164) that "the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person."

The question involved in *Currie* v. *Misa* arose on the giving of a cheque, and the argument proceeded on the assumption that while, if a negotiable security payable at a future day had been given, the element of time during which suspension of the remedy would operate formed the consideration, the same result could not follow in case of a cheque which was payable on demand.

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I find that in cases earlier than *Belshaw* v. *Bush* the giving of a negotiable instrument made or drawn by a third party has been considered as equivalent to the giving of such an instrument by the debtor.

The view held by Mr. Justice Maclaren in his work on Bills Notes and Cheques, 5th ed., p. 368, is shewn in the following passage where the learned author draws his conclusion from *Currie* v. *Misa* and *Maxwell* v. *Deare* (1853), 8 Moore P.C. 363, 14 E.R. 138:—

"A creditor is not bound to take a bill, note or cheque in payment of a debt; and if he does so it operates only as a conditional payment, unless he expressly agrees to take it in absolute payment, or unless there are special circumstances from which such an agreement may be implied."

See also Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 569, 570, *et seq.*; Roscoe's Nisi Prius, 18th ed., p. 700; Byles, 17th ed., p. 183; Chalmers on Bills of Exchange, 7th ed., pp. 338, 242.

Belshaw v. *Bush* has been followed in *Keay* v. *Fenwick* (1876), 1 C.P.D. 745 (C.A.); *In re A Debtor*, [1908] 1 K.B. 344; *In re J. Defries & Sons Limited*, [1909] 2 Ch. 423.

It may be interesting to note that, earlier than 1851, the question had arisen in at least four cases where promissory notes or bills of exchange of a third person had been taken by the creditor. These are *Stedman* v. *Gooch* (1793), 1 Esp. 3; *Kearslake* v. *Morgan* (1794), 5 T.R. 513, 101 E.R. 289; *Camidge* v. *Allenby* (1827), 6 B. & C. 373; *Goodwin* v. *Coates* (1832), 1 Moo. & Rob. 221; and in each case the plaintiff had judgment.

These cases, as well as *Currie* v. *Misa*, are discussed by my brother Riddell in *Freeman* v. *Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296.

The only remaining question on this branch of the case is whether a cheque under our law stands in the same position as in the English cases. I think it is clear from our Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 53, and sec. 165, that a cheque, for the purposes of this case, must be treated as a negotiable instrument within the decisions which have been already cited.

Section 53, in providing that valuable consideration may be constituted by an antecedent debt or liability, says that such a

debt or liability is so considered "whether the bill is payable on demand or at a future time."

By sec. 165, a cheque is a bill of exchange drawn on a bank payable on demand, and, except as otherwise provided in Part III. of the Bills of Exchange Act, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. The exceptions may be found in Maclaren on Bills Notes and Cheques, 5th ed., p. 425, and do not affect the question. See *McLean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95; *Trunkfield* v. *Proctor* (1901), 2 O.L.R. 326.

Looking at the facts of this case, I think the situation may be described in the words of Sir John Jervis in *Maxwell* v. *Deare*, 8 Moore P.C. 363, 377, 14 E.R. 138:—

"The object was to substitute a bill of exchange for a cash payment as a mode of payment, but only to be considered so if the bill was duly honoured at maturity."

The law applicable to the case is that where a negotiable instrument, including a cheque either of the debtor or a third party, is taken for an antecedent debt of the debtor, it is, unless special circumstances intervene, only conditional payment, and that, unless the receiver of it is guilty of laches, he can, upon non-payment of the security, look to his original purchaser.

What then is the evidence on the question of diligence or laches on the part of the plaintiff? The cheque in question is dated the 18th October, 1917, and is drawn on the Dominion Bank, Wingham. The respondent deposited it to his credit in the Bank of Hamilton in Wroxeter on the same day, and it reached the branch of that bank at Wingham on the 19th October. It was noted for non-payment also on the 19th and protested on the 20th October, 1917. The respondent learned of this on the 22nd, and at once called up the appellant's house. In his absence he left a message with the appellant's wife that Munro's cheque was protested, and was told by her to go and see Fells in Wingham. Fells was a partner of Munro. The respondent did not go, but he heard, shortly after, from the appellant by telephone and discussed the matter with him. The appellant promised to see Munro and communicate with the respondent, but did not do so, and the respondent then went to see him without any result. No laches is shewn, and the cheque is produced from the respondent's custody. The right of

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the respondent to sue the appellant has not been lost, and he is entitled to recover the amount sued for.

The appeal should be dismissed.

Since writing the above, I have had the advantage of reading the judgment of my brother Maclaren. While unable to agree with its conclusions, yet, on account of his authority upon questions of this nature, I feel I must venture to set out my reasons notwithstanding the small amount at stake.

I cannot bring myself to regard the transaction as a barter, or as the purchase of a negotiable security. The cheque was, until the moment before it was handed over, an incomplete instrument: *Hogarth* v. *Latham & Co.* (1878), 3 Q.B.D. 643. The appellant was, therefore, not the holder of a security which he desired to sell, and it was not until after the delivery and weighing was complete, and the sale of the hogs made, that the cheque became a valuable security.

To decide that, without a word being said, the respondent at that moment of time bought the cheque as a bill of exchange, and lost his right to be paid for the hogs if Munro had not enough money in the bank, is to go much further than I think the real transaction warrants. It is a question of intention, and therefore of fact, as is pointed out in Chalmers, 7th ed., p. 342.

I think there was an antecedent debt; for, as Lord Campbell observes in *Timmins* v. *Gibbins* (1852), 18 Q.B. 722, 726, 118 E.R. 273: "In fact it is difficult to say that there can be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor."

Fydell v. *Clark*, cited by my learned brother, relates to unendorsed bills and notes given by a bank 2 years before to a customer for the proceeds of promissory notes for £8,000, and the action was by the customer's former partner, asserting liability in the bank to pay the value in cash of those securities, which proved worthless. It was properly held that the customer must have long since agreed to take the securities in the place of cash.

The case of *Camidge* v. *Allenby* was one of what were known as county bank notes. Its effect is set out in the following quotation from Halsbury's Laws of England, vol. 1, pp. 574, 575:—

"If a bank note be given in payment for value received at the time, the payment is complete, and in the event of dishonour of the note, no recourse can be had against the transferor either on the note or the consideration for it (*Camidge* v. *Allenby* (1827), 6 B. & C. 373). But a note given for a pre-existing debt has been held to be only payment conditional on its being paid when presented. A note, however, must be presented or circulated within a reasonable time, otherwise, in the event of the bank failing, the loss will fall on the transferee. And in the event of the bank failing, or the note being dishonoured, the transferee, in order to preserve his right as against the transferor, must give him notice and offer to return the note."

It is also treated in the same way by Roscoe and by Byles, in the last editions of their works, where the decision is limited to bills or notes *payable to bearer*. Bramwell, B., in *Guardians of Lichfield Union* v. *Greene* (1857), 1 H. & N. 884, 156 E.R. 1459, deals with it as if confined to bank notes.

In Roscoe's Nisi Prius, 18th ed., p. 699, this statement is made:—

"If a bill or note payable to bearer be delivered without endorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn* v. *Harrison*, 3 T.R. 757, 759; *Ex p. Shuttleworth* (1797), 3 Ves. 368, 30 E.R. 1057; *Camidge* v. *Allenby*, *supra*. But when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee makes the security his own by laches."

Byles on Bills, 17th ed., p. 182, puts it thus:—

"If a bill or note, made or become payable to bearer, be delivered without endorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

No doubt the statement by Bayley, J., if read as applying generally to all negotiable instruments, may bear the construction

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given to it. If so treated it would be inconsistent with *Currie* v. *Misa*, *ante*. But such a wide interpretation was not necessary to the decision, and I do not think that all the learned Judge's remarks have been treated by the text-writers as authoritative, or as expressing the judgment of the Court.

Park, J., at about the same time, in *Evans* v. *Whyle* (1829), 5 Bing. 485, 488, 130 E.R. 1148, said:—

"If a party sells goods, and takes for them a bill of exchange which is not honoured, he is remitted to his original consideration."

In Halsbury's Laws of England the sale or transfer of a bill is spoken of in vol. 2, pp. 521, 522, in this way:—

"A transferor by delivery is in effect the vendor of an instrument precisely as he might be the vendor of any other chattel. Beyond the actual points in regard to it which he warrants he is in no way responsible for the value of what he sells. If, therefore, its value diminishes or even vanishes altogether, e.g., through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss (*Fydell* v. *Clark* (1796), 1 Esp. 447, 448). Where, on the other hand, the instrument is transferred, not by way of sale, but in payment of a debt, the transferor is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt. *Camidge* v. *Allenby* (1827), 6 B. & C. 373, 108 E.R. 489."

And in vol. 7, pp. 447, 448, the general rule is thus stated:—

"A creditor is not bound to accept payment of a debt otherwise than in current coin, or, in the case of a debt exceeding £5, in notes of the Bank of England; and if he takes a bill, note, or cheque in payment, he may either accept it in satisfaction of the debt, in which case he takes the risk of its being dishonoured, or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument.

"The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of a bill, note, or cheque is a conditional payment only. If the security is paid when it becomes due, this is equivalent to payment of the original debt; and if it is paid in part, the original debt is discharged *pro tanto*. If the instrument is dishonoured, payment of the original debt may be enforced as if no security has been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the

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hands of a third party, in which case the creditor's remedy continues to be suspended."

I cannot find, in the evidence in this case, any clear indication that the cheque of Munro, when it became a completed instrument, was, without a word being said, purchased *eo instanti* by the respondent, and prefer to rest my conclusion upon the proposition as above laid down.

Hodgins, J.

MAGEE, J.A., agreed with Hodgins, J.A.

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Appeal allowed (MAGEE *and* HODGINS, JJ.A., *dissenting*).

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Ives, and McCarthy, JJ. April 2, 1919.

LANDLORD AND TENANT (§ II D—33)—LEASE—BREACH OF COVENANT BY LESSOR—EXCUSES ON EQUITABLE GROUNDS—COURT BOUND TO CONSIDER—RELIEF AGAINST FORFEITURE.

Where the lessor of farm property commits a breach of an express covenant in the lease but raises excuses for the breach on equitable grounds, the court is bound to consider them and in a proper case relieve from forfeiture.

APPEAL by plaintiff from a judgment of Simmons, J., in an action brought for a declaration that a lease from plaintiff to the defendant had been forfeited and for possession. Affirmed by an equal division of the court.

Statement.

A. H. Clarke, K.C., for appellant; *W. S. Ball*, for respondent.

HARVEY, C.J.:—The facts of this case are set out in the reasons of my brother Beck.

Harvey, C.J.

I agree with him that on the facts of the case there was a breach of the covenant to farm in a husbandlike manner having regard to the absolute covenant to rid the land of weeds.

This, under s. 56 of the Land Titles Act, creates a forfeiture and gives the landlord the right to re-enter.

The trial judge was of opinion that the exceptional weather conditions excused the performance of the covenant. I cannot accept that view.

That might have been a ground of appeal to the landlord to be excused from the performance but I do not see how it can amount to a legal excuse.

There was no actual impossibility—not even practical impossibility—and no provision was made in the lease for such a con-

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tingency. Nor can I come to the conclusion that there is any sufficient ground for the court to grant relief from the forfeiture.

The court's interference for such a purpose is founded on well-established principles and they do not, in my opinion, extend to such a case as this.

In Snell's Equity, 17th ed., p. 345, it is stated that

> The principle which governs the court in relieving against forfeitures is that the court will only relieve against a forfeiture when the court could give compensation for the forfeiture, and equity in general, therefore, only relieved against a forfeiture where the forfeiture in substance was merely security for payment of a monetary sum (and on the following page): On similar principles, forfeitures under express limitation are, in general, not relievable. A common illustration is the forfeiture which arises under the proviso for re-entry contained in a lease. Here, as a rule, no relief was obtainable, and the legal forfeiture took effect. But here, again, if the forfeiture rose by reason of non-payment of rent, then equity relieved.

Likewise Indermaur & Thwaites' Equity, 7th ed., p. 437:—

> Although the court gave relief against a forfeiture for non-payment of rent, yet it would not do so in respect of other covenants, *e.g.*, a covenant to repair, or to insure, or not to assign without license; and a tenant committing breaches of such covenants was, therefore, absolutely liable to be ejected under the condition of re-entry reserved in the lease.

Smith's Equity, 5th ed., is to the same effect, when at p. 258 it is said:—

> It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that when there are no means of ascertaining what amount of compensation would be equitable, no relief will be given.
>
> Thus in the case of a breach of a general covenant to repair by which a forfeiture has been incurred, equity has hitherto usually refused to interfere. The case of a covenant not in general terms, but to lay out a specific sum in a given time, was sometimes distinguished; but it seems that even in such cases relief was only given under special circumstances. On similar grounds, relief was refused in case of a breach of a covenant to build houses, and of a covenant to cultivate land in a husbandlike manner.

The ground for the exercise of the court's jurisdiction is, of course, to do equity, but to say that this defendant may go on under the lease, notwithstanding that he had broken its terms to the damage of the plaintiff for which he has not, and cannot give, adequate compensation, would appear to me to be far from equitable.

I would allow the appeal with costs, and direct judgment for the plaintiff as prayed, with costs.

Beck, J.

BECK, J.:—This is an appeal by the plaintiff from the judgment of Simmons, J., dismissing the action.

The action was brought for a declaration that a lease from the plaintiff to the defendant had been forfeited and for possession.

The lease is dated February 12, 1917. The term is five years from February 1, 1917. The rent is the one-half share of the whole crop of the different kinds and qualities of grain to be grown on the premises in each year, such share to be delivered after threshing not later than November 1, in each year. The land consists of two half sections some 7 or 8 miles apart; the east half of s. 12, called the "home place," and the south-west quarter of s. 33 and the north-west quarter of s. 28, called the "Schafer place."

The home place was a well-improved and cultivated farm on which the plaintiff had been living. It was, at the date of the lease, practically wholly under cultivation. On the Schafer place there were about 90 acres ready for crop, the rest was in sod. The cultivated land on both places, therefore, amounted to about 410 acres.

One of the lessee's covenants is that he would, in 1917, seed 470 acres—150 acres to wheat, 320 acres to flax. There is an obvious error in the wording, leaving this to be the obvious intention.

Another of the lessee's covenants is that, in each season succeeding 1917, he was to summer fallow at least 160 acres, and seed to wheat at least 480 acres. This, obviously, provides for the cultivation of the entire acreage of both farms, 640 acres; but inasmuch as at the date of the lease 230 acres had not yet been brought under cultivation, the question arises upon which of the parties was the obligation to break up the 230 acres. It is not expressly provided for by the lease.

As the defendant covenanted to summer fallow or seed it, both of which operations imply previous breaking, probably an obligation would be implied on the part of the lessee to do the necessary breaking; but an implied obligation can be rebutted by evidence of the real intention.

From the cross-examination of the plaintiff it is made evident that the *expense* of the breaking was to fall upon the plaintiff; he says he expected the defendant to do the work but he does not go so far as to say that the defendant was under obligation to do it. At this stage the evidence directed to this question of breaking was stopped by the interjection of counsel:—

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Mr. Ball (for defendant), to the court—If you will hold that because he (the plaintiff) went on and allowed him (the defendant) to farm in 1918 that cures the defects in 1917 then that will shorten the case.

The Court—Well, I will hold that he did.

Mr. Hogg (for plaintiff)—We don't propose to press any agreement about the breaking at all; it is this year's (1918) farming.

What I understand from the foregoing, and the trial judge tells me it was his understanding, is that all question of the defendant being in default for failing to break any of the unbroken land is eliminated from the case; that all that is in issue is the question of the proper farming during the year 1918 of the land hitherto under cultivation having regard to the covenants in the case.

If this is what the counsel at the trial really intended it seems to create new difficulties while removing some. How is the covenant to summer fallow 160 and seed 480 acres to be interpreted and applied now that we are left with only 410 acres in all which have been brought under cultivation? Is it to be applied proportionately? Or is it wholly gone, leaving the lessee's obligation only to farm the land in a good, proper and husbandlike manner?

The defendant, in 1918, did, in fact, put in seed the whole of the 410 acres cultivated land. The plaintiff admits this; but contends that some portion of it ought not to have been seeded but summer fallowed.

I take the view that this special covenant was gone in its entirety. I also think that especially in view of the economic conditions existing in the season of 1918 and the propaganda in favour of increased agricultural production, it cannot be said that it was not good husbandry to seed the whole of the cultivated land.

Then it is said that there was a breach of covenant to "rid the said demised premises" of all noxious weeds.

It is virtually admitted that weeds became very prevalent on the land in 1918, and the plaintiff contends that it was the duty of the defendant to take steps during that year to eradicate them and that the means actually taken were of little value.

The covenant to rid the land of weeds must be interpreted in the light not only of the covenant to farm the land in a good, proper and husbandlike manner, but also of the Noxious Weeds Act (c. 15 of 1907); and must be applied with due regard to the

character of the weather, the state of the land and the consequent condition of the growing grain and the growing weeds.

The tenant was in the circumstances placed in a difficult position. He might well be in great doubt what was the best course to pursue. In the result I think that he committed a breach of the covenant respecting the weeds, but that he was led into it owing to the difficulty of the circumstances.

A breach of a covenant gives rise to a forfeiture (Land Titles Act, s. 56, and an express provision in the lease), but where, as in the defence in this case, excuses for breaches are raised on equitable grounds I think the court is bound to consider them and in a proper case relieve from forfeiture.

The plaintiff anticipated this possible aspect of the case, dealing with it from that point of view in his factum. I had occasion to relieve from forfeiture under a lease in a case some years ago, *Royal Trust Co.* v. *Bell* (1909), 2 A.L.R. 425.

I think the defendant should be relieved from the forfeiture. I would do so without imposing conditions on the grounds suggested by the trial judge in dismissing the plaintiff's action. In the result I would dismiss the appeal with costs.

IVES, J.:—By an agreement in writing dated February 12, 1917, the plaintiff let his farm, comprising some 640 acres, to the defendant for a term of 5 years. Ives, J.

Among the covenants subscribed to by the defendant was an uncompromising undertaking to rid the demised premises of weeds. It is in the following words:—

> The lessee further covenants and agrees that he will rid the said demised premises of Canada thistle, French weed, Russian thistle, tumble weed, wild mustard, and every other noxious weed with which the said demised premises may become infested.

While the breach of other material covenants of the defendant is alleged and evidence led at the trial to prove the allegation, it would seem that it was the breach of this "weed clause," if I may so call it, which most strongly impressed Simmons, J., at the trial. The evidence is clear that the land was infested with weeds in 1917 and that the condition became worse in 1918 owing to drought.

I think I may take it for granted that weeds on a farm, of any extent, can be destroyed best by mowing or cultivation. The reason given by the defendant for not pursuing either method

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in 1918 was that to do such work at the proper time would have destroyed the growing crop and that later, when hope of a grain crop had to be abandoned, it was too dry to cultivate, and mowing was not done because he still hoped for some return in the nature of forage. The weed clause is unconditional in form, and while its performance may leave the defendant tenant without profit, and even subject to serious loss in his operation of the demised lands, that does not excuse him from performance. But it might be urged that the defendant has not breached this "weed" covenant because nothing is stated in the covenant fixing a time for performance, and, therefore, performance at any time before the expiration of the term would be a fulfilment. Against this contention, however, is the further covenant of the defendant which must be read with the other covenants, "to farm the said premises in a good, proper and husbandlike manner."

This action is brought for a declaration terminating the unexpired term of the lease, and for possession. The lease provides for re-entry for non-performance and, I think, upon the undisputed facts here the plaintiff is entitled to have the judgment prayed for.

The appeal should be allowed with costs here and below.

McCarthy, J.

McCARTHY, J.:—In my opinion the judgment of the trial judge was right and I would dismiss the appeal.

Appeal dismissed; court equally divided.

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MURPHY v. HART.

Nova Scotia Supreme Court, Harris, C.J., Russell and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. April 9, 1919.

BAILMENT (§ III—19)—RESTAURANT KEEPER—ARTICLE DEPOSITED TEMPORARILY AS AN INCIDENT TO HIS BUSINESS—LOSS—LIABILITY FOR—BURDEN OF PROOF.

A restaurant keeper, in whose custody clothing or other articles are deposited temporarily as an incident to his general business is liable as an ordinary bailee for hire for any loss resulting from ordinary negligence. The burden is on the plaintiff to establish negligence, but where the loss is established, a sufficient *primâ facie* case against the bailee is raised to put him on his defence.

[*Ultzen* v. *Nicols*, [1894] 1 Q.B. 92; *Jenkyns* v. *Southampton Mail Packet Co.* (1919), 35 T.L.R. 264; *Phipps* v. *New Claridges Hotel* (1905), 22 T.L.R. 49; *Bunnell* v. *Stern*, 122 N.Y. 539, followed.]

Statement.

APPEAL from the judgment of Wallace, C.C.J., judge of the County Court for District No. 1, in favour of plaintiff with costs

in an action claiming damages for the loss of plaintiff's coat and other articles stolen from defendant's restaurant, intrusted by plaintiff to defendant to be cared for while plaintiff was supping at said restaurant, alleged to have been lost through the negligence of defendant.

V. J. Paton, K.C., for appellant; *J. J. Power*, K.C., for respondent.

The judgment of the court was delivered by.

HARRIS, C.J.:—This case comes before the court on appeal from a decision by His Honour Judge Wallace in favour of the plaintiff. The facts agreed upon by the parties are as follows: Defendant keeps a restaurant called "The Green Lantern," and plaintiff, as one of the public, was invited to enter upon the premises and become a patron. The front portion of the premises consists of a shop with the usual counters. In rear of this shop downstairs is a large room containing tables and chairs, where patrons go who desire to be served with refreshments. Between the shop and the refreshment room there are recesses or alcoves provided with racks and hooks upon which patrons of the refreshment room hang their hats and overcoats. Plaintiff, when proceeding to this room, hung up his overcoat and hat in one of these recesses, and then had something to eat, and subsequently, when he came out from the refreshment room his coat and hat were gone.

Harris, C.J.

I agree with the findings of the trial judge that:—

> The patron could not reasonably be expected to wear his overcoat and hat in the refreshment room, or to hold them in his hands or on his knees while he was eating. It was necessary for him to put them somewhere. A suitable place was provided by the proprietor of the restaurant. The presence of the racks and hooks implied an invitation to patrons to hang their coats and hats there. In the circumstances I find that the patron availed himself of the accommodation provided by the defendant and that there was a sufficient constructive delivery to the custody or possession of the defendant to constitute a bailment. If the coat hung on a hook just over the table where the plaintiff had been sitting during the meal it could not be said that the plaintiff had ceased to retain possession of the coat, but in the present case, having regard to the location of the alcove, the plaintiff was impliedly invited to yield his personal vigilance, and the actual possession of the coat, and to yield it to the custody of the defendant.

The contentions on behalf of the appellant were that there was no bailment—that if there was a bailment the defendant was a gratuitous bailee—and being a gratuitous bailee he was only

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liable for gross negligence, the burden of establishing which was on plaintiff, and, therefore, the action must fail.

I am clearly of opinion that there was a bailment, and that the bailment was for hire and not gratuitous.

The depositing of the overcoat in the place provided by the defendant for that purpose was for the benefit of both parties, and while no price was paid directly or specifically to the defendant for the care of the plaintiff's overcoat, it was part of the accommodation for which the defendant received his recompense from his customers. It is obvious that the defendant derived some advantage in the way of increased trade by making his premises attractive and the providing of a place in which customers could leave their coats and hats while eating was a necessary incident to the business just as it is in the case of a barber shop, or a bathing house.

On principle I do not see why the defendant is not a bailee for hire quite as much as he would be if paid a specific sum for the care and custody of the plaintiff's coat.

As was said by the court in the case of *Woodruff* v. *Painter* (1892), 150 Pa. 91, at 97:—

> Manifestly the bailment in a case like the present is of the latter class (*i.e.*, reciprocally beneficial to both parties) for, while the customer pays nothing directly, or *eo nomine*, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident.

In *Bunnell* v. *Stern*, 122 N.Y. 539, the defendants were proprietors of a retail store with a department for the sale of ready-made cloaks. The plaintiff went to this department and asked to see some cloaks which were brought and she removed the cloak which she was wearing in order to try on the new ones. There was no place provided for hanging up or placing clothing in such a case and she was not told where to put her cloak, but the plaintiff, in the presence of the clerk, laid it on the counter. After trying on several new cloaks at a mirror some distance away the plaintiff looked for her own cloak and it could not be found. Vann, J., in delivering the judgment of the Court of Appeals, said:—

> The defendant kept a store and thus invited the public to come there and trade. In one of its departments they kept ready-made cloaks for sale, and provided mirrors for the use of customers in trying them on and clerks to aid in the process. They thus invited each lady who came there to buy a

cloak, to remove the one she had on and try the one that they wished her to purchase, because the invitation to do a given act extends by implication to whatever is known to be necessary in order to do that act. It is not perceived that under the circumstances disclosed by the evidence, the obligation of the defendant would have been greater or in any respect different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had requested her to take off her wrap and try on the one that he offered to sell her. The clerk who waited upon her stood in the place of the defendants as long as she was engaged in the line of her duties, and no claim is made that she at any time exceeded her authority. Therefore, when she led the way to the second mirror and stood before it holding the new garment in her hands in readiness to help the plaintiff try it on, in legal effect one of the defendants stood there inviting her to try it on, and to lay aside her wrap for that purpose. She accepted the invitation and removed her wrap, but as she could not hold it in her hands while she tried on the other, it was necessary for her to lay it down somewhere. No place was provided for that purpose. There was not even a chair in sight. She was neither notified where to put it, nor informed that she must look out for it as it would be at her own risk whatever she did with it. She put it in the only place that was available, unless she threw it on the floor, and as she did so, in contemplation of law, the defendants stood looking at her. Under these circumstances, we think that it became their duty to exercise some care for the plaintiff's cloak, because she had laid it aside on their invitation and with their knowledge and, without question or notice from them, had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of the plaintiff and her property for which the defendants were responsible, and in the chance of selling the goods that she had selected.

On similar grounds the keeper of a bathing establishment, the proprietor of a barber shop, restaurant keepers and the like have been held liable.

There are many American authorities to that effect.

In 6 Corpus Juris, p. 1,100, the law is thus stated:—

Where a bailment is a mere incident to the performance of service for which the bailee receives compensation, or to the conduct of a business from which the bailee derives profit, it is a bailment for mutual benefit although the bailee receives no compensation for the bailment as such.

And at p. 1,121:—

Where a bailment is for mutual benefit, the bailee, in the absence of special contract, is held to the exercise of ordinary care in relation to the subject-matter thereof and is responsible only for ordinary negligence. In the absence of special agreement the bailee is not an insurer of the chattel entrusted to his care.

And at p. 1,125:—

A shopkeeper, a restaurant keeper, a barber, a bathhouse proprietor or other similar person in whose custody clothing or other articles are deposited temporarily as an incident to his general business is liable as an ordinary bailee for hire for any loss resulting from ordinary negligence.

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The courts have uniformly held the bailee in such a case to be liable for ordinary neglect and have required that he should exercise ordinary diligence in taking care of the property entrusted to his care.

I have first referred to the American authorities on the question because they are more directly in point, but the cases of *Ultzen* v. *Nicols*, [1894] 1 Q.B. 92 and *Jenkyns* v. *Southampton Mail Packet Co.* (1919), 35 T.L.R. 264, are in accord with the principles to which I have referred. *Orchard* v. *Bush*, [1898] 2 Q.B. 284, turned on the question that the defendant was an inn-keeper and, therefore, liable without proof of negligence, and it is, therefore, not in point. The case of *Phipps* v. *New Claridges Hotel* (1905), 22 T.L.R. 49, to which I shall refer on another branch of the case is clear authority in plaintiff's favour.

The next question is as to whether the evidence shews a lack of ordinary diligence on the part of the defendant in taking care of the plaintiff's coat.

The rule in such cases is that the burden is on plaintiff to establish negligence, but where the loss is established, or the goods are not returned at all, a sufficient *primâ facie* case against the bailee is raised to put him upon his defence. The law in such a case presumes negligence to be the cause of the loss or non-return and casts upon the bailee the burden of shewing that the loss is due to other causes consistent with due care on his part.

This rule is based on the supposition that if the goods have been lost during the bailment it is just that the bailee should shew the circumstances acquitting himself of the want of diligence it was his duty to bestow on the goods delivered into his possession. Here, there is absolutely no explanation of the loss, and it is unnecessary to consider what would have been a sufficient explanation or excuse for the non-return of the goods. The defendant has absolutely failed to meet the *primâ facie* case made against him by proof of the non-return of the goods and must fail.

That the rule is, as I have stated, it is clear from a perusal of the authorities.

In the case of *Phipps* v. *New Claridges Hotel Co.*, *supra*, a dog had been given into the custody of a person and accepted by him as bailee and was lost while in his custody. Bray, J., in giving judgment for the plaintiff, said:—

That he was of opinion that when it was once proved that this dog was placed in the defendant's custody as an ordinary bailment, it was their duty to shew some circumstances which negatived the idea of negligence on their part.

See also *Pratt* v. *Waddington* (1911), 23 O.L.R. 178; *Polson Iron Works* v. *Laurie* (1911), 3 O.W.N. 213; *Carlisle* v. *Grand Trunk R. Co.* (1912), 1 D.L.R. 130, 25 O.L.R. 372, at 379; *Nutt* v. *Davidson* (1913), 44 L.R.A., N.S. 1170; *Jackson* v. *McDonald* (1904), 70 N.J.L. 594.

It was argued by counsel for the defendant that, as the plaintiff knew the defendant had no one in charge of the compartment where the coat was hung up, he had acquiesced in the kind and degree of care which defendant exercised, and waived due care on the part of the defendant, but there is no evidence to warrant any such finding. So far as appears the plaintiff had never visited the defendant's premises before and knew nothing as to the care which defendant was exercising to protect the clothing of his customers, and as Bigelow, C.J., said in *Conway Bank* v. *American Express Co.* (1864), 8 Allen (Mass.) 512, at 516:—

> Mere knowledge of the mode in which a depository receives and takes care of property entrusted to him will not operate to absolve him from all liability to those who employ him with such knowledge of a want of due care in the keeping of their property. Such knowledge accompanied by evidence of long acquiescence without objection by an employer might be evidence of an agreement as to the nature and degree of care which was to be used by the bailee but beyond this it would not be safe to go.

The judgment appealed from should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

UNION BANK OF CANADA AND PHILLIPS v. BOULTER-WAUGH Ltd.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Mignault, JJ., and Cassels, J., ad hoc. March 17, 1919.

MORTGAGE (§ II—40)—MORTGAGEE OF EQUITABLE INTEREST—OTHER PRIOR UNREGISTERED EQUITABLE INTERESTS—MORTGAGEE'S KNOWLEDGE OF—REGISTRATION—PRIORITY—CAVEAT—LAND TITLES ACT, 1917, C. 18, SEC. 194—STATUTES—CONSTRUCTION.

In cases coming within sec. 162 of the Land Titles Act (R.S.S. 1909, c. 41; see stats. 1917, c. 18, sec. 194) a registered purchaser or mortgagee for value of an equitable interest in lands, who has actual or constructive notice of other equitable unregistered interests prior to that which he acquired, does not, except in cases of fraud, take subject to those interests. Knowledge of an unregistered interest is not to be imputed as fraud.

[*Boulter-Waugh* v. *Phillips*, 42 D.L.R. 548, reversed.]

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1918), 42 D.L.R. 548, 11 S.L.R. 297, *sub nom. Boulter-*

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Waugh v. *Phillips*, reversing the judgment of Brown, C.J., at the trial and maintaining the plaintiff's action. Reversed.

S. B. Woods, K.C., for appellant; *P. E. Mackenzie*, K.C., for respondent.

DAVIES, C.J.:—The question for our decision in this appeal really turns upon the proper construction to be given s. 194 of the Land Titles Act, 1917, of Saskatchewan. Apart from that statute, and especially from s. 194, there is little doubt that, under the authorities, the plaintiff respondent would have a right to maintain its action and the priority of its security over that of the bank and that, but for s. 194, the failure on its part to maintain or renew its caveat which it had registered to protect its interest would not, with the knowledge possessed by the bank of the respondent's interest, operate to affect such right of priority. As Haultain, C.J., puts it, 42 D.L.R. 548:—

> The outstanding and important facts are that the plaintiff had an equitable interest in the land in question prior in time to the equitable interest of the defendant bank, and that the bank had full knowledge and notice of that interest at the time it took its security from Phillips. Apart from the provisions of the Land Titles Act, 1917 (2nd sess.), c. 18, these facts bring this case clearly within well established principles.

The section in question, 194, reads as follows:—

> 194. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive, of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.
>
> 2. Knowledge on the part of any such person that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The authorities relied upon in the argument at bar were to the effect that a purchaser or mortgagee for value of an equitable interest in lands with actual or constructive notice of other equitable unregistered interests prior to that which he acquired took subject to those interests.

But it seems to me that the object and purpose of this section, apart from cases of fraud, was to lay down a different rule which should govern in cases coming within its ambit, and, unless we are prepared to ignore the section altogether or fritter away its language and meaning, we must hold that, except in cases of fraud, these

equitable rules established by the authorities, however just and equitable they may seem to be under ordinary circumstances, are not applicable to cases coming within s. 194 of the Land Titles Act.

I think the object and purpose of such statutes as the one here was very well stated by Edwards, J., in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles* (1906), 26 N.Z.R. 604, at 620:—

> The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law. . . . The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

In construing s. 194 of the Saskatchewan Land Titles Act, we must always bear in mind that cases of fraud are excepted from it, but that knowledge of an unregistered interest in the lands "shall not of itself be imputed as fraud." The section provides that no person dealing with lands for which a certificate of title has been granted shall "be affected by any notice direct implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding." That seems to be sufficiently explicit and clear as making the register everything and outside notices or knowledge immaterial.

Now in this case, a caveat had been filed on behalf of the plaintiff respondent against the lands in question and the registrar having given the plaintiff respondent notice to take action on the caveat the local master made an order under the statute directing the plaintiff within 35 days to bring an action to establish any claim it might have to the lands with an express provision that if such action was not brought the caveat should be vacated. No action having been brought the caveat was vacated.

The plaintiff then notified the appellant bank that it had not abandoned its claim and it brought the present action resting its claim to relief on the ground that the appellant bank, having had the knowledge of plaintiff's claim before taking its mortgage, cannot in equity acquire a title free from and prior to such claim.

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This raises a clear cut issue whether the old rules of equity which s. 194 was supposed to do away with still prevail and will be given effect to notwithstanding the section or whether the plain words of the section itself, which practically makes the register everything, shall prevail.

I have no hesitation myself, apart from cases of fraud, in reaching the latter conclusion and that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.

Such rule has, in my judgment, been expressly abrogated by this s. 194, in all cases coming within its ambit and the register alone made the sole test always of course excepting, as the section does, cases of fraud.

I cannot find that the plaintiff has any one to blame but itself for the position it finds itself in. The bank did not try to take any unjust advantage of it. Perfectly within its right, the bank took proceedings under the Act which resulted in the plaintiff being ordered to bring an action to enforce that claim within a definite period, otherwise its caveat would lapse and be vacated.

The respondent allowed it, by its own neglect and inaction, to be vacated and so lost the right it otherwise would have had to enforce its claim of priority as against the defendant bank which in the meantime had acquired an interest in the land. I agree with Newlands, J., "that the vacating of the caveat cleared the registered title to the land of any claim the plaintiff might have against it in priority to any right that had attached to such land by such lapse."

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

Idington, J.

IDINGTON, J.:—The question raised herein, I think, should be determined by the interpretation and construction of s. 162 of the Land Titles Act, c. 41 of R.S.S., 1909, (Sask. stat. 1917, 2nd sess. c. 18, s. 194), so far as relevant to the facts in evidence: —

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease, from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner

of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

One Munson sold some land to one Phillips and gave him an agreement of purchase therefor on April 2, 1912, which he assigned, merely in the way of security, on May 2, 1913, to a company under whom, by virtue of several assignments, the respondent corporate company claims.

In the course of events attendant upon the said several assignments, one Scott Barlow, who had become one of the said several assignees, as trustee for respondent company, registered a caveat on June 5, 1913.

In September, 1914, Phillips had paid the balance of the purchase-money and obtained a conveyance from Munson who had never been notified by the assignees aforesaid, or any of them, of the fact of the said assignment by Phillips the vendor.

No one has pretended that Phillips, in doing so, had any fraudulent purpose in view or claimed that his action in doing so was fraudulent.

Thereafter, on March 23, 1915, the appellant obtained from Phillips a mortgage upon the said lands and having had, when doing so, knowledge of the said caveat filed by Scott Barlow, the appellant is held by the court below to have committed a fraud and thereby is deprived of its rights as such mortgagee.

Not a word appears in the pleading herein charging such fraud.

And a very curious circumstance appears in evidence which seems quite inconsistent with the charge of fraud made by the court below. It is this: that the appellant, shortly after getting its mortgage from Phillips, instructed solicitors to call the attention of Scott Barlow, in whose name the caveat stood that he must proceed to enforce his claim thereunder or it would lapse in 30 days, unless continued by order of the court.

The respondent, in consequence of this, applied accordingly and obtained an order continuing the caveat for 35 days on terms of the caveator taking proceedings within that time to establish his rights thereunder.

This he and the respondent failed to do and in the language

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used in the Western Provinces relative to such omissions, the caveat lapsed.

The respondent took ineffectual steps later to have it re-established.

The consequence of such failures is that on the registry record the appellant stands in priority to anything the respondent can now get registered against the same land. What has that in it in the nature of fraud?

The answer is furnished by the judgment in *Le Neve* v. *Le Neve* (1747), Ambler 436, 27 E.R. 291, upon which had been built, as it were, an enormous volume of law, which produces judicial expressions that might, if later legislation discarded, warrant one in saying any such advantage with knowledge, was equivalent to fraud and liable to have that declared and the priority of registration deprived of its usual effect.

I cannot, however, see how such doctrines can be maintained in such cases as this, in view of the express language of the legislature in the clause above quoted.

It seems impossible that the proper effect can be given to that section unless we try to appreciate what the legislature was about.

Clearly it was not satisfied with the results of the law as settled by judicial expressions and decisions, and had determined upon the adoption of a system of registration as a basis of ownership of land and a means of settling the order of priority of claims into or out of any such ownership when once registered under the Act in question.

In doing so it casts upon those acquiring any such ownership or claim to any interest therein burdens, perhaps previously unknown, in the way of diligence in order to protect the rights so acquired by observing the provisions of the Act in that regard under penalty of losing ownership or priority of claim save in the case of fraud on the part of those obtaining the priority, which the Act seems clearly to contemplate as possible; even with notice or knowledge unless springing from that conveyed by means of registration of a caveat. Notice or knowledge resting upon the warning given by a permissible caveat would be available to him registering it, or those claiming under him by virtue thereof as a means of maintaining priority over any later registration.

But the steps necessary to secure such benefits must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way that statute provides.

It cannot be made available in any other way. The respondent seems to have recognized that by getting the renewal under the Act.

When it failed to proceed according to the law enacted for its benefit its rights ceased.

The notice or knowledge thus obtained by appellant was nothing more than all other kinds of notice or knowledge excluded by the section quoted from having any effect and, by the express language of the Act, "shall not of itself be imputed as fraud."

I am unable, therefore, to see how the language of the legislature can be properly defied and set at naught by reason of judicial conceptions of what might have been called fraud, before this express prohibition of their being given further recognition.

We have been referred to a number of New Zealand cases which, of course, do not bind us any more than the judgment appealed from. I have, however, looked at them and find in most, if not all, some element of fact which could well be interpreted as to constitute fraud, or might well be held as within such a compliance with the statute as to found a claim thereunder for the relief sought and got.

The New Zealand Act differs somewhat from that now in question and the corresponding section to that above quoted is capable of a less drastic meaning than it.

The Australian statutes, upon which cases were cited to us, are not in our library. And I may be permitted to think that the attempted construction of such like statutes as in question from a reading of a single section or extract therefrom is rather a hazardous sort of proceeding.

For this court to attempt to call that fraud on the part of the appellant which it appears to have done herein, would only tend to impair the regard attaching to any finding of fraud we might be able to find as understood by the exception in above quoted section.

Nor is this the only illustration furnished by the administration of justice wherein due diligence is recognized as entitled to acquire its reward and he wanting in the application thereof is doomed to disappointment.

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So long as its application is not associated with a fraudulent purpose, he suffering has no legal right to complain.

It does not seem to me that the facts upon which the court above had to proceed in the case of *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A.C. 491, have much resemblance to those we have to deal with and the relevant law contained in the statute there in question has still less to that above quoted.

The appeal should be allowed with costs throughout and, I think, the respondent should be at liberty to redeem and judgment go for that as falling under its alternative prayer for relief.

Anglin, J.

ANGLIN, J.:—The facts in this case appear in the judgments delivered, 42 D.L.R. 548, in the Court of Appeal. They establish that the appellant bank took the mortgage for which it now claims priority over the respondent's unregistered equitable interest in, or claim upon, the lands in question with "direct" notice of such interest. Were it not for the effect of s. 194 of the Land Titles Act (statutes of Saskatchewan, 1917 (2nd sess.), c. 18), I should unhesitatingly agree with the Chief Justice of Saskatchewan and Lamont, J., that any attempt of the bank to give to its security "an effect inconsistent with or destructive of" the respondent's prior interest would, under these circumstances, be "looked upon by equity as a fraud which it (could) not countenance." Lamont, J., has, in my opinion, very convincingly shewn that, but for the effect of s. 194, a caveat would not have been required to protect the respondent's interest against the bank and that the lapse of its caveat, therefor, did not leave it in any worse position than it would have occupied had it never lodged it.

But I find in s. 194 an insuperable difficulty to giving effect to the principle of equity which would otherwise support the respondent in this position. The language of that section is so explicit that it leaves no room for doubt as to the intention of the legislature that that principle shall be abrogated in favour of a "person . . . taking . . . a transfer mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted, except in the case of fraud. By sub-sec. 2: Knowledge that any trust or unregistered instrument is in existence shall not of itself be imputed as fraud."

Here there was knowledge, but nothing more. Knowledge, of course, could not, of itself, constitute fraud. Fraud must always

have consisted in the doing of something which that knowledge made it unjust or inequitable to do. The meaning of the statute must, therefore, be that the doing of that which mere knowledge of "any trust or unregistered interest" would make it inequitable to do shall nevertheless not be imputed as fraud, within the meaning of that term as used in sub-sec. 1 of s. 194. That which equity deems fraud, therefore is, by this enactment of a competent legislature, declared not to be imputable as fraud.

A passage from my judgment in *Grace* v. *Kuebler* (1917), 39 D.L.R. 39, at pp. 47-8, 56 Can. S.C.R. 1, at p. 14, is cited by the Chief Justice and by Lamont, J., apparently as inconsistent with this view. All that that case decided was that the mere lodging of a caveat to protect an interest acquired subsequently to the making of an agreement for the sale of registered lands does not affect the purchaser under such agreement, otherwise ignorant of them, with notice of the rights to protect which the caveat is lodged so as to render ineffectual as against the caveator payments on account of purchase money subsequently made by the purchaser to his vendor. Expressions of opinions in the judgment on any other point must, it is needless to say, be regarded as *obiter*.

If anything I said in that case is really inconsistent with the views I have expressed above, I can only cry peccavi and plead that it was not so intended. I find in s. 194 the "very explicit language" which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been, had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. Were we to do so consequences still more deplorable must ensue. The court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

MIGNAULT, J.:—In my opinion, the decision of the question

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submitted is entirely governed by the provisions of the Land Titles Act of Saskatchewan (c. 41 of R.S.S. (1909)). (Sask. stats., 1917, 2nd sess., c. 18).

As briefly as they can be stated, the pertinent facts are as follows:—

In April, 1912, one J. H. Munson made an agreement to sell to Frank C. Phillips lot 10, block 6, plan E.M., town of Humboldt, Saskatchewan, for $1,750 payable by instalments.

In May, 1913, Phillips, being indebted to Boulter-Waugh and Co., Limited (now represented by the respondent), assigned his interest in the agreement for sale to the said company, which immediately transferred its interest to its credit manager, Mr. Scott Barlow, in trust for the company. These assignments were not registered, but on June 5, 1913, Barlow filed a caveat in the district land titles office to protect the interest thus assigned by Phillips.

In September, 1914, Phillips, having paid to Munson the purchase-price, received a transfer and was registered as owner of the land, subject to a mechanic's lien and to the Barlow caveat.

Subsequently Phillips became indebted to the appellant and executed a mortgage of the land in its favour, which mortgage was registered on March 24, 1915. When the appellant acquired this mortgage from Phillips, it was aware of the Barlow caveat, which was entered on the certificate of title, and of the rights represented by this caveat.

On June 29, 1915, the dep. reg., under s. 130 of the Land Titles Act, (R.S.S. c. 41), notified Barlow, at the request of the appellant, that his caveat would lapse at the end of 30 days unless continued by order of the court. An order was made on July 28, 1915, and registered, continuing the caveat until further order. By a subsequent order of the court, the Barlow caveat was continued for 35 days from October 8, 1915, and it was ordered that in default of the caveator taking proceedings within that time, the caveat should be vacated. On November 13, 1915, a certificate of the clerk of the court was registered stating that no action had been taken during the 35 days continuing the caveat, and that this time having expired the caveat was vacated.

Legal proceedings were subsequently taken to reinstate the Barlow caveat resulting in a judgment of the Supreme Court of Saskatchewan *en banc* of July 14, 1916, setting aside an order of the

local master at Humboldt reinstating the Barlow caveat without prejudice, the judgment stated, to the right of the respondent to make application to file a new caveat.

The question to be decided is whether the appellant is entitled to priority over the respondent in respect of their respective rights in and to the lands in question, and this question, as I have said, must be determined according to the rules enacted by the Saskatchewan Land Titles Act.

The material provisions of this statute are as follows:—(The judge here cited R.S.S. c. 41, ss. 125, 129, 130, 131, 132, and 133.)

The rules laid down here can give rise to no difficulty. Under s. 129, the owner or other person interested in a lot of land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn, or he may, under s. 130, require the registrar to notify the caveator that such caveat shall lapse at the expiration of 30 days from the mailing of the notice by the registrar, unless, within 30 days, the caveator shall file with the registrar an order made by the judge providing for the continuing of the caveat beyond the 30 days, and if such order is not filed, the caveat shall lapse and shall be treated as lapsed by the registrar.

The notice in question was given under s. 130. The caveator first obtained an order of the court continuing the caveat until further order, but a subsequent order continued the caveat for 35 days from the 8th of October, 1915, and ordered that in default of the caveator taking proceedings during this term, the caveat should be vacated. No proceedings having been taken by the caveator during the 35 days I am of the opinion that his caveat fully lapsed. The permission subsequently granted him by the Supreme Court *en banc* to file a new caveat—permission which was required under s. 132—and the filing of the caveat could only operate from the date of the new caveat and could not affect the prior registered mortgage of the appellant.

But the respondent relies on the knowledge acquired by the appellant at the time it took its mortgage from Phillips of the rights represented by the Barlow caveat as first filed, and the respondent contends that it would be "against conscience" or equivalent to fraud to thus acquire a right in land with knowledge of the existing unregistered rights of the respondent. Many cases are cited in

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this connection, but I cannot but think that they are without application in view of s. 162 of the Saskatchewan Land Titles Act, (R.S.S. c. 41), which section is, in my opinion, a complete answer to the respondent's contention.

This section reads as follows:—(See judgment of Davies, C.J.)

In this connection, but of course not an authority, but merely as shewing that the registration laws of the different provinces are not so far apart, I might refer to art. 2085 of the Quebec Civil Code, the application of which has never given rise to any difficulty, and which reads as follows:—

2085. The notice or knowledge acquired of an unregistered right belonging to a third party and subject to registration cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader.

I, however, base entirely my opinion on s. 162 of the Land Titles Act, and I take it that the knowledge acquired by the appellant of the unregistered interest of the respondent cannot, of itself, be imputed as fraud. The registration by the appellant of the mortgage acquired by it from Phillips was certainly not a fraudulent act, for if the Barlow caveat had been maintained by the court the appellant's mortgage would have been subject to the rights represented by this caveat. And it certainly cannot be contended that the appellant committed a fraudulent act by availing itself of the right granted by s. 130 of the Land Titles Act to any person claiming an interest in a lot of land to test the validity of a caveat lodged in the land titles office. If Barlow or the respondent allowed the caveat to lapse, no fault or fraud can be imputed to the appellant, but the respondent suffers by reason of its own negligence.

The judges of the Court of Appeal who have found in favour of the respondent observe that if the opinion I feel constrained to adopt is to be followed, Barlow would be in a worse position by filing a caveat than if he had relied on the equitable doctrine that the knowledge of his right by the appellant prevented the latter from acquiring priority as against his interest in the land in question.

I am not at all sure in view of s. 162 that Barlow would have been in a better position had he not filed the caveat, a point on which it is unnecessary to express any opinion. He has, however, filed a caveat to protect his rights and he, therefore, has put himself

entirely under the Land Titles Act. The respondent has, moreover, since the first caveat lapsed and it was refused reinstatement, filed a new caveat which is subsequent in date to the registration of the appellant's mortgage. I think, therefore, that the statute entirely governs the parties in this case, and it is clear to my mind that the appellant is entitled to preference.

The Chief Justice of Saskatchewan cites certain maxims coming, I think, originally from the Roman Law, with which, as a civilian, I am familiar, such as *nemo dat qui non habet*, or *qui prior est tempore potior est jure*. But I may say with deference that these maxims are not of universal application, and when third parties are concerned they cannot be applied without some qualification. It might, moreover, be possible to offset axiom by axiom and to refer to the one so often mentioned by the old jurists, *vigilantibus non dormientibus scripta est lex*. I prefer, however, to rest on the clear text of the statute, and I take it as being eminently desirable, in the interest of the security of land transactions in a system where registration of titles to land is provided for, that the entries in the public register, in the absence of fraud, be taken as conclusive. Here the respondent failed to register its assignment and even to protect its caveat when it was called upon in the manner prescribed for by the Land Titles Act to do so. I cannot, under the circumstances of this case, come to its assistance.

I am, therefore, of the opinion that the appeal should be allowed and the judgment of the trial judge restored with costs throughout.

CASSELS, J.:—I concur in the reasons and result arrived at by Mignault, J. *Appeal allowed.*

LAWTON v. LINDSAY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, and Elwood, JJ.A. April 12, 1919.

VENDOR AND PURCHASER (§ I E—25)—LACHES—SPECIFIC PERFORMANCE—RETURN OF DEPOSIT—RIGHTS OF PARTIES.

A purchaser of land under an agreement of sale who has never in fact abandoned or receded from his contract, but who has by reason of laches or otherwise deprived himself of the right to specific performance is, in case the vendor refuse to accede to specific performance, *primâ facie* entitled to a return of the deposit or part payment. But where the vendor is ready and willing to complete but the purchaser is unwilling to remedy his default, such purchaser is not entitled to a return of the purchase-money where the agreement has not actually been rescinded.

[*March Bros. & Wells* v. *Banton* (1911), 45 Can. S.C.R. 338, applied.]

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LAWTON v. LINDSAY.

APPEAL by plaintiff from the trial judgment in an action for the return of instalments of purchase-money paid under an agreement for sale of land. Affirmed.

P. H. Gordon, for appellant; *H. E. Sampson*, K.C., for respondent.

The judgment of the court was delivered by

Lamont, J.A.

LAMONT, J.A.:—This is an action for the return of instalments of purchase-money paid under an agreement for the sale of land, on the ground that the vendor had repudiated the agreement by taking possession of the land. The evidence discloses the following: By an agreement in writing dated December 8, 1911, the defendant agreed to sell to one Thomas M. Putnam the north-east quarter of section 23 and that part of the north-west quarter lying east of the Saskatchewan River in township 35, range 5, west of the 3rd, for $12,880; $5,000 cash, and the balance in 5 equal payments in the years 1912 to 1916 inclusive, with interest thereon at 6%. The cash payment was made, as was also the payment of 1912. The 1913 payment was made, in part at least, by a note signed by Putnam and G. A. Cruise, on which certain payments were made up to August, 1914. In that month the defendant was in Putnam's office asking for money. He says Putnam asked him to come again in the afternoon as he wanted to see Cruise. He went back in the afternoon and found present Putnam, Cruise and the plaintiff. Putnam said to him, "You talk it over with Cruise, I think he can fix you up some way." Cruise gave his personal note for $500. This was on account of the payment for December, 1913. It appears from the evidence that although the sale was made to Putnam and the agreement taken in his name, in reality there were some 5 persons interested: Putnam, Cruise, Ingram, Williams and the plaintiff. On August 20, 1914, Putnam gave the plaintiff an assignment of a two-fifths interest in the agreement of sale which he had with the defendant, to which assignment the defendant consented in writing. The plaintiff says that he had acquired the interests of the other parties above mentioned in the lands. By an agreement in writing dated August 24, 1914, Putnam assigned to the plaintiff his entire interest under the agreement of December 8, 1911, subject to the payment of the balance of the purchase-money. Of this assignment the defendant was not aware. No further

payments were made to the defendant in respect of this land. Even the Cruise note was not paid. In 1915 the land was sold for taxes which, under the agreement, the purchaser covenanted to pay. Further, there was a seed grain lien placed against the land by one Saunders, who was the plaintiff's tenant in 1915. The buildings had been allowed to get into poor condition and the house had been broken down in part and turned into a granary. Early in 1916 the defendant saw both Cruise and Putnam, and was informed that Putnam had no money. He then, through his solicitors, had a cancellation notice served upon Putnam. After the cancellation notice, the defendant testified that he had a conversation with Cruise. In answer to the question "What about?" he said:—

> He wrote to me and asked me to call and see him, and I went to his office, and he says, "well, Putnam hadn't got any money, and Lawton hadn't sent any money," and, he said, "I think you had better take back the place and put a good man on," and I told him that was the trouble, finding a good man, and I told him the best thing I could do was to move on to the place myself.

Cruise asked the defendant if he would return his note for $500, but the defendant declined to do so, saying he would rather have the money. The defendant then wrote to Saunders, the tenant, and subsequently saw him. The defendant asked Saunders to get off the place, as he intended to go on to it himself. Saunders replied that he had a lease, but if the defendant wanted him to get off he would do so. He got off, and the defendant put a man of his own in possession. In July, 1916, the plaintiff's agent notified the defendant that the plaintiff accepted the rescission which the defendant had brought about, and demanded the return of all moneys paid.

The defendant in his statement of defence set up that he was ready and willing to carry out the contract. The plaintiff admits that he has not offered to pay the balance of the purchase-money.

The Chief Justice of the King's Bench, who tried the case, held that under the circumstances the contract should not be considered as rescinded, but that the defendant's possession should be considered as similar to a mortgagee in possession. From that judgment the plaintiff appeals. His contention is that the defendant, by asking his tenant to leave the premises, rescinded the contract, and, as a result, must make restitution.

As the trial judge held that, under the circumstances, the con-

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tract should not be regarded as rescinded, I take it that he accepted the defendant's testimony as to his conversation with Cruise, after the notice of cancellation had been sent, and that the defendant took possession by reason of what Cruise said to him and believing that the plaintiff and Putnam had abandoned the contract, which abandonment is set up in the statement of defence. These being the facts, is the plaintiff entitled to recover?

In my opinion the law applicable to this case is clear. If this is a case of actual rescission, there must be restitution. If what the vendor did amounts to an election on his part that he will no longer be bound by the contract, such repudiation by him, acquiesced in by the plaintiff, rescinds the contract and the parties must be restored to their original position. The vendor will be entitled to the land and the deposit, if any, and the purchaser to the instalments of purchase-money.

McCaul on Vendor and Purchaser, 2nd ed., p. 60.

If, however, the plaintiff had abandoned the contract at the time the vendor took possession, or if the taking possession by the defendant did not under the circumstances amount to a refusal by him to be longer bound by the contract, the plaintiff is not entitled to succeed. Two questions therefore arise: (1) Had the plaintiff abandoned the contract at the time the defendant took possession, and, (2), if not, was the taking possession by the defendant an election on his part to be no longer bound by the contract?

Before considering these questions, I might point out that the notice of cancellation given by the defendant was ineffectual to determine the contract, by reason of the existence of an order-in-council which provided that all proceedings by a vendor to determine or put an end to or rescind or cancel a contract for the sale of land had to be taken by proceedings in a court of competent jurisdiction.

1. Was the contract abandoned by the plaintiff? The plaintiff never admitted that he was abandoning it, but that is not necessary.

In *Howe* v. *Smith* (1884), 27 Ch. D. 89, at 98, Bowen, L.J., said:—

> It seems to me the answer to that argument is that although in terms in a case like the present the purchaser may appear to be insisting on his con-

tract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused, performance.

To determine whether or not the conduct of the plaintiff amounted to an abandonment, it is necessary to see what he agreed to do and wherein he failed to perform his obligations. He was let into possession of the property not as purchaser but as tenant. The agreement provided that the vendor should retain possession until April 1, 1912, and also that "until the completion of the purchase the purchaser should hold the premises as tenant of the vendor." The purchaser agreed to pay the purchase-money on the days and times set out in the agreement. He agreed not to remove or destroy any of the buildings on the land without the permission of the vendor, and he agreed to pay the taxes. He did not pay the instalments of purchase-money; the house was broken in part and turned into a granary; the plaintiff, by his tenant, had placed a seed grain lien encumbrance for $180 against the land, the proceeds of the crop grown from this grain the plaintiff kept without paying either the seed grain lien or making a payment under the agreement; and, finally, he failed to pay the taxes and allowed the land to be sold for unpaid taxes. However vociferously the plaintiff may declare that he was not abandoning the contract, such conduct, in my opinion, may well be held to evidence an abandonment thereof.

It is not necessary, however, that I make any final determination on the question of abandonment, because I am of opinion that the ground upon which the trial judge placed his judgment is sound, namely, that the taking possession by the defendant, under the circumstances, did not constitute a repudiation by him of the contract. The defendant took possession because Cruise told him that Putnam had no money and the plaintiff had not sent any, and suggested that he take possession, and he believed the purchasers were abandoning the contract. The sum and substance of their subsequent proceedings seems to me to amount to this: the plaintiff informs the defendant that by taking possession he has repudiated the contract, and that he (the plaintiff) has acquiesced therein and wants a return of the moneys paid. The defendant replies that Cruise told him the plaintiff had abandoned the contract. The plaintiff says Cruise had no authority to make such a statement; to which the defendant replies that if the

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plaintiff did not intend to abandon the contract, he is ready and willing to carry it out.

Under these circumstances, the taking possession of the land by the defendant constituted, in my opinion, only an acquiescence by him in the abandonment of the contract by the plaintiff. If there was in fact no such abandonment, his acquiescence in that supposed state of affairs cannot be turned into a repudiation by him of the contract.

In *March Bros. & Wells* v. *Banton* (1911), 45 Can. S.C.R. 338, the purchaser had paid $600 on the contract, but had made such default in the payments as to disentitle him to specific performance, but he had not abandoned the contract. The vendor served upon him a notice which was ineffectual to put an end to the contract. The purchaser tendered the balance remaining unpaid under the agreement, but the vendor refused to complete. The Supreme Court of Canada held that the purchaser was entitled to a return of the $600 paid. In his judgment, Davies, J., at p. 342, says:—

> . . . the mere neglect and delay on the part of the purchaser, while sufficient to deprive him of his right to specific performance, did not operate as a forfeiture of the instalments of the purchase-moneys paid. These moneys not having been paid as a deposit and not having been forfeited under the agreement of sale, and the defendants being unwilling to accept the balance of the purchase-moneys and convey the land on the ground claimed by them that the agreement was at an end and rescinded and the plaintiff having been refused by the trial judge specific performance of the agreement on account of his delay, I am of opinion that the judgment on his alternative claim awarding him a return of the $600 paid by him was correct.

And Idington, J., at pp. 343 and 344, states the law as follows:—

> The rule seems tolerably clear that a purchaser who has never in fact abandoned or receded from his contract, but yet been by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance *primâ facie* entitled to a return of the deposit or part payment.

It will be observed in these judgments that the right of the purchaser to a return of the moneys paid is said to be dependent upon the refusal of the vendor to accede to specific performance. Where a vendor is ready and willing to complete, but the purchaser is unwilling to remedy his default, it would seem to follow that the purchaser is not entitled to a return of the purchase-money where the agreement has not actually been rescinded.

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Having reached the above conclusion, it is unnecessary to consider whether or not the defendant was entitled to take possession in his capacity as landlord, the rent reserved being in arrear, nor the question whether or not the plaintiff and Putnam—by referring the defendant to Cruise to arrange the balance unpaid of the 1913 payment—held Cruise out to the defendant as their agent in matters under the contract.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

LE BLANC v. The "EMILIEN BURKE."

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Ex. C.

Exchequer Court of Canada, Prince Edward Island Admiralty District, Stewart, L.J., in Adm. April 1, 1919.

COLLISION (§ I A—3)—BETWEEN SAILING VESSELS—REGULATIONS RELATING TO—LIABILITY.

The regulations relating to sailing vessels require that when two sailing vessels are approaching one another so as to involve risk of collision the one which is running free shall keep out of the way of the one that is close-hauled; if both are running free with the wind on different sides the vessel which has the wind on the port side shall keep clear of the other. Where one vessel is to keep out of the way the other shall keep her course and speed. Held on the evidence that the defendant vessel had violated these rules.

Statement.

ACTION *in rem* and counterclaim for damages caused by a collision between two sailing schooners.

A. B. Warburton, K.C., and *D. E. Shaw*, for plaintiff; *G. Gaudet*, K.C., and *J. M. Hynes*, for defendant.

Stewart, L.J.

STEWART, L.J.:—This is an action *in rem* brought by the plaintiff, the master of the schooner "Florrie V.," registered at Arichat, Cape Breton, of about 97 tons, against the "Emilien Burke," for damages done by a collision in the Bras d'Or Lakes off Baddeck, Cape Breton, on November 8, 1918, somewhere about 2 o'clock in the afternoon. There is a counterclaim by the owner and master of the "Emilien Burke" for damages caused to her in the same collision.

The "Emilien Burke" is a schooner of about 90 tons. She had a crew, including Capt. Arsenault, of 4 men. At the time in question, she was bound on a voyage from Sydney with a cargo of coal. The "Florrie V." was coming from Crapaud in this province and proceeding to Sydney laden with turnips and potatoes. She also had a crew of 4. The weather at the time was clear and fine, with a moderate breeze.

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It is very creditable to the parties to this suit that there is so little contradictory evidence. I was particularly struck with the frank and candid manner in which the captain of the "Emilien Burke" gave his testimony. He has been sailing the seas for 56 years and a master mariner for 43 years. He made no attempt to suppress or explain away anything that might tend to prejudice his case; he was, in short, a model witness, and if it were necessary for me to decide the determining factors of this case on a conflict of evidence I would find some difficulty in disbelieving the account given by Capt. Arsenault.

There is, however, a slight disagreement between the parties as to the direction of the wind and the movements of their respective vessels a short time before the collision.

Capt. Le Blanc's account of that afternoon's event is substantially as follows: The "Florrie V." an hour or two before the collision had left the Grand Narrows Bridge and was proceeding in an east-north-easterly course accompanied by the schooners, the "Rosy M.B." and the "John Halifax," all three vessels sailing close-hauled to the wind which was north-north-east. The "Florrie V." continued on this course until she opened up into Baddeck Bay off Burnt Point. She then headed on an east by north course and kept on that tack until she reached Coffin Island. At Coffin Island she tacked and stood on a north-west by north course for about a half a mile. Shortly before this she saw the "Emilien Burke" about 5 miles distant, coming west in a west by south course, after proceeding for about half a mile on that tack the "Florrie V." tacked again and stood on an east by north course close-hauled to the wind. The "Emilien Burke" was then coming from an opposite direction running free in a course parallel with that of the "Florrie V.," and if she had kept her course would have passed the "Florrie V." 300 yards off on her starboard side. The "Emilien Burke" when nearly abreast his starboard bow changed her course towards the "Florrie V." At that time his mate was stationed on the lookout and his seaman was at the wheel. The captain himself paced the deck near the lookout, and when he saw the "Emilien Burke" changing her course towards him he thought her captain wished to speak with him. He walked aft to give him an opportunity of doing so as he would go by the stern. Noticing, however, that she was luffing up

towards the "Florrie V.," and coming nearer, he went to the forward part of the poop and sang out "Keep away, you are going to run into us." At this he saw a man stand up forward of the main hatch and abaft of the foremast, and run towards the wheel and turn it over to starboard, but it was then too late to avert the collision.

In this he is corroborated by his mate and the seaman who was at the wheel.

The mate of the "Rosy M.B.," the master and owner of the "John Halifax," and Lorenzo Poirier, master mariner and owner of several vessels, support the evidence of Capt. Le Blanc as to the direction of the wind, and as to the vessels sailing close-hauled to the wind. Lorenzo Poirier stated that he was at New Harris, about 9 miles from Port Bevis, that morning on his way to Sydney—that there is a narrow outlet from that lake—that he couldn't get out because of a head wind blowing north-north-east—that there were 5 or 6 vessels there and all were compelled to remain inactive, not only that but the following day, and that if the wind had been north-north-east as claimed by the captain of the "Emilien Burke," it would have enabled him, with the tide running out, to have got out that day and to proceed on his intended voyage.

Several of these witnesses also corroborate Capt. Le Blanc's statement that the "Florrie V." and "Emilien Burke" were sailing on parallel courses. The mate of the "Rosy M.B." also stated that hearing a call on board the "Emilien Burke," he saw a man leave her wheel and go forward, where he remained for about 2 or 3 minutes. When this man was away from the wheel he saw the "Emilien Burke" changing her course in the direction of the "Florrie V."

Capt. Arsenault of the "Emilien Burke" admits that his course was w. by s. and that the "Florrie V." was proceeding in a course east by north. He also admits that he was running free. He, however, claims that the two vessels were approaching each other absolutely heads on and not on parallel lines. As to the direction of the wind, he said that it was varying, puffing one way and another from north-north-west to north, that there was no east in it, and that it was fully north-north-west at the time of the collision. He further testified that the courses of both vessels were as stated until they were about half a mile apart,

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that he then hove his helm to port in order to send his vessel to windward so that he might pass the other vessel on her port side. That he wished to bring his vessel as close to the wind as possible on the starboard tack—that at the time he began to change his course, the "Florrie V." began to change hers by starboarding her helm—that when the "Florrie V." was a quarter of a mile from him he tied his wheel with the helm ported and went forward to give two of his men a hand to raise the foreboom to get it out of the socket—that he was away from the wheel about 2 or 3 minutes and while forward his vessel drew more into the wind. While rendering the assistance referred to he saw the "Florrie V." curving ahead of him, and that when he returned to the wheel she was about 300 yards off and that he then reversed his wheel, but it was too late to avoid the collision.

Thomas Gallant, the mate, supported to some extent the evidence of Capt. Arsenault. The wind he said, was about north, and that the last change in the course of the "Emilien Burke" was made just before the collision. Thomas McGrath, the cook, was the only other witness produced by the defendant. He seemed to know very little about the case, except that he said the wind varied about two points each way off north-north-west.

Capt. Le Blanc and those of his crew who gave evidence denied having changed their course on the approach of the "Emilien Burke," but kept it right along until the happening of the collision.

There seems to me to be a preponderance of evidence that on the day of the collision the wind was about north-north-east.

The defendant in his preliminary act, to the question "What fault or default, if any, is attributed to the other ship?" gives this answer:—

> That the plaintiff or those on board the "Florrie V." improperly neglected to take in due time proper measures for avoiding a collision with the "Emilien Burke" and did not make any attempt to avoid same. She was not kept in her proper course as required by law and those on board the said vessel violated the rules and regulations as to her proper navigation.

This, it seems to me, is entirely too vague and indefinite. The object of the questions is to obtain a statement *recenti facto* of the circumstances from the parties and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff. If answers like this were sufficient, the door would be open for the

making out of almost any kind of a case. As neither party is allowed to depart from the case set up in his preliminary act, it can be readily seen how necessary it is that definite and precise answers should be given to the questions submitted. Besides the kind of answer given here might suggest inability to attribute any fault or default to the other side.

The regulations which it is material to consider in this case are articles 17, 21 and 27, which are as follows:—

Article 17. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz:—

(*a*) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(*c*) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note. When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Let me assume for the present that the direction of the wind was n.n.e. and that the vessels were approaching one another on parallel courses and not heads on. It is admitted that the course of the "Florrie V." was east by north and that of the "Emilien Burke" west by south. On this assumption the "Florrie V." would be sailing close-hauled to the wind and the "Emilien Burke" would be running free. But the latter did not only not keep out of the way of the "Florrie V.," as provision "*a*" of article 17 required her to do, but, in changing her course to starboard, in place of continuing as she was going, she brought herself in the way of the "Florrie V.," in direct violation of the rule.

Take now the contention of the "Emilien Burke" and assume that the wind was north-north-west, and that both vessels were coming heads on on the respective courses admitted by both sides. In this assumption it is admitted that both vessels would be running free. It would have been the duty of the "Flo rie V." with the wind on her port side to have kept out of the way of the

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"Emilien Burke" having the wind on her starboard side. But it would equally have been the duty of the "Emilien Burke" to have kept her course and speed. This, however, is what she did not do, but deliberately altered her course when the vessels were half a mile apart, by porting his helm, and this at the very time the "Florrie V." had begun to starboard his helm, the proper move to make in order to keep out of the way of the "Emilien Burke." So whether I take the evidence of the plaintiff or the defendant, the result is the same, Capt. Arsenault has been guilty of a violation of the rules.

But it is necessary for me to consider the question whether the "Emilien Burke" being to blame, the "Florrie V." was not to blame also.

A contention was advanced by Mr. Gaudet with considerable emphasis that the "Florrie V." did nothing to avoid the collision, that the man at her wheel never attempted to change her course, although the two vessels were advancing in dangerous proximity to one another.

There is no doubt the "Florrie V." was bound to comply with article 21 and keep her course and speed until she found herself so close to the "Emilien Burke" that the collision could not be avoided by the action of the latter vessel alone. Then she should endeavour if possible to prevent disaster. The defence of contributory negligence is always open to the defendant ship, although she herself may have been guilty of a breach of the regulations.

Sir Gorell Barnes in *The Parisian*, [1907] A.C. 193, at p. 207, deals with this point in a very common sense way. He said:—

> It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel and might be blamed for so doing and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point and then act, but the precise point must necessarily be difficult to determine and some little latitude has to be allowed to the master in determining this.

It was the duty of the plaintiff to have avoided the consequences of the defendant's breach if he could have done so by the exercise of ordinary care and prudence. But the burden of proof lies on the offending vessel.

Reverting to the fact of the wind being north-north-east and the duty of the vessel running free to keep out of the way of the vessel which is close-hauled, Capt. Le Blanc would have no reason to doubt that the "Emilien Burke" would observe the rules and keep out of his way. When he saw her changing her course and advancing in his direction, it was not an unreasonable supposition for him to entertain that her captain desired to speak to him as he came near. He would naturally up to the last moment rely upon the "Emilien Burke" observing the rules of navigation.

If the captain of the "Florrie V." knew that the "Emilien Burke" was by means of some compelling situation obliged to run into his vessel, he should have used all necessary and possible means to avoid it. There must indeed be special circumstances within the meaning of article 27 and the note to article 21 to justify a departure from article 21. Without the existence of such it would be extremely risky and likely to involve the chance of being mulcted in damages for any vessel to take such a departure. A learned judge in dealing with this point, said:—

> But the principle embodied in this rule, though a sound one, should be applied very cautiously and only when the circumstances are clearly exceptional.

No such circumstances existed or were attempted to be shewn to exist in this case. The unfortunate event happened in broad daylight when the weather was clear and fine, and there was ample sea room in which to sail and manœuvre.

I have on a careful consideration of the whole case, come to the conclusion that no fault can be attributed to the "Florrie V.," her master or crew, and that the "Emilien Burke" is alone to blame for the collision, and that she must be held liable for the damages that ensued.

These damages I will now assess, as follows:—For damage done to the sails, $140.52; for rope and block, $21.55; for repairing boat, $35; for plank and fittings for davitts, $58; for 24 turned stanchions, $15.60; for towage done by the "Rosy M.B.," $40; for help, $10; for costs of survey, $10; for damage done to hull, $229.33; total, $560; for which sum with costs I condemn the ship "Emilien Burke," her sails, apparel and equipment, and decree accordingly. *Order accordingly.*

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S. C.

HICKMAN v. WARMAN.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. December 10, 1918.

MISTAKE (§ III C—35)—MUTUAL—VENDOR AND PURCHASER—HOUSE AND LOT DESCRIBED BY STREET NUMBER—HOUSE ON OTHER LOT—REMOVAL BY PURCHASER TO PROPER LOT—DAMAGES.

Where a vendor agrees to sell and a purchaser to buy a house and lot described by the street and street number where it is situated, both parties believing at the time of sale that the house stood on the west half of a certain lot according to a registered plan, and after the sale it is found that the house in fact encroaches 4 feet on the east half of the lot, which has been conveyed to a third party; it being impossible to rectify the deed to conform with the agreement the purchaser is entitled to damages. The damages were assessed at what it cost the purchaser to move the house onto the west half.

Statement. APPEAL by the plaintiff from the judgment of Denton, Jun. Co. C.J., dismissing an action, brought in the County Court of the County of York, to recover damages for breach of a contract or covenant. Reversed.

On the 12th June, 1913, the plaintiff entered into an agreement with the defendant to purchase a "house and lot known as No. 144 north side of Glenwood avenue, city of Toronto." The defendant produced to the plaintiff, before the agreement was signed, a surveyor's plan of the land. Both parties believed—but were mistaken—that the survey was correct; and, relying upon the plan, the defendant in 1913 conveyed to the plaintiff by deed, containing the usual covenants, the west half of lot 82 on the north side of Glenwood avenue, as shewn on the plan. By a subsequent survey it appeared that house No. 144 was so built as to encroach 4 feet on the next lot to the west of 82. The owner of the next lot offered to sell the plaintiff 4 feet, but the plaintiff preferred to remove his house, and did so, at an expense of $125.

The learned trial Judge was of opinion that the plaintiff could not succeed upon his claim for damages for breach of the contract or covenant, and dismissed the action.

A. J. Russell Snow, K.C., for the plaintiff, appellant.

A. C. Heighington, for the defendant, respondent.

Clute, J. CLUTE, J.:—This is an appeal by the plaintiff from the judgment of the trial Judge, who dismissed the action with costs.

The facts are not in dispute.

The plaintiff, a labourer, entered into an agreement with the

defendant to purchase a house and lot, in the words and figures following:—

"June 12/13.

"This agreement between Edward H. Warman who agrees to sell and Herbert W. Hickman who agrees to purchase house and lot known as No. 144 north side of Glenwood avenue, city of Toronto, for the sum of $1,500, payable as follows:

"$400 as a deposit and $1,100 on completion of sale. Mr. Hickman to get possession on last day of June, 1913; costs of deeds etc. to be paid by vendor.

"Witness: E. H. Warman.

"Jno. E. Head. H. W. Hickman."

This agreement was signed after the parties had viewed the premises.

Prior to the negotiations, the defendant had had a survey made of his property, and the agreement was entered into on the assumption and belief by both parties that the survey was correct, and that the land intended to be conveyed consisted of the west half of lot 82 on the north side of Glenwood avenue, registered plan No. 866.

The defendant produced to the plaintiff, during the negotiations and before the agreement was signed, a plan dated the 16th April, 1909, made by Henry D. Sewell, O.L.S., shewing that the defendant had had a survey made of the said lot and built the house thereon according to the survey, and he pointed out to the plaintiff the posts which he alleged had been put there by the said surveyor.

Both parties believing, by mutual mistake, that the said survey was correct and relying upon the same, the defendant conveyed to the plaintiff, by deed dated June, 1913, the west half of lot No. 82 on the north side of Glenwood avenue as shewn on the said plan No. 866. By a subsequent survey it plainly appeared that the first survey was incorrect, and that the house and lot known as street No. 144 in fact extended 4 feet beyond the west half of lot 82.

The owner offered to sell to the plaintiff the 4 feet originally included in the purchase, or to allow the plaintiff to remove his house; but the plaintiff, not desiring more land, removed his house upon the said lot No. 82. The expenses of moving the same and incidental thereto amounted to $125.

Upon the undisputed facts, the house and lot which the

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plaintiff bought was house No. 144. The deed not having been made in accordance with the agreement, the plaintiff would have been entitled to succeed in an action for reformation to make it comply with the agreement; but, as the transaction has been completed, and the 4 feet have passed into the hands of a third party, the plaintiff is entitled to damages in lieu of specific performance; and, as he was compelled to remove his house to the land conveyed by the deed at a cost of $125, he is entitled to damages for that amount to compensate for the loss: sec. 18 of the Judicature Act, R.S.O. 1914, ch. 56.

In *Turner* v. *Moon*, [1901] 2 Ch. 825, it was held that the proper measure of damages was the difference between the value of the property as it purported to be conveyed and its value as the vendor had power to convey it. This was followed in *Great Western R. Co.* v. *Fisher*, [1905] 1 Ch. 316, and in *Eastwood* v. *Ashton*, [1913] 2 Ch. 39, reversed in [1914] 1 Ch. 68, and restored in [1915] A.C. 900.

It is obvious that the damages to which the plaintiff would be entitled under the decision in the *Turner* case would be much more than the cost of removing the house, but evidence was not given upon which damages could be based upon the difference in value between the property as conveyed and intended so to be; it would be at least the cost of the removal of the house.

It may be suggested that he was bound to accept a deed of the additional 4 feet at $30 per foot, but he was a labouring man, and he thought the removal of the house would cost less, and he did not want to pay additional taxes for the additional land, nor was he bound to do so. He is entitled to at least the cost of removal of the house upon the land conveyed, amounting to $125.

The judgment below should be set aside and judgment entered for the plaintiff for $125 with costs of the action and of this appeal.

Mulock, C.J.Ex.

MULOCK, C.J. Ex., agreed with Clute, J.

Riddell, J.

RIDDELL, J.:—The facts are not in dispute: the defendant in 1909 bought a block of vacant land composed of lots 82 and 84, each 50 feet wide, 82 being west of 84, lying on the north side of Glenwood avenue—he had a survey made of the block by an Ontario Land Surveyor, Mr. Sewell, who placed a post at each corner of the block, but did not divide the block into the two lots. The defendant says that he measured off a strip 25 feet wide of the

west side of the block from front to rear; and, leaving a strip of two feet for a sidewalk to the west, he built his house about 23 feet wide on what he supposed to be the west half of lot 82: this house was numbered No. 144, and the defendant lived in it.

In 1913, the plaintiff, who is a labourer, wished to buy a house, and was taken by one Head, who had it for sale, to see this house: as the plaintiff says, "Mr. Head said the house was for sale, and would I like to buy it, and I said, yes I would if it was all right." He did examine the house, was shewn over the premises by the defendant and his wife, and finally an agreement was drawn up and signed.

[The learned Judge set out the agreement as above.]

It was the intention of the plaintiff to buy the house as a residence, and that intention was known to the defendant; and it is plain from all the circumstances of the case that the land itself was not of importance except as being the lot upon which the house was built and by which it was surrounded.

The plaintiff and defendant went to the defendant's solicitor, who acted for both parties; he drew up the deed (to be particularly described below) by which it was intended to carry out the agreement formally—the plaintiff paid his money, took possession of the house, and has ever since occupied it as a dwelling.

Two or three weeks after the purchase, the owner of the land to the east told the plaintiff that he was on her lot about 4 or 6 feet, and told him to get off her property; but the plaintiff did nothing. This owner sold her lot, and the new owner had a survey made and found that the house was some 4 feet on the east half of lot 82. He wrote the plaintiff requiring him to remove his building without delay. This not being done, he offered to sell the 4 feet at $30 per foot frontage, but the plaintiff believed he could move his building for less, and did remove the building some 4 feet to the west, at an expense of $97.40. To that sum he added the cost of a new fence..... $12
estimated damage to walls..... 12
estimated value of time lost by the plaintiff removing..... 18
estimated value of time lost by the plaintiff in law-suit..... 10

$52,

and sued for $150 in the County Court.

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The deed turns out to be in pursuance of the Short Forms of Conveyances Act, of "all and singular . . . being composed of the west half of lot number eighty-two (82) on the north side of Glenwood avenue as shewn on a plan . . .;" it contains the usual covenants, but no mention is made of the house No. 144, which was the real object of purchase.

It is agreed that no fraud can be charged against the defendant; that both parties at the time of the purchase believed the house No. 144 to be on the west half of lot 82, and that both believed that the deed conveyed the house No. 144.

The learned County Court Judge (Denton) dismissed the action with costs, and the plaintiff now appeals.

Any right which the plaintiff might have had to rescission when he discovered that his deed did not convey the land upon which the house stood, he lost when he changed the position of the house, and therefore there could be no *restitutio in integrum*. Nor does he claim rescission in this action: he says that the defendant sold him the house and lot known as No. 144, that that implies at least all the land covered by the house and upon which the house was built, that either the deed conveys this land or there is a mistake in reducing into formal shape the real agreement.

That Equity will reform the deed where there is a mistake in the expression of a real agreement entered into, is quite clear; that a mistake mutually made by the parties as to the effect of a deed, may give ground for a rectification is equally clear: Halsbury's Laws of England, vol. 21, pp. 11, 12, and cases cited.

Where, as here, there has been a previous written agreement, difficulty has sometimes been made over going outside the written agreement into the circumstances by parol evidence—but that has been when the formal document agrees with the written agreement and the agreement is in itself clear and unambiguous: *Thompson* v. *Hickman*, [1907] 1 Ch. 550, and cases cited. Whether that is the law since *Fowler* v. *Sugden* (1916), 115 L.T.R. 51, 85 L.J.K.B. 1090, we need not consider. Here the deed is not in accord with the written agreement, and we may look not only at the agreement but at all prior relevant transactions: *Ellis* v. *Hills* (1892), 67 L.T.R. 287.

From all the circumstances it is quite clear that the defendant intended to sell and the plaintiff to buy the house with the land on

which it stood: and the deed should be reformed accordingly: *Whiteley* v. *Delaney*, [1914] A.C. 132.

The evidence establishes that the defendant and plaintiff both thought that the land went west to about 2 feet west of the house and east to the eastern side of the house. The land desired was from the east side of the house to a line 2 feet west of the house, whereas in fact the deed gives east only to a line 4 feet west of the east side of the house. The deed being rectified should cover the land to the former position of the east side of the house. We should, if possible, treat the deed as being rectified, the Court having equitable as well as legal jurisdiction: *Walsh* v. *Lonsdale* (1882), 21 Ch.D. 9; *Rogers* v. *National Drug and Chemical Co.* (1911), 23 O.L.R. 234, 24 O.L.R. 486. Of course we cannot actually rectify the deed, as the right of a third party, a purchaser for value without notice, prevents: but we may award damages: Ontario Judicature Act, sec. 18; Story's Equity Jur., 2nd ed., sec. 798, and notes. In assessing such damages we proceed as though the deed were rectified as between the plaintiff and defendant. Then the covenant 2 in the Short Forms Act, R.S.O. 1914, ch. 115, is effective as to this land also—the defendant covenants that he had the right to convey notwithstanding any act of his own, whereas he had already sold the 4 feet.

The plaintiff is entitled to damages for breach of this covenant, and to be put in the same position as if the deed had properly conveyed the 4 feet—this he could have brought about by an expenditure of $120, but that would load him with extra land on which he would have to pay taxes etc. in perpetuity—a burden which we have no right to compel him to assume. He pursued the better and what he thought the cheaper way, and moved his house, and he should be paid a reasonable sum by way of damages, but he cannot be allowed the time lost in connection with the action, and I think the sum of $125 is fair under all the circumstances.

I would allow the appeal and direct judgment to be entered for the plaintiff for $125, with costs here and below on the County Court scale.

SUTHERLAND, J., agreed in the result. Sutherland, J.

Appeal allowed.

SASK.

C. A.

BANK OF HAMILTON v. HODGES, CRANE & HEPBURN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 12, 1919.

BILLS OF SALE (§ III G—41)—TAKEN MERELY AS SECURITY FOR INDEBTEDNESS —DEPOSIT IN BANK—BANK MANAGER'S KNOWLEDGE OF CIRCUMSTANCES—AFFIDAVIT OF BONÂ FIDES—TRANSACTION VOID—RIGHTS OF CREDITORS.

Where the irresistible conclusion is that a bill of sale was taken merely as security for an indebtedness, and deposited with the bank as collateral security, the bank manager having full knowledge of all the circumstances surrounding the giving of the bill, the affidavit of *bonâ fides* on the bill of sale does not truly set forth the consideration and not being the affidavit of *bonâ fides* as required in the case of a chattel mortgage, the transaction is void as against creditors.

Statement. APPEAL from the trial judgment in an action on a bill of sale. Affirmed.

C. E. Gregory, for appellant; *Schull*, for respondent.

The judgment of the court was delivered by

Elwood, J.A. ELWOOD, J.A.:—The question for consideration in this case is whether or not a bill of sale dated April 12, 1913, given by Carl Dobbecke to one Watson on certain horses, and which subsequently came into the possession of the appellant as collateral security to indebtedness of the said Watson to the appellant was intended to be a bill of sale or merely a security for the indebtedness of Dobbecke to Watson, and if it was intended to be given merely as a security, whether or not the appellant was aware of such intention.

The evidence shews that, notwithstanding the giving of this bill of sale, Watson continued to accept promissory notes from Dobbecke in renewal of the indebtedness for which the bill of sale was taken. Dobbecke, in his examination for discovery, stated that he continued to be the owner of the animals until Watson made a seizure of them in 1915, and, before going further into the evidence, I have no hesitation in concluding that as between Watson and Dobbecke the bill of sale was intended to be merely a security for the indebtedness of Dobbecke to Watson. The evidence shews that the manager of the appellant was present when the bill of sale in question was taken and knew all of the circumstances surrounding the taking of it. After the bill of sale was taken Dobbecke's notes and renewals were deposited from time to time with the appellant by Watson as collateral to Watson's indebtedness to the appellant. Among these notes is one

dated March 5, 1915, nearly 2 years after the giving of the bill of sale, and on it is written "secured by bill of sale on horses."

A man named Broatch, giving evidence on behalf of the appellant, on cross-examination stated that at the time he went out and made the seizure of the horses in 1915 he was instructed by the appellant to go out and get a chattel mortgage on all the stock from Dobbecke. This stock would be the stock covered by the bill of sale, and the result would be that the bank would be getting a chattel mortgage from Dobbecke on stock which it now claims was absolutely transferred to Watson 2 years and more before the instructions were given to get this chattel mortgage.

The evidence further shews that after the seizure in 1915 the horses were sold or pretended to be sold to Dobbecke's wife, and that she gave a chattel mortgage to the appellant for the purchase-price. When this sale to Dobbecke's wife was being arranged, the manager of the bank was consulted as to Dobbecke's indebtedness to Watson. The manager made up the amount of the indebtedness from Dobbecke's notes, and it was the amount of the indebtedness that was arranged as the consideration for the sale to Dobbecke's wife.

I might refer to other evidence shewing the knowledge of the appellant, but I think it is sufficient for me to say that the irresistible conclusion is that the appellant was at all times aware of the circumstances surrounding the giving of the bill of sale, and was aware at all times that it was taken by Watson merely as security for Dobbecke's indebtedness. Having reached that conclusion, then the affidavit of *bonâ fides* on the bill of sale did not truly set forth the consideration and it is not the affidavit of *bonâ fides* as required in the case of a chattel mortgage or conveyance intended to operate as a chattel mortgage and the transaction would be void as against the creditors. I am, therefore, of the opinion that the appeal should be dismissed with costs.

Appeal dismissed.

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McCARTHY v. CITY OF REGINA.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

DAMAGES (§ III L—255)—COMPENSATION FOR INJURIOUS AFFECTION—CITY ACT, SASK.

The owner of property injuriously affected by the building of a subway is entitled to damages under s. 247 of the City Act (R.S.S. 1909, c. 84) although no land has been actually taken. The compensation to be awarded is to be determined by the depreciation in value of the property as of the date of publication of the notice of completion of the work. The fact that during the construction of the works the claimant recovered some insurance for injury to his buildings by fire, and with the insurance money recovered, built other buildings, does not affect the issue.

[*City of Regina* v. *Armour and McCarthy* (1918), 42 D.L.R. 792, reversed.]

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, 42 D.L.R. 792, varying the judgment of the Supreme Court *en banc* (1917), 38 D.L.R. 336, and further reducing an award given to the claimant.

The claimant claims compensation for land and buildings injuriously affected by the construction of a subway by respondent. The work had begun about September 18, 1911, and the public notice of the completion of the subway was given on October 17, 1914. On January 10, 1912, the buildings were destroyed by fire, but rebuilt, partly with insurance moneys recovered, in the summer of 1912. The claimant filed a demand for compensation to the amount of $81,000, and he was awarded $21,334 by the arbitrator. The respondent then appealed to the Supreme Court of Saskatchewan *en banc* where a reduction of $4,050 was made. Subsequently, on a motion by the respondent to amend the minutes of the above judgment, the amount of $6,484 was further deducted from the claimant's award.

E. B. Jonah, for appellant; *G. F. Blair*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—The damages to be ascertained "for injurious affection" to lands, no part of which has been taken, have to be determined as from or on a particular day, but they are only such as were "necessarily incurred by the construction of the work" and must relate to the conditions existing not alone at the date fixed to ascertain the damages, but those created or caused by or necessarily resulting from the exercise of the city's powers in constructing the work.

The evidence shewed that the buildings, which had been upon the appellant's property at the time the subway was commenced,

had been destroyed by fire some 3 months after such commencement. It was not contended, and could not be successfully contended, that the construction of the subway had anything to do with the burning of the building directly or indirectly, or that the city was an insurer and liable for plaintiff's loss by fire not caused by the subway. The respondent collected his insurance and built another and larger building in its place while the subway was being constructed. That building, having been commenced and completed months after the commencement of the construction of the subway, cannot in any way be considered as coming within the terms of the statute. I fail to understand how damages can be awarded for a new building erected on the premises of the appellant after the construction of the subway was commenced and during its construction. I think the damages allowed by the arbitrator of 40% for depreciation in the value of this building now in dispute in this appeal was properly disallowed by the Court of Appeal.

Improvements upon the property made after the commencement and during the construction of the subway are, in my opinion, not within the contemplation of the statute. It is the condition of the property when the construction of the subway was commenced that is to be considered when the arbitrator is to ascertain the "damages necessarily incurred by the construction of the work," and not improvements which the owner may put on the land after the work has been commenced.

It was contended that because the statute provided that the date of the publication of the notice of the completion of the work or undertaking should be the date in respect of which the damages should be ascertained, that as a consequence buildings erected by the owner after the work was commenced and depreciated in value in consequence of the work should be awarded.

As I have said I cannot accede to that contention. The owner could not, by his own act, after the commencement of the work, increase the damages to which he otherwise would be entitled. Those damages must be confined to those as the statute provides "necessarily incurred by the construction of the work," and I cannot think damages incurred to buildings erected by the owner after the "work" has been commenced are within the statute.

I would dismiss the appeal.

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Idington, J.

IDINGTON, J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan which deducted from the award of an arbitrator the sum of $6,484. The award was made under provisions enabling the arbitrator to determine the damages suffered by the appellant by reason of the injurious affection of his property by the construction of a subway.

The only right of recovery of damages appellant could have in law was that given by s. 247 of respondent city's charter reading as follows:—

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.

The foregoing furnishes the only basis of submission possible and must be held to contain the limitations of the claim made, and authority of the arbitrator to determine the damages suffered by reason of the construction of the work in question.

It is to be observed that the claim could only arise after the completion of the work as evidenced by the final certificate of him in charge of the work and upon the notice of the city clerk forthwith thereafter.

The date of that publication "shall be the date in respect of which the damages shall be ascertained."

The Court of Appeal, in going beyond that date of October 19, 1914, I submit with respect, erred by exceeding the powers there given by this statutory submission to the arbitrator.

It was not the condition of things existent two or three years before that time, but simply how much the completed structural changes affected the value of the appellants' property on October 19, 1914, by depriving it of the advantages the owner would have enjoyed had the said changes on the street never taken place.

Hence importing into the matters to be considered the destruction of a property by fire in the month of January, 1912, and the insurance money secured in relation thereto, was doing that for which there was no authority.

The above statutory provision seems novel and may be unique, nevertheless it is what those concerned for respondent chose to induce the legislature to provide.

Each expropriating statute generally fixes a time for determining the damages to meet the particular case in respect of which provision is made. The fact that usually the question of what damages any party may suffer by reason of the execution of any public project having to be determined before such execution is entered upon, may have led to the misconception of the court below in regard to what should fall within the operation of the section in question.

It is to be observed that any statute passed, competent for any parliament or legislature to pass, authorizing the execution of any work, gives no right to those suffering thereby to recover damages in respect thereof unless provision for compensation or damages is provided for. I repeat the only provision made herein seems to be that which I have quoted.

The appeal does not enable us to determine whether or not the point of view taken by the arbitrator and his measure of damages were correct. We can only determine herein whether or not the limits of the submission have been exceeded or not.

The appeal should be allowed and the judgment of the court below, so far as relative to the item of $6,484, amended by restoring said sum to the amount awarded appellant, with costs of this appeal to the appellant.

ANGLIN, J.:—When the defendant city constructed the subway which gave rise to the claim for compensation or damages before us on this appeal, it was governed by the City Act of Saskatchewan (R.S.S. 1909, c. 84). No part of the claimant's property having been taken, his claim for injurious affection fell under s. 247 of that Act. That section prescribed that such a claim should be filed with the city clerk within 15 days after publication in a local newspaper of notice of completion of the work, which the municipal council was directed to give. Sub-s. 3 is in the following terms:— Anglin, J.

3. The date of publication of such notice shall be *the date in respect of which* the damages shall be ascertained.

This provision, in my opinion, admits of only one construction. It prescribes that the compensation of the claimant should be the amount of the depreciation in the value of his property, as it stood

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at the date set, due to the work in question, *i.e.*, he should be awarded the difference between its value as it then stood with the work constructed and what would have been its value as it then stood had the work not been constructed. The use in sub-s. 3 of the words, "the date in respect of which" makes this abundantly clear; and a comparison of the language of that sub-section with the corresponding clause at the end of sub-s. 2 of s. 246 removes any possible ground for contending that the words "in respect of which" are not more than an equivalent of "at which."

Mr. Blair very properly directed our attention to the language of s. 245 restricting the damages to such "as necessarily result from the exercise of (the) powers" of the city. But I find nothing in these terms which would justify our placing any other construction than that which I have indicated on sub-s. 3 of s. 247. Of course the damages to be allowed must be confined to the depreciation in value which the claimant's property as it stood at the date of publication of the notice of completion had suffered as a necessary result of the work done by the municipality in the exercise of its powers. The owner cannot enhance his damages by introducing fanciful considerations.

He is apparently not entitled to compensation for loss sustained during the construction of the work owing to reduction in the rental value of his property, or other inconvenience. That is one of the anomalies of this peculiar legislation. Another is that if the work is not completed there would appear to be no provision for any compensation although serious loss may have been entailed.

But, with great respect, I am unable to appreciate the bearing on the claimant's right to compensation of the fact that pending the construction of the work he recovered some insurance in respect of injury to his buildings by fire. Neither is the relative value of his buildings when the work was begun and when it was completed a matter for consideration in determining the compensation to be awarded under the statute.

Although sub-s. 3 of s. 247 is probably a unique provision in legislation of this class, it is not at all unjust that the claimant should be compensated on the basis fixed by it. He is entitled to make the most of his land—to build upon it so as to use it to the best advantage. Its possibilities when so utilized must be taken into account in determining its value to him and in estimating the

depreciation caused by the work constructed by the municipality. For this purpose a building should be valued not according to its cost—it may be very extravagant for the locality and therefore unprofitable—but upon the basis of its rental value, and depreciation must be measured on the same footing.

I am, with deference, of opinion that the Court of Appeal erred in disallowing $6,484 awarded by the arbitrator for damages in respect of the claimant's building and that this item of the award should be restored. The appellant is entitled to his costs of the appeal to this court and also to his costs of the defendant's motion before the Court of Appeal to vary the minutes of its judgment.

Anglin, J.

BRODEUR, J.:—In 1911 the respondent corporation commenced the construction of a subway on Broad St., in the City of Regina. The appellant was the owner of lands and buildings fronting on that subway but which were not taken and expropriated. However, those lands and buildings were injuriously affected by the construction of that work, since it partially lowered the grade of the street.

Brodeur, J.

In 1912 a fire occurred in the appellant's buildings; and, as they were insured, he recovered the insurance money and he rebuilt them.

The subway was completed in 1914 and, as required by the law, a notice was published in October, 1914, by the city clerk. By the law of Saskatchewan, the liability of the municipal corporation to pay compensation for land injuriously affected is not limited to the cases where some land has been actually taken by the city but it exists in any case where land is injuriously affected by the exercise of the power conferred by the Act. *Vachon* v. *City of Prince Albert* (1916), 9 S.L.R. 80.

In the case of land taken a plan has to be filed shewing the land which is to be expropriated and the work which is to be done; and the names of the owners must be filed with the city clerk. Those owners are then notified and the claims for compensation must be filed within 15 days from the date of the deposit of the plan.

In the case, however, of land not taken but simply injuriously affected, the owner of the land has to file his claim for damages with the city clerk, within fifteen days after notice has been given in a local newspaper of the completion of the work. (S. 247, c. 84, R.S.S. 1909.)

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The law also provides that "the date of publication of such notice shall be the date in respect of which the damages shall be ascertained."

So, we see that there are different provisions in the case of lands taken and of lands injuriously affected. In the first case the owner is obliged to make his claim within 15 days of the deposit of the plan; and in the case of land simply injuriously affected, the claim has to be filed within 15 days after the notice of completion has been given.

McCarthy filed his claim in due time after the notice of completion was given. In the judgment *a quo* McCarthy was denied the right to claim any compensation in respect of his building because the property had been built on after the commencement of the subway. I am unable to agree with that proposition. The law states specifically that the date of publication of the notice of completion shall be the date at which the damages shall be ascertained. Then, we have to find out what buildings were on the property when the work was completed, and the extent to which those buildings are injuriously affected. We have nothing to do as to whether those buildings were of recent date or not.

Of course, if something had been done by the owner so as to unduly increase the burden of the city as regards the compensation to be paid, the situation might be different (*Mercer* v. *Liverpool, St. Helens & Lancashire R. Co.* (1904), 73 L.J.K.B. 960, 962). But there is no suggestion in this case of any such fraudulent action on the part of the land owner.

In those circumstances, I am of opinion that the appeal should be allowed and that the appellant should be entitled to recover the sum of $6,484 for damages as to his building with costs of this court and of the motion to amend the judgment in the court below.

Mignault, J.

MIGNAULT, J.:—The only question which arises here is as to the construction and effect of certain provisions of the statute governing the respondent previous to 1915.

The appellant claimed compensation for land and buildings injuriously affected by the construction of Broad St. subway, being an extension north of Broad St. across the right-of-way of the Canadian Pacific Railway to Dewdney St., in the City of Regina. No part of the appellant's land or buildings was taken,

but he claimed that they were injuriously affected by the construction of the subway and demanded the sum of $81,000 for his damages. Public notice of the completion of the subway was given on October 17, 1914, the work of construction of which had begun about September 18, 1911.

On January 10, 1912, the appellant's building on lots 24, 25 and 26 was destroyed by a fire which also damaged his building on lots 27 and 28. The building on the two latter lots was repaired or rebuilt in the spring and summer of 1912, and was in the same condition as repaired or rebuilt on the date the damages were assessed, namely, October 14, 1914. The appellant filed his claim for damages on October 22, 1914.

The arbitrator awarded to the appellant $21,334. The respondent then appealed to the Supreme Court of Saskatchewan *en banc*, where, as appears by the judgment of Newlands, J., of November 27, 1917, a reduction of $4,050 was made in the amount awarded to McCarthy. Subsequently, on July 15, 1918, on a motion of the respondent to amend the minutes of judgment, the amount of $6,484 was further deducted from Mr. McCarthy's award for the reasons stated by Newlands, J., as follows:—

In this matter, Mr. Blair, for the city, called the attention of the court to the fact that the learned arbitrator in assessing the damages to the McCarthy property had included in his award the building upon the property, and had allowed 40 per cent. depreciation for damage to the same by the subway; that the evidence shewed that the building which had been upon this property at the time the subway was commenced had been destroyed by fire some three months after the commencement of that work; that McCarthy had collected the insurance and had rebuilt.

This matter was not dealt with in our previous judgment through an oversight.

As the building which is now upon the property was built after the commencement of the subway, it cannot be said to be injured by that work, so McCarthy would not be entitled to any damages on that account. Neither can the rebuilding be considered as a repair of an existing building, as urged by Mr. Jonah, because after the fire it could not be used for any purpose, and was not such a building as could be damaged by the building of the subway.

The building was damaged by fire, for which McCarthy was paid by the insurance company, not by the subway.

There should, therefore, be deducted from the award to McCarthy the sum of $6,484, the amount allowed for damage to the building.

Mr. McCarthy now appeals from the judgment thus reducing his award by $6,484.

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S. C.

MCCARTHY v. CITY OF REGINA.

Mignault, J.

I am, with deference, of the opinion that this reduction should not have been made.

The sections of c. 84, R.S.S. 1909, which governed, at all the dates in question in this case, the compensation payable for land taken by the respondent, or for land injuriously affected by the construction of public works by it, are the following:—(The judge here cited ss. 245, 246 and 247.)

A clear distinction is here made between compensation for lands taken by the city and compensation for lands not taken but injuriously affected by a public work constructed by it.

In the case of lands taken, plans and specifications of the lands and work are deposited with the city clerk before taking the lands, and thereupon the city clerk notifies the owners of the lands to be taken, and the date of the deposit of the plans and specifications is that with reference to which the amount of the compensation for such lands shall be ascertained.

In the case of lands not taken but injuriously affected, the owner notifies the city clerk of his claim for damages within fifteen days after notice has been given in a local newspaper "*of the completion of the work*," and the date of publication of such notice "*shall be the date in respect of which the damages shall be ascertained.*"

Since the date of the notice of the completion of the work is the date in respect of which the damages to lands not taken but injuriously affected shall be ascertained, it is entirely immaterial whether during the construction of the work the buildings of the appellant were destroyed by fire and rebuilt by him. It is also immaterial whether or not the appellant received insurance money on account of the destruction of the building. I cannot, with respect, agree with Newlands, J., when he says that as the building which is now on the property was built after the commencement of the subway, it cannot be said to be injured by that work. The roadway was narrowed from 100 ft. to about 33 ft., and any building erected on such a roadway would be damaged by the work. In other words, it would generally be worth less than if the roadway had not been narrowed. It is true that McCarthy received the amount of his insurance, but apparently he employed it to rebuild, and there is nothing in the statute preventing him from so doing. There is no suggestion of fraud on his part or of any attempt to injure the city. What he did was to replace at his own cost a building which was on the property when the work began.

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Moreover, as I have stated, the statute is clear and the only date to be considered for the purpose of determining the compensation to which the appellant is entitled is that when the notice of completion of the work was published.

I would, therefore, allow the appeal with costs as stated by my brother Anglin, and fix the compensation to be paid to the appellant at the sum of $17,284, being the amount allowed by the court below before the reduction was made.

Appeal allowed.

Re WENTZELL.

N. S.

S. C.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm, J. April 12, 1919.

WILLS (§ III A—78)—WILL WRITTEN BY SEAMAN—ON ENVELOPE UNDER STAMP—PROBATE—CONSTRUCTION—VALIDITY.

A will, written by a seaman on an envelope, addressed to the young lady to whom he was shortly to be married; in the following words: "If I never return my will for you is two thousand five hundred, $2000,500, my share land shares vessels remainder for mother," held to be properly interpreted as giving the fiancee the shares of the vessels owned by the deceased. The will having been admitted to probate by the judge of probate after proof in solemn form there was no appeal from his decree.

Statement.

APPEAL from the judgment of S. A. Chesley, judge of probate for the County of Lunenburg, and the decree granted thereon, admitting to probate the will of a seaman written by him in a small space on the outside of an envelope during the course of the voyage upon which he was lost. The will was covered with two large Barbadoes postage stamps, and was not found for some time after the receipt of the letter enclosed in the envelope, which was addressed to a young woman to whom the deceased was to have been married on his return from the voyage upon which he was lost.

The judgment appealed from is quoted in the opinion of Ritchie, E.J.

T. R. Robertson, K.C., and *D. F. Matheson*, K.C., for appellant; *C. W. Lane*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—Colin Wentzell was a seaman, and being at sea wrote a letter addressed to Gladys Keddy, the young lady to whom he was shortly to be married, and under the two large Barbadoes stamps on the envelope addressed to Gladys Keddy there was found printed or written with a pen in the handwriting of the deceased the following words:—

Nov. 28. If I never return my will for you is two thousand five hundred

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$2000,500 my share land shares vessels remainder for mother. (Sgd.) Colin Wentzell.

The will was admitted to probate by the judge of probate after proof in solemn form, and there is no appeal from this decree.

The estate was subsequently settled and a claim of the mother for the board, etc., of the deceased for $1,200 was allowed at $360.

The judge of probate, in making the decree for distribution, interpreted the will as giving Gladys Keddy the shares of the vessels owned by the deceased. The will is not good as to the real estate as s. 9 only applies to personal property. There is an appeal from this decree, and the following questions have been raised: 1. In removing the stamps some of the letters of some of the words were obliterated, or partly so, and among others the letter "o" in the word "you" is partly obliterated, and it is argued that the word "you" is not apparent and that there is an entire destruction *pro tanto* of the will, and, therefore, a revocation of the devise of the $2,500 under the provisions of s. 21 of the Wills Act.

I do not think s. 21 of the Wills Act has anything to do with the question. No alteration of the will was ever intended, and that section obviously refers only to a will executed with all the formalities of the Wills Act, but it is not necessary to decide that question because it is in my opinion perfectly apparent that the word in question is "you"; the letters "y" and "u" are not obliterated, but the "o" is partly obliterated. It is clear that what happened is that part of the letter came away with the stamp when it was removed, but no one can look at the writing and make anything out of it but the word "you." The objection fails.

Then it is said that the will correctly interpreted means that the $2,500 is to go to Gladys Keddy, and the share of the deceased in the land and shares in the vessels and the remainder of the estate is to go to the mother. I cannot agree with this contention. The words "my share land shares vessels" are, I think, part of the gift to Gladys Keddy. If the object of the deceased was to give Gladys Keddy only the $2,500, he would not have added the words referred to but simply have said "remainder for mother." The words if read as a part of the gift to Gladys Keddy have a full meaning; they are surplusage if read as connected with the gift of the residue of the estate to the mother.

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Harris, C.J.

The natural meaning of the words as used seems to imply a gift to Gladys Keddy of the shares and then the residue of the estate to the mother.

There is what appears to be a bracket after the word "vessels" and before the word "remainder" as if to separate the two words, but, quite apart from this, I think the meaning is clear, and that the judge below correctly interpreted the instrument.

The only other question in the case is as to the claim of the mother for board. After a careful perusal of the evidence I am clearly of the opinion that the judge of probate should not have allowed any part of the claim of the mother. It was clear that she never intended to make any charge and had no legal claim, and that her account was only filed for the purpose of endeavouring to get back something out of the estate which otherwise would go to Gladys Keddy under the will. There is, however, no appeal by Gladys Keddy against the $360 allowed to the mother by the judge of probate, and it will stand.

The appeal should be dismissed with costs to be paid personally by the appellant.

Russell, J.

RUSSELL, J.:—I concur with my brother Ritchie.

Ritchie, E. J.

RITCHIE, E.J.:—I copy from the decision of the probate judge:—

The late Colin Wentzell, a young man about 33 years of age, was lost at sea on December 23, 1916, 4 days before the arrival in Mahone Bay of the schooner "Alforetta," on which he had shipped as mate for the round voyage from Liverpool to Barbadoes and return, via Turks Island, to Mahone Bay. While engaged as a seaman on this voyage, during the temporary stay of the vessel in Barbadoes, he wrote and posted a letter to the young lady with whom he had been keeping company for some 14 years, Miss Gladys Keddy. The letter was received by her early in December, having been posted in Barbadoes on November 28, 1916. About these facts there can be no question. It is also proved with sufficient clearness, and without any evidence suggesting a doubt as to the fact, that the deceased and Miss Keddy were to have been married soon after his return from the fatal voyage.

Miss Keddy states that she read his last letter, one of many received by her from him during his absence from home, a number of times. On closing the envelope on the occasion of a re-reading of the letter on the night of January 21, after attending a memorial service in the local church at which special reference was made to his loss, she observed, she says, several letters written on the inside of the envelope. The next day she showed them to a younger sister, who attached no significance to them. On the following day, January 23, a neighbour, Mrs. Norman Eisenhauer, called in the evening and the letter and envelope were shown to her by Miss Keddy. After looking at the letters on the inside of the envelope, they both say, and making two guesses at their meaning, Mrs. Eisenhauer tried again and suggested that the letters

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"Rem Stp." meant "remove stamp." Mrs. Eisenhauer, they both say, then steamed the stamps over the tea kettle in the kitchen and removed them, throwing them on the kitchen floor. When the stamps were removed, they say, and they are corroborated by Mrs. Fred Boehner, who had just then entered the house, the following words were seen printed with a pen on the space previously covered by the two half-penny Barbadoes postage stamps: "If I never return my will for you is two thousand five hundred my share land shares vessels remainder for mother. Colin Wentzell."

This paper writing was duly admitted to probate as the last will and testament of Colin Wentzell, and as to this there is no appeal. The appeal is as to the proper construction of the will and as to an alleged obliteration, and also it is contended that an amount allowed for services rendered by Sarah Wentzell, one of the administrators, should be increased. As to the $2,500 it is contended that there is an intestacy apparently because the letter "o" is not discernable with the naked eye; indications of the "o" can be discerned with a magnifying glass. I am perfectly satisfied that the "o" was originally the middle letter of the word "you" as written by Wentzell, and that it was obliterated, so far as it is obliterated, by the removal of the stamp; the only object which Wentzell had in covering the writing with the stamps was to conceal it until it reached Miss Keddy. He then intended her to remove them. I am bound to assume this because it is incidental to the decision of the probate judge from which there was no appeal.

I think it is obvious that this contention cannot prevail, and the point is, in my opinion, not sufficiently serious to be worthy of being dealt with at greater length.

The share in the land is out of the case, as a will of this kind is only applicable to personal property.

The next contention was that upon the true construction of the writing which has been held to be a will, the vessel shares were intended for the mother and not for Miss Keddy. This is a more or less arguable question of construction, and I can understand that different views might be held in regard to it.

I am, however, of opinion that Wentzell's intention was that the $2,500, the shares in the land and vessel shares should go to Miss Keddy, and the remainder, whatever it might be, to his mother. I think that is the true construction.

The only remaining question is as to whether the $360 allowed to Mrs. Wentzell for services should be increased. Under all the circumstances of this case I would be glad to do so, but it is

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quite impossible under well settled law. In view of the relationship of mother and son, Mrs. Wentzell is not entitled to recover at all unless by virtue of an express contract. There is no such contract; the only thing that saves the $360 for Mrs. Wentzell is the fact that no appeal was taken from its allowance.

Ritchie, E. J.

I would dismiss the appeal.

Chisholm, J.

CHISHOLM, J.:—I agree that the appeal should be dismissed. In this matter the principal difficulty which I find is to determine whether the testator intended his shares in land and shares in vessels to go to his mother. The will, one must hold as the appeal comes to us, was written by a seaman who was endeavouring to make a testamentary disposition of his property within the space covered by two Barbadoes postage stamps, and we cannot expect him to effect his purpose with the order and logical sequence of a professional man or trained business man.

It is contended by appellant that the testator intended to give to her the shares mentioned together with any residue that remained; while it is argued for the petitioner that the shares were intended to go to her, as did the sum of $2,500, and whatever thereafter remained was to go to the mother. The words are open to both constructions, and in adopting the construction put upon them by the judge below, I must state that I am not free from doubt.

Appeal dismissed.

CANADIAN PACIFIC R. Co. v. HAY.

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S. C.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

CARRIERS (§ II G—101B)—PASSENGER ON TRAIN—REFUSAL TO STOP TRAIN FOR HIM TO ALIGHT—AGREEMENT OF BRAKEMAN TO SLOW UP—PASSENGER JUMPING UNDER DIRECTION OF BRAKEMAN—INJURY—LIABILITY OF COMPANY.

A traveller on a railway train who, wishing to alight at a station where the train does not stop and which is not the destination to which he has bought his ticket, assents to a suggestion of the brakeman that the train should be slowed down in order that he may jump from the moving train, takes all the risk of alighting, although he acts under the direction of such brakeman as to when it is safe to do so.

[*Hay* v. *Canadian Pacific R. Co.*, 40 D.L.R. 292, reversed; *Grand Trunk R. Co.* v. *Mayne* (1917), 39 D.L.R. 691, approved.]

Statement.

APPEAL from the judgment of the Court of Appeal (1918), 40 D.L.R. 292, 11 S.L.R. 127, 23 Can. Ry. Cas. 275, reversing the judgment of Elwood, J., at the trial, and ordering a new trial. The trial judge had dismissed the action with costs. Reversed.

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The respondent, who was a passenger on appellant's train travelling from Swift Current to Piapot, changed his mind as to his destination and got off the train at Cardell and was injured. According to evidence, the appellant knew that the train would not stop at Cardell being told so by the brakeman; but the latter added that he would slow up the train and that the respondent could jump off. When respondent was ready to get off, the brakeman told him not to do it until he told him to; then respondent waited a short time until the brakeman told him to jump and he did so. The trial judge has found that the train was then travelling at the rate of about 12 miles an hour.

W. E. Knowles, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—In my opinion this appeal must be allowed.

The plaintiff respondent in jumping off the car at the time and under the circumstances he did clearly did so "taking a chance" and at his own risk. Even if his statement as to having done so with the actual concurrence of the brakeman of the car and at the latter's suggestion to jump when the brakeman told him to is accepted that will not absolve the plaintiff from blame or remove the case from the category of contributory negligence. He was a man 28 years of age, experienced in travelling and knew well the risk he was running as he stated the train was going at the rate of from 8 to 10 miles an hour when he jumped off. It was a foolhardy thing to have done, and he must be taken to have assumed the risks which such an action inevitably involved.

I would allow the appeal with costs throughout and dismiss the action.

Idington, J.

IDINGTON, J.:—I cannot say, as a matter of law, that a man in jumping from a train going at the rate of 8 or 10 miles an hour is doing what a reasonably prudent man should permit himself to do, much less so if going at 12 miles an hour. The former rate of speed is respondent's own guess of rate in question. The latter rate is the finding of fact by the trial judge.

The respondent seems to have been an experienced traveller and had the advantage of daylight to guide him in making an estimate of the rate of speed and of his chances in doing what he did.

There are many circumstances evident in this case which should appeal to another court (either that of parliament or its delegate the Board of Railway Commissioners) to supply for the

public an efficient protective remedy in such like circumstances as respondent was placed, if the contentions set up on behalf of appellant are well founded.

The one feature I have referred to in respondent's case seems an insuperable barrier in his way in this court and in this case.

Therefore, I can see no good to be gained by directing as the court below has done, a new trial. If respondent is entitled to succeed, the proper disposition of the case would be to so adjudge.

On the facts as found by the trial judge he suffered a wrong, but took a risky remedy when induced by the appellant's brakeman to jump, and an equally risky one when he launched this suit. *Grand Trunk R. Co.* v. *Mayne* (1917), 39 D.L.R. 691, 56 Can. S.C.R. 95, 22 Can. Ry. Cas. 218, where plaintiff had a much stronger case but failed, must stand as a warning to travellers trusting brakemen.

Anglin, J.

ANGLIN, J.:—The proper conclusion from the plaintiff's own evidence, in my opinion, is that he assented to a suggestion of the brakeman that instead of the train being stopped at Cardell (a flag station and not the destination for which he had bought his ticket), to let him off, it should be slowed down and he might jump off. His story is that he asked the brakeman if he would stop the train at Cardell to let him off and when the brakeman replied that he would not but that he would slow up the train and the plaintiff could jump off, he, the plaintiff, answered "all right." He adds that he was prepared to do that and elsewhere he says that he did not want to insist on the train stopping, as he knew he was entitled to, because he "thought it would be all right." Upon such a state of facts, I find it extremely difficult to hold that there was any breach of duty or negligence imputable to the defendant company. I think there was not.

But assuming that there was breach of duty on the part of the brakeman for which the defendant should be held responsible in failing to stop the train at Cardell to permit the plaintiff to alight, his act in knowingly jumping from the moving train, even if running only at 8 or 10 miles an hour, as he says it was (other witnesses place its speed at from 12 to 22 miles per hour), was not thereby excused. He certainly assumed the risk of being injured in doing so. Although by no means of the opinion that the mere fact of stepping or jumping off a train in motion is always to be

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regarded as contributory negligence *per se*, under the circumstances of this case I am satisfied that the plaintiff's admitted act amounted to such negligence—if indeed it was not the sole negligence—and his recovery is thereby debarred.

The appeal should be allowed and the judgment dismissing the action restored with costs here and in the Court of Appeal, if the defendant should see fit to ask them.

Brodeur, J. BRODEUR, J.:—I concur with my brother Anglin.

Mignault, J. MIGNAULT, J.:—I concur with my brother Anglin.

Appeal allowed.

SASK.
C. A.

Re LAND TITLES ACT.

BANK OF B.N.A. v. LONDON SASK. INVESTMENT CO. Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 12, 1919.

TAXES (§ III F—147)—TAX SALE—APPLICATION TO BE REGISTERED—EASEMENT—DUTY OF REGISTRAR—PURCHASER'S RIGHT CONTESTED—UTHORITYA OF REGISTRAR—ACTION AGAINST MUNICIPALITY—WHEN NECESSARY—EXTINGUISHMENT OF EASEMENT.

When a tax sale purchaser makes application to be registered as owner of the land set out in his tax sale certificate, the duty of the registrar is to cause to be served upon all persons who appear by the records of the land titles office to be interested in the lands sold, a notice requiring them within a specified time to contest the claim of the tax purchaser, or redeem the land. If the purchaser's right is contested on the ground that the sale was not openly and fairly conducted, the matter may be disposed of by the registrar. If, however, the ground is that the land is subject to an easement because such easement has not been properly assessed, it must be by action against the municipality. If no action is brought against the municipality the treasurer's return (see Arrears of Taxes Act, 1915, Sask.) is conclusive evidence to the registrar of the validity of the assessment and the sale of the land for taxes, and the easement is extinguished.

[*Reach* v. *Crosland* (1918), 45 D.L.R. 140, annotated, followed.]

Statement. APPEAL from the trial judgment in an action to determine the rights of a purchaser of land sold for taxes, the land being subject to an easement. Affirmed.

H. E. Sampson, K.C., for appellant; *T. D. Brown*, K.C., for respondent.

Haultain, C.J.S. HAULTAIN, C.J.S., concurred with Elwood, J.A.

Lamont, J.A. LAMONT, J.A.:—The appellant bank is the registered owner of lot 4 in block 151, Saskatoon, together with a right-of-way over and upon the westerly 15 feet of the south half of lot 5, adjoining.

The respondent company is assignee of the tax sale purchaser of the south half of said lot 5, sold for taxes on December 8,

1915. The regularity of the tax sale is not questioned. The respondents made application to be registered as owners, under this tax sale transfer. The application was opposed by the appellants on the ground that the tax sale transfer could not deprive them of their right-of-way over lot 5, as their easement had not been assessed, nor had it been sold for taxes. To this, the respondent replied that the land covered by lot 5 had been assessed and sold, and that entitled them to a certificate of title freed from all encumbrances and claims against the land.

The question is, does the assessment of a lot by its registered number and the sale of the same for unpaid taxes extinguish an easement registered against the lot?

The City Act makes provision for the levying of taxes on "lands," and lands are defined therein as including "lands, tenements and hereditaments and any estate or interest therein or easement affecting the same." (S. 2, sub-s. 10). It will, therefore, be seen that provision is made for the assessment of an easement. Upon this is based the appellant's contention, which is that the legislature having made provision for the separate assessment of an easement, the appellant's right-of-way should have been assessed along with lot 4, while the south half of lot 5 should have been assessed subject to the right-of-way, and that the tax sale certificate should have contained a reservation of the right-of-way.

The same argument was made before the Ontario Court of Appeal in the recent case of *A. J. Reach & Co.* v. *Crosland* (1918), 45 D.L.R. 140 (annotated), 43 O.L.R. 635, which held that a right-of-way appurtenant is extinguished upon a sale and conveyance of the servient tenement for arrears of taxes. In his judgment, Meredith, C.J.O., said, p. 144:—

> It may be that Mr. Cooke is right, and that the proper way to assess is to assess the dominant tenement for the added value given to it by the right to the easement which appertains to it, and that the owner of the soil over which the easement exists should be assessed for a sum less by what has been assessed in respect of the dominant tenement. Assuming that, the difficulty here is that that course has not been followed; the land itself has been assessed, that assessment has been confirmed, and there is a provision in the statute making it binding notwithstanding that no notice of the assessment has been given to the parties affected. Then, in addition to that, an Act has been passed declaring the sale and conveyance made in pursuance of it to be valid. This is fatal to the appellants' case, and the appeal must be dismissed.

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Lamont, J.A.

In the case at bar the easement was not assessed, but the south half of lot 5 was. Under the City Act, the taxes levied in respect thereof constitute a special lien upon the land.

The Arrears of Taxes Act (1915) makes provision for the sale of the land taxed and the acquisition of title thereunder. C. 21, s. 44 (1), makes the treasurer's return, after the expiration of 2 years from the date of the sale, conclusive evidence of the validity of the assessment, the levying of the rate and the sale of the land for taxes, and all other proceedings leading up to such sale.

Sub-secs. (2) and (3) are as follows:—(See judgment of Elwood, J.A.).

S. 155 (2) and (5) of the Land Titles Act (1917), 2nd sess., c. 18, which deals with lands sold under the Arrears of Taxes Act, in part reads as follows:—(See judgment of Elwood, J.A.)

And sub-s. (7) provides that in default of redemption before the registration of the applicant as owner, all persons served with notice shall be for ever estopped and debarred from setting up any claim to or in respect of the land sold for taxes.

It would, therefore, appear that when a tax sale purchaser makes application to be registered as owner of the land set out in his tax sale certificate, the duty of the registrar is to cause to be served upon all persons, who appear by the records of the land titles office to be interested in the lands sold, a notice requiring them within a specified time to contest the claim of the tax purchaser or redeem the land. If the tax purchaser's right is contested on the ground that the sale was not openly and fairly conducted, the matter may be disposed of by the registrar; but if the tax purchaser's right is contested on any other ground it must be by action against the municipality.

As no action has been brought against the municipality, the treasurer's return was conclusive evidence to the registrar of the validity of the assessment and the sale of the land for taxes.

Had the appellant upon receiving notice of the company's application to be registered as owner brought an action against the municipality to set aside the tax sale in so far as it affected their right-of-way, because such right-of-way had not been properly assessed, it seems to me, at any rate as at present advised, that they might have expected to succeed. Where the legislature has provided for the assessment of an easement, it seems only reason-

able that the owner thereof should be able to protect his interest therein by compelling its assessment to himself. The difficulty here, however, is that such a course was not followed. The appellant bank contented itself with protesting to the registrar, who had no jurisdiction to question the validity of the assessment.

In my opinion, therefore, the appeal should be dismissed with costs.

ELWOOD, J.A.:—The respondent is the assignee and purchaser of a tax sale certificate covering the south half of lot 5, in block 151, plan Q.2, Saskatoon, which land was sold for taxes on December 8, 1915, under the provisions of the Arrears of Taxes Act, to the City of Saskatoon, and was duly assigned by writing containing apt words in that behalf on June 3, 1916, to the respondent. The tax certificate has not mentioned thereon or contained therein any exceptions, reservations, liens, privileges, encumbrances or interests respecting the said land. The respondent made application to be registered as owner of the said land on December 18, 1917, and duly served all parties having any interest, lien, privilege or encumbrance in or against the property described on the said tax certificate with notice of said application as required by the Arrears of Taxes Act; the last of such services being effected on February 4, 1918, and in particular served the appellant and the Bank of Hamilton with true copies of said notice. On August 7, 1918, the respondent applied for title to the said land. The registrar of the Saskatoon Land Registration District refused to register the respondent as owner of the said land unless the certificate of title for said land to be issued to the respondent should have endorsed thereon an easement and caveat appearing on the certificate of title of the former owner of said land. Such easement is one which had been granted to the appellant and is a right-of-way 15 ft. wide from east to west extending across the whole of said land from north to south, and had been duly registered against said land.

The respondent, being dissatisfied with the refusal of the registrar, petitioned the master of titles to order the registrar to issue a certificate of title to said land in the name of the respondent, clear of all encumbrances. The matter came before the master of titles, counsel appearing for the appellant and respondent, and on January 15, 1919, the master of titles directed

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the registrar that, unless the land was redeemed, he should issue a certificate of title in the name of the respondent, clear of all claims, interests or encumbrances of any person. From that decision this appeal is taken.

It appears that the appellant is the registered owner of a portion of lots 1, 2, 3, and 4, in said block, and that the portion of said lot 4 so owned by the appellant immediately adjoins said right-of-way, which is the subject of said easement, and that it is to the land so owned by the appellant that said easement is appurtenant.

For the appellant, it was contended that the City of Saskatoon should, in assessing the land with respect to which the respondent claims the title, have assessed it subject to the easement granted to the appellant, and that such easement should have been assessed as appurtenant to the appellant's land, and that, the assessment not being so made, was void, and the sale under such assessment should be set aside, or, at any rate, not given effect to; or, if given effect to, the certificate of title to be issued to the respondent should have endorsed thereon that it is subject to the easement to the appellant.

On behalf of the respondent, it was urged before us that neither the registrar nor the master of titles has any jurisdiction to enter into an inquiry as to whether the assessment of the land in question is effectual to bind the appellant's easement; that the sole duty of the registrar is to give effect to the tax certificate, as provided for by s. 155 of c. 18 of the Statutes of Saskatchewan (Land Titles Act) 1917, s. 2, and by the Arrears of Taxes Act, c. 21, of the Statutes of Sask. for 1915.

S. 155 of the Land Titles Act, sub-secs. 1, 2, 5, and 7, is as follows:

(1) In case land is sold for taxes under the Arrears of Taxes Act or any other enactment that may be from time to time in force in Saskatchewan for collection of arrears of taxes, the tax purchaser or his assigns, when applying for title, shall furnish a tax sale certificate from the treasurer of the municipality.

(2) The registrar shall not inquire into any irregularities in a tax sale or in any of the proceedings relating thereto or in any of the proceedings prior to or connected with the assessment of the land, but he shall, before registering the tax purchaser or his assign as owner, satisfy himself that the sale was openly and fairly conducted.

(5) The registrar shall cause to be served upon all persons, other than the tax purchaser or his assigns, who appear by the records of the land titles

office at the time of the filing of the application for title to be interested in the lands sold, a notice requiring them, within a time therein to be limited, to contest the claim of the tax purchaser or his assign, or to redeem the land.

(7) In default of redemption before the registration of the applicant as owner, all persons so served with notice, or who but for the provisions of sub-s. (6) would be entitled to service, shall be forever estopped and debarred from setting up any claim to or in respect of the land sold for taxes, and the registrar shall register the person entitled under such tax sale as owner.

It will be observed that sub-s. (2) of the above section provides that the registrar shall not inquire into any irregularities in a tax sale, etc.

S. 52 of the Arrears of Taxes Act is as follows:—

52. The registrar shall not be obliged to ascertain or inquire into the regularity of the tax sale proceedings or any proceedings prior to or having relation to the assessment of the said land,

and it would seem to follow that, if the registrar is not to inquire into any irregularities, he would not have power to inquire into or determine whether or not the sale is a nullity. I apprehend that the registrar has only such power as is granted to him by some Act, and unless there is some Act which gives him power to inquire into or determine the validity of a tax sale he cannot so inquire into or determine.

S. 44 of the Arrears of Taxes Act is as follows:—

44. Upon the expiration of two years from the date of sale the treasurer's return to the registrar hereinafter provided for shall in any proceedings in any court in this province, and for the purpose of proving title under the Land Titles Act, be, except as hereinafter provided, conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale of the land for taxes and all other proceedings leading up to such sale, and that the land was not redeemed at the end of said period of two years.

(2) Notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax sale shall be annulled or set aside except upon the following grounds and no other: that the sale was not conducted in a fair and open manner, or that the taxes for the year or years for which the land was sold had been paid, or that the land was not liable to taxation for the year or years for which it was sold.

(3) All actions, suits or other proceedings to set aside or annul a sale of land for taxes shall be brought or taken against the municipality, and it shall not be necessary to make the tax purchaser a party thereto.

(4) No such suit, action or proceeding shall be brought or taken after the issue of a certificate of title to the tax purchaser or his assigns.

(5) After the issue of a certificate of title to the tax purchaser or his assign, the former owner or his assigns shall have no claim for damages against the municipality or against the assurance fund.

It will be observed that sub-s. (2) of s. 155 of the Land Titles Act (1917) provides that the registrar before registering the tax

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purchaser shall satisfy himself that the sale was openly and fairly conducted, and it seems to me that, except for the latter ground—which it will be noticed is one of the grounds mentioned in sub-s. (2) of s. 44 of the Arrears of Taxes Act—the sale can only be questioned by an action in the courts, and not in proceedings before the registrar or the master of titles.

S. 51 (2) of the Arrears of Taxes Act is as follows:—

(2) After the issue of such certificate, no person except the tax purchaser or those claiming through or under him, shall be deemed to be rightly entitled to the land included in such certificate of title or to any part thereof, or to any interest therein or lien thereon, whose rights in respect thereof accrued or commenced to accrue prior to the issue of such certificate of title.

The effect of that sub-section is to give a tax purchaser, who receives a certificate of title, a title to the land for which the tax certificate has issued freed from all claims or interests or rights of any and all persons whose rights in respect thereof accrued or commenced prior to the issue of such certificate of title, and, in the case at bar, the respondent on receiving a certificate of title to the land in question would take it freed from this easement.

The sole duty of the registrar was to give effect to the documents before him, and, under the sections of the Acts which I have quoted above, this would mean that he should issue a title to the respondent freed from such easement, unless restrained in some way by some action or proceeding in the courts. So far as appeared before us, no such action or proceeding has been taken.

I refrain from expressing any opinion upon the effect or validity of the assessment which led up to the sale in question, or of the sale itself. The question of the validity of such sale or assessment is one which can only be properly inquired into by an action brought through the courts, and not in these proceedings.

In my opinion, therefore, this appeal should be dismissed with costs. *Appeal dismissed.*

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Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. February 17, 1919.

LANDLORD AND TENANT (§ II B—10)—LEASE—PROVISION FOR RENEWAL—TERMS OF TO BE AGREED UPON—COVENANT AS TO COSTS OF ALTERATIONS—FIXTURES TO BECOME PROPERTY OF LESSOR—TRADE FIXTURES NOT INCLUDED.

Under a lease providing for a renewal "upon such terms as may be mutually agreed upon," and further providing that "in the event of a renewal of this lease not being granted . . . . the lessor shall pay to the lessee . . . . the actual costs . . . . of alterations and additions," the lessor is liable if no agreement for renewal is in fact made no matter how unreasonable one of the parties may be as to the terms and conditions of renewal.

A clause providing that "all improvements, alterations and fixtures constructed or made or to be constructed or made in or upon the said premises shall become the absolute property of the lessor," at the expiration of the lease does not include trade fixtures, and these the lessee is entitled to remove.

Statement.

APPEAL from the Court of Appeal for British Columbia affirming the judgment of the trial judge, Gregory, J., and maintaining the plaintiff's action with costs. Affirmed.

A. H. Clarke, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—For the reasons given by Macdonald, C.J., and Martin, J., in the Appeal Court, which are together quite satisfactory to me, I think this appeal must fail and should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The answers to the only questions raised herein depend upon the construction of the lease. I am of the opinion that the trial judge and the Court of Appeal have correctly construed the same.

The language used in expressing the agreement of the parties might have been more explicit, but I do not think it difficult to understand and accurately determine its meaning, if we pay attention to the business the parties had on hand.

I do not think we can help the solution of the problems presented by paying attention to the business which some other parties long ago had in hand and the language they used relevant thereto.

It is quite clear the parties postponed for nearly 5 years the settlement of the terms of a renewal lease and depended for the protection of their respective self-interests upon the development by work to be done within the meaning of the contract as likely to ensure a renewal upon reasonable terms. For who could imagine a

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lessor as being likely to pay $15,000 for the privilege of refusing a lease upon reasonable terms?

This lessor did so refuse and imagined he could by devious methods escape paying the $15,000. And he has thereby started the amusing exhibitions of dialectical skill necessary to enable him to hope to escape the consequences of so doing.

The meaning of the word "fixtures" in the clause which has been for convenience sake numbered five, but not so in the instrument, is *primâ facie* more fairly arguable.

Seeing, however, that the operation of the whole scheme was expressly made dependent upon the following paragraph in clause 2:—

> Provided, however, that the plan and specifications of any such alterations or additions shall be first submitted to and approved by the lessor;

and seeing further that he paid, as is admitted, $5,000 on account of such work and there is not pretended to have ever been any other "plans and specifications" than those adduced in evidence, I accept them as an infallible guide and especially so when coupled with the later conduct of the lessor and his language in his correspondence as to "fixtures."

These plans and specifications seem to have no relation to such fixtures as now in question, and hence any claim in respect of their removal must be founded upon something else which is *not* discoverable in the lease when read in light of the law relevant to trade fixtures owned by a tenant.

How a lessor so keenly alive to his selfish desires as appellant seems to have been, failed to object to their removal, done openly under his own eyes or those of his agent, surprises me. And his solicitor's failure to recognize the possibility of claiming therefor, till over a year after the pleadings were closed, indicates how little either expected from such a claim.

And even when amended then, I incline to think as urged by respondent's counsel, he failed to rest the claim upon the right ground in law if such had ever had any foundation in fact.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—For the reasons stated by Martin, J., I am satisfied that the failure to renew the respondent's lease entitled him to recover the $15,000 in question in this action. If reasonableness of conduct were a consideration that should enter into the

matter I would agree with the view of the Chief Justice of the Court of Appeal "that the lessee (had) *bonâ fide* endeavoured to bring about an agreement on reasonable terms of renewal."

The construction placed by the dissenting justice of appeal on the provision for renewal, with respect, seems to me to be so unreasonable that it is inconceivable that it is what the parties intended. The language used certainly does not require such a construction. In my opinion it scarcely admits of it.

I also concur in the view of the Chief Justice that the trial judge came to the right conclusion as to the construction of what he terms the 5th clause of the lease, which immediately follows the short form covenant for quiet enjoyment, and that the respondent was entitled to remove the tenant's fixtures which it took away from the premises. They formed no part of the "alterations to the front" and "alterations and additions to the interior of the building" for which the appellant agreed to pay a sum not exceeding $20,000 in the event of non-renewal. Applying the rule *noscitur à sociis* the word "fixtures" in the clause of the lease in question, having regard to the improvements and alterations with which it is connected, must be restricted to what are ordinarily known as landlord's fixtures.

I would dismiss the appeal with costs.

BRODEUR, J.:—This is an action by a lessee to recover the value of improvements made upon the property leased. The lease was for 5 years from April 1, 1909, at a rental of $12,000 a year, of premises in Vancouver known as the Braid Building. It could be renewed at the lessee's option on terms to be agreed upon and by his giving 3 months' notice in writing of his desire to renew.

Brodeur, J.

By the lease, the lessee, who is the respondent, agreed to make certain alterations necessary for the requirements of his business and to adapt the other portions of the premises as hotel rooms, since only a portion of the ground floor and basement was used by the respondent for his business.

It was stipulated that the alterations and plans should be submitted to and approved by the lessor, and it was further agreed that the lessor would pay the lessee during the second year of the term a sum of $5,000 in connection with those improvements.

Clause 4 of the lease, which is the one the construction of which has occasioned this litigation, reads as follows:—

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In the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of $5,000. Provided, however, that such total cost shall not in any case exceed the sum of $20,000.

Extensive alterations were made and approved by the lessor. Those alterations are estimated by the respondent as having cost a much larger sum than the $20,000 stipulated as being the amount which should be paid for those alterations in case the renewal of the lease should not be granted.

The notice required by the lease was given by the lessee, that he was willing to renew the lease. Negotiations went on and were being carried out until a few days before the lease expired, but the parties were never able to agree. The lessee then had to vacate the premises and has instituted the present action to recover the $15,000 which was stipulated in that clause 4.

There is no doubt that the parties contemplated a renewal lease for a further period of five years if they could agree as to the terms; but in the case they would not agree as to the terms, or in the case where a new lease would not be granted, then, in such a case, what should be done with regard to the improvements?

The parties agreed that if a renewal would take place, the benefit of the alterations enjoyed by the lessee and the $5,000 already paid by the lessor would be sufficient to cover those alterations and the lessee would have no further claim as to them. But if there was no renewal, then I construe the lease as meaning that the lessor is bound to pay the balance of the sum stipulated for the value of the alterations.

Another question was raised as to some fixtures to the value of $8,000, which had been put in by the respondent on the premises and which were of the category of fixtures called tenant's fixtures.

The appellant claims that he is entitled to those fixtures.

I think, on the contrary, that the fixtures mentioned in the lease which could be retained by him are those alterations and fixtures provided by the contract itself and not the fixtures which the lessee might bring in. Clause 5, relied upon by the appellant to substantiate his contention, mentions at first in general terms "all improvements, alterations and fixtures;" but the reference in the latter part of the clause to the payments made on account

of those improvements shews conclusively that what the parties intended to cover was not the tenant's fixtures but those improvements included in the formal covenant, viz., those which the lessee undertook to make with approval of the lessor.

For those reasons, I am of opinion that the plaintiff (respondent) was entitled to claim the $15,000, and that the judgment rendered in his favour below should be confirmed with costs.

MIGNAULT, J.:—The contract which has given rise to this litigation is in truth a singular one.

The appellant, on February 1, 1911, leased to the respondent a certain building in Vancouver for a term of 5 years at a rental of $1,000 per month, the lessee to have the privilege

of renewing said term for a further term of 5 years from April 1, 1916, upon such terms as may be mutually agreed upon between the parties hereto, and further upon the lessee giving to the lessor a notice in writing of the lessee's desire to renew same as aforesaid, which said notice shall be given at least 3 months before the expiration of the term hereby granted.

It was stipulated that the lessee should make

such alterations to the front, and such alterations and additions to the interior of the building hereby demised as in the opinion of the lessee shall be necessary for the requirements of its business, provided, however, that the plans and specifications of any such alterations and additions shall be first submitted to and approved by the lessor.

It was agreed that the lessor would pay to the lessee, during the second year of the term of the lease, the sum of $5,000,

which sum shall be accepted by the lessee in full of all claims and demands of the lessee against the lessor for any and all alterations hereafter made to the building by the lessee as aforesaid.

Notwithstanding this specific stipulation, however, the lease immediately added that

in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such a case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of $5,000. Provided, however, that such total cost shall not in any case exceed the sum of $20,000.

The parties could very well expect trouble under such a contract. The renewal clause, leaving as it did the terms and conditions of renewal to be determined by a future agreement of the parties, really gave no right of renewal to the lessee, for a disagreement as to these terms and conditions was a more likely contingency than an agreement. But, on the other hand, it was possibly thought by the lessee that he could nevertheless go

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ahead and make expensive alterations and additions, in the expectation of recovering from the lessor the value of the alterations and additions up to the sum of $20,000 (including the $5,000 already paid by the lessor), should the latter not grant a renewal of the lease on terms acceptable to the lessee.

On December 28, 1915, the respondent gave formal written notice to the appellant of his desire to renew the lease, and that he was ready and willing to enter into negotiations with a view to the settlement of the terms of such renewal. Some correspondence followed and finally, on March 2, 1916, the appellant stated as his terms of renewal of the lease for the premises as a whole (apparently the whole block), $850 per month for the balance of that year, and for the ensuing period of 4 years, $1,000 per month. The respondent demurred to this, and on March 23 proposed a renewal at a rental of $500 per month, offering whatever it could get out of the upstairs and basement in addition, adding, that if this were not satisfactory, it would be willing to leave the matter to arbitration. In a subsequent letter of March 27, the respondent repeated this offer, and stated that if it were not accepted, the respondent would expect to receive the sum of $15,000 under the provisions of the lease.

Both of the parties adhered to the position they had respectively, taken until finally, on April 28, the appellant accepted the offer he had previously refused of a renewal at a rental of $500 per month but this proposal was refused by the respondent which had previously given notice to the appellant of its intention to move out of the premises.

The present action was taken by the respondent (lessee) against the appellant (lessor) demanding, because the parties had failed to agree as to the terms of renewal of the lease and the lessor had not granted a renewal of the same, that the appellant pay him $15,000 for the balance of the cost of the alterations and additions, the total cost of which was approximately $39,000. His action was maintained by the trial judge, Gregory, J., and this judgment was affirmed by the Court of Appeal, McPhillips, J., dissenting.

The right of action of the respondent depends on the construction of the lease, and notwithstanding the somewhat singular and almost conflicting provisions of this lease, it does not seem impossible to arrive at a construction which will give effect to

what I take to have been the intention of the parties. The premises rented by the appellant required considerable alterations to make them suitable for the respondent's business, and the appellant had agreed to contribute at all events the sum of $5,000 to the cost of these alterations and additions, thereby indicating that they enhanced the value of his building. On the other hand, it was also considered that if the lease were not renewed for a further term of five years, the lessee should be further compensated for his improvements, and the extent to which the lessor should contribute to the payment of the same was fixed at an amount not exceeding $15,000, over and above the $5,000 he had already paid. It is true that for the renewal of the lease an agreement of the parties as to the terms and conditions on which the renewal would be granted was necessary, and the parties evidently considered that these terms and conditions could not be determined in advance, but if the renewal was not granted by the lessor, and if he took possession of the premises with the alterations and additions made by the lessee at the expiration of the lease, it was expressly stipulated that the lessor should pay to the lessee the balance of the actual cost of the alterations and additions over and above the $5,000, not to exceed in the aggregate $20,000.

It seems to me entirely immaterial whether the lessor and the lessee, or either of them, were unreasonable in the discussion of terms and conditions of renewal. There was no agreement between them and the renewal term of 5 years was not granted by the lessor, and he thus came into possession of the leased premises at the expiration of the lease. I think, therefore, that the lessee is clearly entitled to the $15,000, which is no way a penalty against the lessor, but a sum payable to the lessee on a contingency provided for and which has happened. I think also that the offer of the lessor on April 28 to accept terms of renewal which he had already refused to accept came too late to avail him in this litigation.

Counsel for appellant, on behalf of the appellant, earnestly argued that the respondent had violated the lease by removing certain improvements, alterations and fixtures, and that consequently he could not avail himself of the stipulation concerning the $15,000. In my opinion, nothing was removed by the lessee which does not fairly come under the description of tenant fixtures

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which the lessee could in any event remove at the expiration of the lease.

The appeal should be dismissed with costs.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 12, 1919.

VENDOR AND PURCHASER (§ I E—28)—SASK. STATS. 1917, 1ST SESS., C. 31—TERMINATION OF CONTRACT—COURT OF COMPETENT JURISDICTION—RIGHT OF COURT TO LAY DOWN TERMS AND CONDITIONS.

Chapter 31, 1917, Sask. stats., first session, whereby all proceedings by a vendor to determine or put an end to or rescind or cancel an agreement for sale of land shall be had and taken by proceedings in a court of competent jurisdiction, gives such court the right to lay down the terms and conditions upon which its aid will be granted. The court is not required to grant cancellation in all cases in which the vendor himself could have cancelled if the Act had not been passed.

[*Steedman* v. *Drinkle* (1916), 25 D.L.R. 420, distinguished.]

Statement.

APPEAL by plaintiff from an order of a judge in chambers allowing defendants time in which to pay the balances due on certain agreements for sale of land. Affirmed.

J. N. Fish, K.C., for appellants; *H. E. Sampson*, K.C., for respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

Lamont, J.A.

LAMONT, J.A.:—On February 3, 1911, the plaintiff McBain and the defendant Gratias entered into two contracts in writing for the sale of land, McBain being the vendor and Gratias the purchaser. The two contracts are known as contract No. 1 and contract No. 9; the first to cover 1,120 acres and the other 960. No land was specified in either contract. The lands to be covered by the contracts were selections which were to be made by Gratias out of the unsold and available lands of the Canadian Northern R. Co. in the Province of Saskatchewan. The agreement contained a clause which stated that the Canadian Northern R. Co. did not agree to set aside or reserve any of its lands under this purchase, and that any sale reported should be made a part of the contracts in question only upon the written acceptance of the Canadian Northern R. Co. Certain lands were selected by Gratias under both of these contracts, and these lands he resold to sub-purchasers. Certain payments were made which the plaintiffs acknowledge, but Gratias failed to make the payments as provided in the agreements in question.

In August, 1918, the plaintiffs brought action against the defendant Gratias and a number of sub-purchasers, and claimed cancellation of the said contracts and foreclosure of the respective interests of the defendants. The defendant Gratias did not appear to the writ, but appearances were entered for the sub-purchasers. They, however, did not file any defence. Thereupon the plaintiffs, on October 7, 1918, launched a motion asking for "an order for judgment herein foreclosing the interests of the respective defendants in the lands in the pleadings mentioned, and cancelling the contracts mentioned in the 1st paragraph of the statement of claim as contract No. 1 and contract No. 9."

Before the application came on for hearing the solicitor for the sub-purchasers under contract No. 9 wrote to the plaintiffs' solicitors asking for a statement of the sum necessary to pay contract No. 9 in full. On receiving a statement of the amount the solicitor offered to pay the same over to the plaintiffs' solicitors on their undertaking that title would be made to the lands in question. This the plaintiffs' solicitors refused. When the application came on in chambers counsel for the sub-purchasers under contract No. 9 informed the master that he had the money in hand to pay the balance in full under that contract, and only asked that the sub-purchasers be protected. The master made an order which—as varied on one point on appeal to a judge in chambers—provides for a reference to the local registrar to ascertain the amount due to the plaintiffs under each contract, payment into court of the amount found due under contract No. 9 together with the plaintiffs' costs within three months, and under contract No. 1 within 12 months. He directed the plaintiffs to deposit with the local registrar the duplicate certificate of title of the lands in question and transfer thereof to Gratias. If default was made in the payment of the money found due under contract No. 1 within the time fixed, the contract was to be cancelled. As counsel for the sub-purchasers under contract No. 9 was ready and willing to pay over in full the balance remaining unpaid on that contract, it was unnecessary for the master to direct cancellation in the event of non-payment. From the above order, the plaintiffs now appeal to this court.

The contention of the plaintiffs is, that they are entitled to have both contracts cancelled without any time being given to

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the defendants within which they may pay the balance due. They point out that the agreements contained cancellation clauses under which the plaintiff McBain could have cancelled the contracts had it not been for the statutory provision enacted since the contracts were executed, namely, c. 31 of 1917, 1st sess., which reads as follows:—

1. Notwithstanding any term or provision to the contrary contained in any contract or agreement for the sale of land in Saskatchewan now or hereafter entered into, all proceedings by a vendor to determine or put an end to or rescind or cancel the same shall be had and taken by proceedings in a court of competent jurisdiction.

Although under this statutory provision the plaintiffs admit their inability to put an end to the contract under the clause for cancellation contained therein, they argue that, on application to the court as provided in the section, the court has no option but to cancel the contracts, if the conditions exist which would have enabled the plaintiff McBain to cancel them himself had the above legislation not been passed, and they rely on the case of *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275.

That case, in my opinion, does not help the plaintiffs at all. In that case the court was not asked to determine the contract, it was asked to declare that the vendor himself had validly determined the contract in accordance with a provision to that effect contained in the agreement. As the vendor in that case simply exercised the rights which were his under the agreement, the court held that the contract had been validly determined. In the case at bar the contract has not been determined; it is still an existing contract. The plaintiffs seek the aid of the court to have it determined. This, in my opinion, gives the court the right to lay down the terms upon which its aid will be granted. In taking away the vendor's right of cancellation by notice under the terms of the contract and enforcing a resort to the courts for cancellation, the legislature, in my opinion, was making provision for the protection of the purchasers. It was protecting a purchaser from the exercise of a right given by the contract to the vendor, and which it was thought he ought not to exercise under the existing conditions.

If the plaintiffs' argument be given effect to, that the courts must grant cancellation in all cases where, by the terms of the contract, the vendor could himself have cancelled but for the

statutory provisions, no protection to the purchaser would be afforded by the legislation and there was no object whatever in passing it; for it would make no difference to a purchaser whose contract had been validly cancelled whether the cancellation took place by order of the court or by notice from the vendor. With, possibly, this exception; that if it were cancelled by an order of the court he probably would be obliged to pay the costs of the cancellation, which he would not be called upon to do if the vendor cancelled himself. It is, I think, clear that, in forcing a resort to the courts to secure cancellation of a contract by a vendor, the legislature was leaving the question of cancellation to the discretion of the court.

In my opinion, the discretion was properly exercised in the order appealed from.

Apart altogether from the statute above referred to, an application for an order "foreclosing the interest of the respective defendants in the lands in the pleadings mentioned and cancelling the contracts" would, I think, by its very terms empower the court, if it did not otherwise have power, to make the ordinary order *nisi* for foreclosure and to decree that in default of payment within the time specified the contracts would be cancelled. This, as I understand it, has always been the practice of the courts in this province.

In *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, at 506, the Master of Rolls, in contrasting the position of an unpaid vendor with that of a mortgagee, said:—

> Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate.

The above observations seem to me to make clear the right of the court upon an application for the cancellation of a contract to fix a time for payment by the purchaser.

Attention might also be called to the fact that the material

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on which the plaintiffs ask for their order is defective. The contracts provided that any lands selected shall be made part of the contracts only upon the written acceptance of the Canadian Northern R. Co. There is not a particle of evidence that the railway company ever accepted the said selections. On this ground alone, had the defendants taken the objection, the plaintiffs' application must have failed. The defendants, however, raise no objection. Their attitude is that, whether or not the plaintiffs are entitled on the material filed to their order, the defendants are willing that the order *nisi* should go so long as provision is made for delivery of title upon payment of the balance. Reasonable provision in this regard has been made in the order appealed from, and I can see no good reason for interfering with it. The appeal, in my opinion, should be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the conclusions of my brother Lamont except that I express no opinion as to whether or not there was evidence that the railway company had accepted the selections of land. That question was not raised before us.

Counsel for the respondent contended that this appeal was launched too late, but in view of the conclusion reached on the merits, there is no necessity for expressing any opinion on that point. *Appeal dismissed.*

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Re MARITIME FISH Co. Ltd.

Nova Scotia Supreme Court, Harris, C.J., Russell and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. February 22, 1919.

CERTIORARI (§ I B—11)—DISCRETIONARY WRIT—MANIFEST INJUSTICE—DISCRETION IN FAVOUR OF WRIT—RIGHT TO APPEAL—DOES NOT BAR REMEDY BY.

The writ of *certiorari* is a discretionary writ and where a manifest injustice has been done, such as assessing a ship, under the Nova Scotia Assessment Act, to one to whom it does not belong, such discretion will be exercised in favour of applying the remedy which *certiorari* provides, although the party applying has not availed himself of the right of appeal. The existence of an appeal does not displace the remedy by means of a writ of *certiorari*.

[*Rex* v. *Jukes* (1800), 101 E.R. 1536; *Golding* v. *Wharton Salt Works* (1876), 1 Q.B.D. 374; *Re Assessment School Rate* (1872), 9 N.S.R. 122, referred to.]

Statement.

APPEAL from the judgment of Longley, J., refusing an application made on behalf of the Maritime Fish Corporation, Ltd., for a writ of *certiorari* to vary the assessment of the Town of Canso for the year 1918, made on or about November 27, 1917, whereby

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the company was assessed for the sum of $74,300, including an amount of $40,500 assessed in respect of the steam trawler "Rayon d'Or," and the sum of $500 in respect of the steamship "Inverness." The grounds upon which the assessment was attacked are stated at length in the judgments.

W. L. Hall, K.C., for appellant; *V. J. Paton*, K.C., for respondent.

RITCHIE, E.J.:—An application was made pursuant to the statute in that behalf to Longley, J., sitting in court at Guysborough, for a writ of *certiorari*. I quote from the notice:— Ritchie, E. J.

To remove into the Supreme Court the assessment roll of the Town of Canso for the year 1918, made on or about November 27, 1917, whereby the Maritime Fish Co., Ltd., was assessed for the sum of $74,300, which assessment included an amount of $40,500, which was assessed in respect of the steam trawler "Rayon d'Or" and the steamship "Inverness" and which assessment of $74,300 was excessive and made without jurisdiction for the following reasons:—(*a*) That the steamship "Rayon d'Or" is not the property of the Maritime Fish Co., Ltd., nor of any person, firm or corporation resident or having its head office or chief place of business in the Province of Nova Scotia. (*b*) That the steamship "Rayon d'Or" is not personal property situate in the Town of Canso or Province of Nova Scotia. (*c*) That the steamship "Inverness" is not the property of any person, firm or corporation resident or having its head office or chief place of business in the Town of Canso or Province of Nova Scotia. (*d*) That the assessment is not direct taxation within the province.

Longley, J., refused the application, giving judgment as follows:

The Maritime Fish Co. is a joint stock company having its head office in Montreal, but does business on a large scale at Canso with H. C. Cowie as accountant and secretary. The corporation takes large quantities of fish and sells the same to various customers. The corporation is assessed for the sum of $74,300 in respect to real and personal property in the Town of Canso.

The affidavit of Mr. Cowie says that $40,000 of this was on the ship "Rayon d'Or" and $500 on ship "Inverness." I hardly see how it can be stated that such is the case, as the assessment roll shews nothing of the kind. The facts in connection with this assessment are as follows: The amount of $74,300 was assessed upon the property. They made an appeal against the same to the Appeal Board of Canso. On February 4, 1918, at the time of the sitting of the said Appeal Board, the Maritime Fish Co. did not appear and the decision of the town assessor was confirmed.

Shortly afterwards, on March 5, 1918, the Maritime Corporation appealed from the decision of the said Appeal Board to the County Court at the regular March sittings.

The said Maritime Fish Co. did not appear by solicitor or otherwise, and the order was granted by the judge dismissing the appeal and confirming the decision of the Appeal Court of Canso. I am under the impression that the company may take proceedings in the Supreme Court for *certiorari* after these failures to have their case heard at the two tribunals which they chose and

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which they ignored, but I am under the impression that the company do not hold as strong a position as if they had gone to those courts and the evidence had been taken in regard to the whole matter. Besides, it is probable that the town has already made use of the assessment roll of last session and the assessment has been completed under it. In the *Town of Westville* v. *Munro* (1899), 32 N.S.R. 511, the following is from Meagher, J., p. 515: "The fact that when the labours of the Court of Appeal are ended and the assessment roll has been completed, certified and laid before the council, the council is required to authorize the levying and collection of a rate or rates of so much upon the dollar on the assessed value of the property and income assessed in such roll as the council shall deem sufficient to defray the expenses of the town for the current year shews to my satisfaction that it was not intended that any change should be made in the roll afterwards."

This is the principal reason I have for determining that the rule for granting a *certiorari* should not be applied in this case.

The question whether the Town of Canso has the right to levy taxes on these ships, if they have levied them, is still open to question. Both the ships spend their winter in Canso and under the control of the present company, and are employed in the summer in catching and landing fish in Canso for the company, but I hold that all the facts in regard to this should have been brought out on a trial before these two appellate courts, and the company should not appeal and then treat their appeal as of no consequence and not attend to it, and then come in and obtain a remedy at this late hour.

It is distinctly stated in the affidavit of the secretary of the Maritime Fish Co. that the "Rayon d'Or" is not, and was not at the time of the assessment, the property of the Maritime Fish Corporation, Limited, but is and has been at all times the property of the Golden Ray Fishing Co., Ltd.

This affidavit is not contradicted as to the ownership. Therefore, for the purposes of this appeal, I must deal with the case on the basis that the "Rayon d'Or" has been assessed to the Maritime Fish Corporation though not owned by that corporation, but being the property of another company.

Under the Assessment Act, the assessors are empowered to assess ships "as property of owner or owners thereof situated in the place or places in which he or they reside."

There is, however, no jurisdiction to assess a ship to a man to whom it does not belong. The ownership is not in dispute, the affidavit as to ownership not being contradicted. This manifest injustice the court, I think, is bound to have brought in judgment unless there is some hard and fast rule in the way, which cannot under the law be overcome. The writ of *certiorari* is a discretionary writ and I do not say that cases have not arisen in the past and may not arise in the future where the court has and will exercise its discretion against granting the writ where the party applying has not availed himself of the right of appeal, but I think where an obvious injustice has been done discretion should be exercised in favour of applying the remedy which *certiorari* provides. In the case of *Re Ruggles* (1902), 35 N.S.R. 57, at p. 60, Sir Wallace Graham said:—"But it was never held that the existence of an appeal displaced the remedy by means of a writ of *certiorari*."

In *Rex* v. *Jukes* (1800), 5 Eng. Rul. Cas. 532, at p. 535, 101 E.R. 1536, 8 T.R. 542, counsel took the objection "that the defendant having elected to appeal to the Sessions, the *certiorari* was in effect taken away by the Act because it said that the determination of the Session should be final." But

Lord Kenyon, C.J., said:—"That would be against all authority, for the *certiorari* being a beneficial writ for the subject, could not be taken away without express words; and he thought it was much to be lamented in a variety of cases that it was taken away at all."

The application calls for the exercise of sound judicial discretion; it may be granted or refused as the court may think right under the facts of the particular case before it. I cannot come to the conclusion that a sound judicial discretion is exercised by the refusal of a *certiorari*, which must result in a denial of justice. Longley, J., exercised his discretion against the granting of the writ, but that exercise of discretion is reviewable by the court. In *Golding* v. *Wharton Salt Works Co.* (1876), 1 Q.B.D., 374, Lord Justice James, delivering the judgment of the court, speaking of reviewing the discretion of a judge, said, p. 375:—

> Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the court below would not be overruled where serious injustice would result from that decision.

I have had some difficulty because the assessment court had jurisdiction to enter upon the enquiry, and the question as to the ownership of the "Rayon d'Or" is a question of fact, but in this case I think the difficulty is not a real one. The Assessment Act clearly contemplates an enquiry as to the facts on *certiorari*. The motion for *certiorari* was made as required by s. 59 "in the first week of the next sittings of the Supreme Court after the time for appealing has expired."

The section goes on to provide that the *certiorari* shall not be granted "unless it is made to appear by affidavit that the merits of the assessment, rate, order or proceeding will by such removal come properly in judgment." Then it is provided that the assessment shall not be quashed "for any matter of form only."

It cannot, I think, be held that the question of ownership of the property sought to be taxed is not a question of the merits of the assessment, and this is the thing which is recognized by s. 59 as the thing to come in judgment on *certiorari*.

Coming to the question of the "Inverness," ships or shares in ships are to be "assessed as property of the owner or owners thereof situated in the place or places in which he or they reside unless owned by a firm in which case such ships or shares in ships shall be assessed as property of the firm."

The "Inverness" is owned by the Maritime Fish Co., an

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incorporated company, and the question is the place in which the company has its residence. The affidavit of Mr. Cowie states that "the business of the Maritime Fish Co. is carried on at its head office in the City of Montreal, and the plants at Canso and Digby are for the purpose of handling fish on the Atlantic seaboard."

In my opinion, Montreal is the place of residence of the company; if so, the "Inverness" was improperly assessed at Canso. The law is correctly stated in Dicey on Conflict of Laws, 2nd ed., at p. 162, where it is said:—

> The residence and domicile of an incorporated trading company are determined by the situation of its principal place of business. By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other business operations are carried on.

This objection is also applicable to the "Rayon d'Or."

It is contended that the decision of the Assessment Appeal Court is *res judicata*. This contention is one which I am unable to appreciate. The decision is clearly reviewable on *certiorari*. This was done in the case of *Re "Effie Sweet"* (1882), 15 N.S.R. 380. There is also an appeal, and an appeal was attempted to be taken to the County Court but was not proceeded with in consequence of the notice not being served in time. I find on the affidavits that the notice of appeal was sent to a policeman of the Town of Canso in time for service within the statutory period; he held it and did not serve it until the time had gone by. The solicitor of the Town of Canso was notified that in consequence of the short notice the appeal would not be proceeded with; he went on and obtained an order in the County Court dismissing the appeal and confirming the decision of the Assessment Appeal Court. The contention is made that this order makes the matter *res judicata*. An answer to this is that there being no valid notice of appeal the order of the County Court was without jurisdiction.

My attention has been called to a decision of this Court delivered by the late Mr. Justice John W. Ritchie, *Re Assessment School Rate* (1872), 9 N.S.R. 122. In that case a *certiorari* to remove an assessment into this court was quashed because every material fact in the affidavit upon which the *certiorari* was granted was negatived in the affidavit of the other side. Ritchie, J., after stating the ground upon which the judgment proceeded went

on to make some remarks which were not necessary to the decision of the case. He said, p. 123:—

Without taking away from the Supreme Court the right of reviewing the proceedings of the parties making the school rate, or those of the Sessions on an appeal to them, the legislature contemplated that, in ordinary cases, the appeal in the first instance should be to the Sessions, and the case before us is one which that court could well have dealt with, as the questions raised by the parties objecting to the rate involved for the most part matters of detail, such as the regularity of the calling of meetings, the appointment of a secretary, whether certain persons were or were not resident within the section, and whether certain other provisions of the School Act had or had not been complied with by the trustees, etc., all of which could, very perfectly, be investigated by that tribunal and, under such circumstances, the parties dissatisfied with the rate should not pass by the appeal given them by the statute, and resort to this court by removing the proceedings to it by *certiorari*.

I am not at variance with the remarks which I have quoted, but, in my opinion, they are distinguishable from, and in no way inconsistent with, the opinion which I have expressed. Assessing property to a company which does not belong to it is not an "ordinary case;" it is not a "matter of detail;" but a matter of substance going to the merits. Ritchie, J., recognized the right of this court in a proper case to review assessment proceedings under *certiorari*, notwithstanding that there is an appeal, but he thought, and I have no doubt rightly thought, that under the facts of the case before him discretion should be exercised against the removal of the proceedings by *certiorari*. I am unable to see how his view in any way interferes with the right of the court in this case under a wholly different state of facts to exercise its discretion in favour of the *certiorari*.

When I first came to the Bar, Mr. Justice John W. Ritchie was on the bench. In my long experience at the Bar, I never knew a judge who more quickly put his finger on injustice, or was more intent on applying a remedy.

I am very confident that if this case had come before him he would have, without hesitation, granted a *certiorari* in order that justice might be done. The broad distinction which exists between this case and the case before Ritchie, J., is the distinction which exists between justice and injustice. In that case no injustice was done by the refusal of a *certiorari*; in this case a refusal would result in grave injustice. Of course it is to be noted that Ritchie, J., refused the *certiorari* on the ground that the facts in the affidavit

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of the applicant were denied in the affidavit produced on the other side.

In my opinion the writ of *certiorari* should be granted and the appeal allowed with costs of the appeal, and also with the costs of the application before Longley, J.

RUSSELL, J., and DRYSDALE, J., concurred.

HARRIS, C.J. (dissenting):—An application for a writ of *certiorari* was refused by Longley, J., and there is an appeal.

The Maritime Fish Co. owns the S.S. "Inverness" and the S.S. "Rayon d'Or" is owned by the Golden Ray Fishing Co. Ltd. Both vessels are registered at Halifax, N.S., and both companies have their head offices and principal places of business in the City of Montreal in the Province of Quebec.

The Maritime Fish Co. carries on a fish business at Canso and uses both of the vessels in connection with that business. Both vessels go out from Canso for fish during the summer, returning there to discharge their catch, and both vessels have used Canso as a winter port for some years past. The law is that ships or shares in ships shall, without regard to the place of registry thereof, be assessed as property of the owners thereof situated in the place or places in which he or they reside, and the contention is that the ships in question are not liable to assessment at Canso.

The Maritime Fish Co. was assessed in 1918 in the Town of Canso for both vessels, upon the "Inverness" for $500 and upon the "Rayon d'Or" for $40,000.

On February 4, 1918, the Maritime Fish Co. gave notice of appeal from the said assessment to the Assessment Appeal Court, but did not appear before that court when the appeal was heard, and that court affirmed the assessment. The Maritime Fish Co. then deposited $100 as security on an appeal to the County Court from the decision of the Assessment Appeal Court, and sent a notice of appeal to a constable at Canso to be served on the town clerk, and it was for some unexplained reason not served within 10 days, as required by the statute. It appears that the solicitor of the company told the solicitor of the town that as the notice was not served in time he would not go on with the appeal. The solicitor of the town took out an order from the Judge of the County Court dismissing the appeal and confirming the assessment and the notice of application for a *certiorari* was given the first

day of the next term of the Supreme Court at Guysborough. There is no explanation whatever of the failure of the Maritime Fish Co. to appear before the Assessment Appeal Court. So far as the order of the County Court is concerned, I think it must be regarded as made without jurisdiction, and as having no bearing on the case. In the first place, as the corporation did not appear before the Assessment Appeal Court, it is doubtful whether it had the right to appeal, but, assuming that it had such right, the County Court would have no jurisdiction, as the notice of appeal was not served within 10 days after the decision of the Assessment Appeal Court. By the Supreme Court Act, c. 139 of R.S.C., s. 41, there is an appeal in this case from the County Court to the Supreme Court of Canada.

The first question is whether *certiorari* will lie to bring up the assessment roll under the circumstances of this case.

I propose, first, to treat the question apart from the provisions of s. 59 of the Assessment Act, and then to consider the effect of that section.

The contention is that the assessors and the Assessment Appeal Court had no jurisdiction to assess the Maritime Fish Co. for property which that company did not own and that vessels could only be assessed where the owners reside—that is, in this case, Montreal, where the business office of the company is situate.

It must be conceded that the assessors, in the first place, and (after due notice of appeal was given by the Maritime Fish Co.) the Assessment Appeal Court had jurisdiction to enter upon the enquiry as to whether the vessels were liable to assessment. The most that can be said is that, having jurisdiction to enter upon that enquiry, they went wrong in the course of it. It is clear, I think, that *certiorari* does not lie at common law for lack of jurisdiction in such a case. One naturally turns to the decision of the *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417, where the court said, pp. 442, 443:—

> There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency

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of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings, or brought before the superior court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to re-try a question which the judge was competent to decide.

Reference to 10 Hals., pp. 193 and 194:—

In *The Queen* v. *Bradly* (1894), 10 T.L.R. 346, at 347, Matthew, J., said:—

> We are not called upon to say whether or not the magistrates were right in this case. The sole question for us to determine is whether they had jurisdiction. . . . The defendant appeared, and they heard the evidence and came to the conclusion that the offence had been committed within the meaning of the Act. They may have come to a wrong conclusion: but the sole question for us is whether they had jurisdiction. . . . We have no jurisdiction to say whether they were right, though, if we had, I should say they were right. . . .

And Cave, J., said:—

> They heard evidence on one side and the other as to whether this piece of land was or was not part of the highway, and when they had heard they were bound to decide the matter. . . . If they had no jurisdiction, they could not decide it at all; but if it is only said they have decided wrongly, that implies that they had jurisdiction. . . . But when it is said that the magistrates have found on one side when they ought to have found on the other, that is not an objection to jurisdiction; on the contrary, it implies that it has been exercised wrongly.

See also *R.* v. *Wallace* (1883), 4 O.R. 127, per Armour, J. and Hagarty, C.J.

I refer to the elaborate review of the authorities by Meagher, J., in *The Queen* v. *Walsh* (1897), 29 N.S.R. 521, 541, where the whole subject is discussed and also to *Re Ruggles*, 35 N.S.R. 57, where the late Graham, C.J., in his extensive and learned discussion of the subject of *certiorari* cites (p. 69) the passage from *Colonial Bank* v. *Willan*, *supra*, referred to by me and points out that it did not apply in the *Ruggles* case where the want of jurisdiction was due to the fact that the writ of summons had not been served in time.

It must be admitted that this case is clearly within the fourth class referred to in the decision of *Colonial Bank* v. *Willan*.

But it is suggested that s. 59 of c. 73 of the R.S.N.S., 1900, gives a right to *certiorari* in this case. It provides as follows:—

59. No *certiorari* to remove any assessment, rate or order, or any proceedings of the council or court touching any assessment, rate or order, shall be granted except upon motion in the first week of the next sittings of the Supreme Court in the county after the time for appealing has expired, and unless it is made to appear by affidavit that the merits of the assessment, rate, order or proceeding will by such removal come properly in judgment; nor shall any assessment, rate, order, or proceeding be quashed for matter of form only, nor any general assessment or rate for any illegality in the assessment or rate of any individual, except as to such individual.

It is to be noted that this section is not an enabling but a restrictive provision. It does not take away the right which existed at common law. It recognizes it but imposes conditions upon which the right may be exercised. I am unable to see how it assists the applicant here. I think the proper conclusion is that *certiorari* does not lie either at common law or under the statute, because of lack or failure of jurisdiction in this case. No other ground was urged. But, assuming my conclusion on this point is not well founded, I still think the court, in the exercise of its discretion, should refuse the writ in this case.

The company took an appeal to the Assessment Appeal Court where the question now raised could have been fully investigated and determined, and if they had appeared and put in their evidence that would in all probability have been the end of the matter. If wrongly decided by the Assessment Appeal Court an appeal could have been taken to the County Court and from the County Court to the Supreme Court of Canada. No explanation whatever is given for not appearing before the Assessment Appeal Court and having the matter disposed of in the cheap and expeditious method provided by the statute. Unless we are to decide that in all cases where parties assessed are claiming that they are not the owners of the property they can ignore the Assessment Appeal Court, the County Court and the Supreme Court of Canada, and bring their cases for hearing before the Supreme Court by *certiorari*, I think we should dismiss this application. I need not point out that it is, in my opinion, an unsuitable method for trying questions of fact, such as those involved in this case; but what is perhaps more important is that before the application for a *certiorari* can be heard at the term of the Supreme Court in the county, the rates are made up on the supposition that the assessment is correct, and great public inconvenience will result if *certiorari* is resorted to in such cases. There are, of course,

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cases where *certiorari* is the only proper remedy, and where it will lie notwithstanding that there is an appeal, but this case is not of that class. It was suggested that great injustice would be done the applicants here if they were held liable for this tax. One answer to that suggestion is that they had a right of appeal and gave notice of their intention to assert it, and they give no explanation whatever of their neglect to appear before the Assessment Appeal Court where the matter could have been set right. So far as appears they had no reason for neglecting to attend the hearing before that tribunal, and it is entirely their own fault and due to their own neglect that they find themselves without remedy. I quote from 4 Encyc. of Pleading and Practice, pp. 62, 63, and 64, passages which seem particularly appropriate:—

Where petitioner is without laches.—If, however, viewing the facts as disclosed by the petition, in the light of surrounding circumstances, it is apparent that the petitioner has been guilty of no laches, and that the failure to perfect his appeal has been due to unavoidable accident or his blameless misfortune, it is customary to allow the writ as a substitute for an appeal lost.

No unreasonable exertion is required on the part of the petitioner, but only such careful attention and diligence in perfecting his appeal as could reasonably be expected under the circumstances.

Where petitioner is guilty of laches.—On the other hand, the law will not excuse or help the careless or negligent litigant; he sleeps upon his rights, forgets and neglects his duties, at his peril; and where the failure to perfect his appeal was occasioned by his own neglect or mismanagement, the writ will be denied.

In *Re Assessment School Rate* (1872), 9 N.S.R. 122, Mr. Justice John W. Ritchie in a case in which there was a statute corresponding to the present one, said, p. 123:—

Without taking away from the Supreme Court the right of reviewing the proceedings of the parties making the school rate, or those of the Sessions on an appeal to them, the legislature contemplated that, in ordinary cases, the appeal in the first instance should be to the Sessions, and the case before us is one which that court could well have dealt with, as the questions raised by the parties objecting to the rate involved for the most part matters of detail, such as the regularity of the calling of meetings, the appointment of a secretary, whether certain persons were or were not resident within the section, and whether certain other provisions of the School Act had or had not been complied with by the trustees, etc., all of which could very perfectly be investigated by that tribunal, and under such circumstances the parties dissatisfied with the rate should not pass by the appeal given them by the statute and resort to this court by removing the proceedings to it by *certiorari*.

It was urged before us at the argument that the Court of Sessions has no right to set aside the whole assessment, but we think that if on an appeal by any party complaining of the assessment it were made to appear that the rate

was irregularly and, therefore, illegally made, that court would have the power of so declaring, and give the relief sought.

I do not see how that case can be distinguished from the present except by saying that it goes much further than it is necessary to go here. There, the objections urged were as to the legality of the whole assessment, and one can readily see the propriety of the argument that questions as to the regularity of the meetings and the appointment of the secretary, and whether certain provisions of the School Act had or had not been complied with were not such subjects as could be properly investigated by the Assessment Appeal Court and still the court thought they could be so investigated and, therefore, that *certiorari* should not have been resorted to. If that is so *a fortiori*, should we refuse the writ where the question involved is not the invalidity of the whole rate but whether the property sought to be assessed is the property of the company, a question, the determination of which is committed to the Assessment Appeal Court by the legislature?.

This decision was expressly affirmed by the court in *Re School Section No. 29* (1878), 12 N.S.R. 207. See p. 218.

In *Wallace* v. *King* (1887), 20 N.S.R. 283, at p. 291, Mr. Justice J. Norman Ritchie said:—

> Although I have no doubt of the power of this court to grant a writ of *certiorari* in a case like this, yet, in view of the inability of the court to deal with the suit, as contemplated by the statute, after it has been removed, and the authority conferred upon the County Court to give ample redress on appeal, or, if necessary, by *certiorari*, I think no such writ should be allowed to remove summary suits into this court. Besides this, the affidavit of the defendant of May 21 does not, in my opinion, disclose grounds sufficient to authorize the making of the order.

And McDonald, J., at p. 287, after referring to *Crawley* v. *Anderson* (1868), 7 N.S.R. 385, said of this case:—

> I regard it as a mere expression of an opinion as to how the discretion ought to be used; and I regard the present case, containing as it does both the element of the right to appeal, existing without the defendant availing himself of it and without accounting for his not doing so, and that of the summary jurisdiction of this court having been taken away so that we cannot inquire into the facts anew, and satisfactorily dispose of the case, as furnishing a fair sample of the injurious results of the want of proper exercise of discretion in such cases and a good ground for saying that the writ should not have been allowed.

Of course, no one is suggesting that because there is a right of appeal, therefore, *certiorari* will not lie in a proper case, *e.g.*,

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where there is a want of jurisdiction in the court below to enter upon the inquiry. The case of *Re Ruggles*, 35 N.S.R. 61, was of that class. The law is well settled otherwise, and there are many cases when the discretion should be exercised, and the writ allowed, notwithstanding the existence of a right of appeal.

What I am asserting is that because of the circumstances here we ought to exercise our discretion and refuse the writ in this case.

I also refer to the additional authorities: *Ex parte Young* (1893), 32 N.B.R. 178, per Allen, C.J.; *Ex parte Barberie* (1892), 31 N.B.R. 368; *The Queen* v. *Herrell* (1899), 3 Can. Cr. Cas. 15, *per* Dubuc, J., p. 19; *The King* v. *Whitbread* (1780), 2 Doug. 549, 99 E.R. 347, *per* Lord Mansfield, p. 552; *Johnston* v. *O'Reilly* (1906), 12 Can. Cr. Cas. 218, 220, *per* Mathers, J.; *The King* v. *Gallagher* (1910), 18 Can. Cr. Cas. 347, 350; *Ex parte Cowan* (1904), 9 Can. Cr. Cas. 454; *Ex parte Damboise* (1909), 16 Can. Cr. Cas. 292; *R.* v. *Wallace*, 4 O.R. 127.

It has always been the law of England that where the granting of a *certiorari* will result in public detriment and inconvenience the court, in the exercise of a sound discretion, will deny the writ.

In *Rex* v. *Uttoxeter* (1732), 2 Strange 932, 93 E.R. 949, there is this report:—

> Upon great debate and search of precedents, it was held that a *certiorari* would not lie to remove the poor's rate itself, the remedy being to appeal, or by action when a distress is taken, which will answer all the ends of justice in coming at an unequal rate; whereas if the rate itself should be required to be sent up, great inconveniences and delays would follow, and a case was cited, Mich. 10 Ann., *Regina* v. *Inhab. de St. Mary the Virgin in Marlborough*, where it was so resolved.

In *Rex* v. *King* (1788), 2 T.R. 234, 100 E.R. 126, Ashurst, J., at p. 235, refused to allow a *certiorari* for this reason.

And that is also the law in the United States. In *People* v. *Queens County* (1836), 1 Hill (N.Y.) 195, at 200, Bronson, J., said:—

> But if we assume that there is some defect in the proceedings which might be reached by a *certiorari*, I still think the writ ought not to be granted. This is an attempt to remove the proceedings of the board of supervisors in assessing the general town and county taxes upon the taxable inhabitants of North Hempstead; and the errors into which the board may have fallen cannot be corrected in this way without producing great public inconvenience. This subject was fully considered in *The People* v. *Supervisors of Allegany* (1836), 15 Wendell 198. We thought it not a proper exercise of discretion to allow a *certiorari* in such a case, and retracing our steps, we quashed the writ which had been awarded notwithstanding the fact that a return had

been made, and the cause had been argued upon its merits. We see no occasion for departing from that decision.

See also 4 Encyc. of Pleadings and Practice, 36 and 116; 11 Corpus Juris, 130s. 85; *Trustees of Schools* v. *Directors of Union District* (1878), 88 Ill. 100.

I would dismiss the appeal with costs.

CHISHOLM, J. (dissenting):—In this matter I think the appeal should be dismissed as I see no sufficient reason for interfering with the discretion of Mr. Justice Longley who refused the application for a writ of *certiorari*. I am not satisfied that the assessment of the steamships "Rayon d'Or" and "Inverness" by the assessors of the Town of Canso was not regular and proper, and I think the applicant should shew that these ships were not assessable in Canso under the provisions of the law in that regard before he gets his writ. The whole scheme of the Assessment Act, R.S.N.S. 1900, c. 73, is to make liable to taxation all tangible property situate within the province, subject, of course, to the statutory provisions expressly exempting any portion of it.

S. 3 provides:—

All real and personal property and income shall, subject to the exemptions in the next succeeding section mentioned, be liable to taxation for all purposes for which municipal, town, local or direct taxes and rates are levied by authority of law.

S. 7 provides that the assessors shall ascertain by diligent inquiring and examination the names of all persons liable to be rated within the town or district and their ratable property.

Rule 4 of s. 15 is as follows:—

Personal property shall be assessed in the name of the owner thereof, if known to the assessors, otherwise in the name of the person in possession thereof; provided that the assessment thereof may be transferred to the owner after hearing by the court on appeal.

And rule 10 is in the following terms:—

Ships or shares in ships shall, without regard to the place of registry thereof, be assessed as property of the owner or owners thereof situated in the place or places in which he or they reside, unless owned by a firm, in which case such ships or shares in ships shall be assessed as the property of the firm.

The "Rayon d'Or" was, at the time of the assessment, the property of the Golden Ray Fishing Co. Ltd., a body corporate, having its head office at Montreal in the Province of Quebec, and the "Inverness" we were informed, was the property of the applicant company whose head office is also in Montreal. Both

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ships have had, for several years, their headquarters in Canso, and they have been within the town except when out on the high seas on their regular fishing trips.

The contention of the applicant is that the ships are not liable to assessment mainly on the ground that they are the property of corporations having their head office out of the province, and rule 10, above quoted, is relied upon as taking them out of the category of personal property situate within the province and liable to assessment.

This rule, as I read it, gives directions in regard to the assessment of ships when owned by persons within Nova Scotia, or by firms doing business within Nova Scotia. When owned by an individual within the province they are to be assessed to him in the district in which he resides; when owned by a firm they are to be assessed as the property of the firm. The head office of the company, when such head office is outside the province, does not, in my opinion, come within the scope of the rule, and I am unable to see that the ships, as property situate within the province, are not liable to assessment.

I think the appeal should be dismissed. *Appeal allowed.*

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C. A

The KING v. HANNAH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

ALTERATION OF INSTRUMENTS (§ II B—11)—LIEN NOTE—AGREEMENT TO EXTEND—NO CONSIDERATION FOR—ALTERATION OF DATE—FORGERY.

Altering the word "Nov." to "Sept." in an unsigned memorandum made on the back of an overdue lien note, agreeing to extend the time for payment of the note, such agreement being made without consideration and there being no evidence of fraudulent intent is not forgery.

[See annotation 44 D.L.R. 170.]

Statement

APPEAL by way of stated case from a conviction in the district court judge's criminal court, for uttering a lien note knowing it to have been forged. Conviction quashed.

H. E. Sampson, K.C., for the Crown; *N. R. Craig*, for the accused.

The judgment of the court was delivered by

Lamont, J.A.

LAMONT, J.A.:—The accused was charged in the district court judge's criminal court on two counts, (1) for forging a lien note by altering its indorsement, and (2) for uttering the note knowing it to be forged.

The facts as found by the trial judge are set out in the stated case as follows:—

(1) That Elmer C. Brabander on the 19th day of February, 1917, signed a lien note or agreement in writing in the following words and figures in favour of the accused, John Hannah:—

$525.00. No. Shaunavon, February 19, 1917.

On or before the first day of November for value received I promise to pay to John Hannah or order the sum of five hundred and twenty-five.....00 Dollars at..... with interest at 8 per cent. per annum till due and 8 per cent. per annum after due till paid.

Given for one dapple gray mare 1100 lbs., age 6 years, one dapple gray gelding 1400 lbs., age 6 years.

(Then follows the ordinary clause as to the ownership and right of possession of the horses.)

(2) That on the 13th day of November, 1917, the maker, Elmer C. Brabander, paid to the accused, John Hannah, the sum of $150.00 on account of this note and asked the accused to extend the time of payment of the balance to November 1st, 1918, to which the accused consented and the accused made an endorsement in the presence of Brabander on the back of the said lien agreement in words and figures as follows:—

"Nov. 13-'17 paid on note $150 Dollars

Balance to be paid Nov. 1, 1918."

(3) That the said words and figures constitute the whole endorsement and no signature was appended thereto.

(4) I further find that some person without the consent or authority of Elmer C. Brabander changed the word "Nov." in the said endorsement where it last occurs to "Sept."

(5) I further find that on or about September 25, 1918, that the accused caused this note to be given to a bailiff to effect a seizure of the horses mentioned in the lien agreement as though the said note were then due or overdue and payable and that the accused knew at the time of the delivery of the said lien agreement for such action by his bailiff that the said word "Nov." had been changed without the knowledge or consent of Brabander to "Sept." and upon my finding of such knowledge on the part of the accused and of his action with regard to the delivery of the said note to his bailiff for the purposes of seizure which seizure was actually effected by his bailiff I found the accused guilty on the second count.

The judge then reserved the following questions of law for the opinion of the Court of Appeal:—(1) Is the document alleged to have been forged a false document and was the original document such a document that an alteration thereof could be classed as a forgery? (2) Was there any consideration for the agreement in writing alleged to have been altered and if there was not, was the alteration thereof nevertheless forgery? (3) Was I justified in law on the facts as set out in convicting the accused on the second count of the indictment?

Forgery is the making of a false document, knowing it to be false, with the intention that it shall be acted upon as genuine to

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the prejudice of another; and making a false document includes altering a genuine one in any material part. Cr. Code, s. 466.

The question is: Did the altering of the word "Nov." in the memorandum made on the back of the lien note to "Sept." alter it in any material part?

What constitutes a material alteration of a document has received judicial consideration in a number of civil cases.

In *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555, Brett, L.J., at p. 568, says:—

> Any alteration of any instrument seems to me to be material which could alter the business effect of the instrument for any ordinary business purpose for which such instrument or any part of it is used.

In 2 Corpus Juris, 1190, the rule is stated as follows:—

> Any change in words or form merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired and unaltered, which in no way affects the rights, duties or obligations of the parties, and which leaves the meaning of the instrument as it originally stood, is not material and will not invalidate the instrument.

And at p. 1213, the author says:—

> Where the indorsement on the back of a note is merely a memorandum of an independent collateral agreement by one of the parties, it will not be an alteration of the body of the instrument affecting the agreement of other parties thereto. Thus the indorsement of an agreement extending the time of payment made on the back of a promissory note has been held not to be an alteration of the note, but merely the making of a memorandum of the agreement to extend the time.

It would, therefore, appear that, if the legal rights and obligations of the parties (if effect were given to the instrument as altered) would be the same as if there had been no alteration in the instrument, the alteration is not a material one.

It was, however, pointed out on behalf of the Crown that forgery might be committed in respect of documents which could not be legally enforced, and the cases of *The Queen* v. *Riley*, [1896] 1 Q.B. 309, and *Rex* v. *Howse*, (1912), 7 Cr. App. R. 103, were cited.

In the former of these cases, the prisoner, who was a clerk in a post office, sent to a book-maker a telegram offering to bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, and the book-maker accepted the bet and ultimately paid the amount won on that understanding. In reality, the telegram was despatched by the prisoner after he had received word that the race had been won by the horse in question. It was held that the telegram was

a forged instrument, although as pointed out by Hawkins, J., at p. 315, the betting contract, though not illegal, could not be enforced by legal process.

In that case, however, as in the other cases cited on behalf of the prosecution, the marking of the instrument with the false date made it appear to be a different document from what it in reality was, and there existed at the marking of the document a fraudulent intent to have another act upon it to his prejudice.

In the case before us, I fail to see how the maker of the lien note or other person could be prejudiced by the alteration made. I also fail to find the slightest evidence of a fraudulent intent on the part of the accused that any one should act upon it to his prejudice. The alteration still left the document a lien note under which the accused had a lien on the horses therein mentioned. It was, on its face, past due. The accused had agreed with the maker to extend the time for the payment of the balance. There was no consideration for that agreement, and it is not contended that there was. There being no consideration, there was no contract. The document was still a lien note, past due and presently enforceable. How then could the maker or anyone else be prejudiced by the repossession of horses, which the accused had a perfect right to take? The endorsement on the lien note was nothing more than an unsigned memorandum of an agreement to extend the time of payment entered into without consideration, and without any intention of discharging the lien agreement. It is of no more effect than if the accused had handed to the maker on another piece of paper a memorandum that payment of the balance of the lien note would be extended until Nov. 1, 1918. In that case no question of forgery could have arisen.

As the accused in repossessing the horses was acting strictly within his legal rights, no intention to prejudice another by so doing can be imputed to him. I would therefore answer the questions submitted in the negative. The conviction should be quashed. *Conviction quashed.*

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LARSON v. BOYD.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin and Mignault, JJ. and Cassels, J., ad hoc.. March 3, 1919.

NEW TRIAL (§ II—9a)— EVIDENCE—ADMISSION OF IRRELEVANT—TRIAL JUDGE POSSIBLY INFLUENCED BY.

The admission of irrelevant evidence which may have adversely influenced the opinion of the trial judge, is sufficient, unless he has disclaimed its having influenced his mind, to justify the granting of a new trial.

[*Boyd* v. *Larson* (1918), 42 D.L.R. 516, affirmed.]

Statement. APPEAL from the judgment of the Court of Appeal for Saskatchewan (1918), 42 D.L.R. 516, 11 S.L.R. 325, reversing the judgment of Bigelow, J., and ordering a new trial. Affirmed.

George A. Cruise, for appellant.

J. A. Allan, K.C., for respondent.

Davies, C.J. DAVIES, C.J.:—I think this appeal must be dismissed and the judgment of the Appeal Court granting a new trial confirmed with costs.

The wrongful evidence admitted at the trial, relating to the sale by the respondent plaintiffs of the Tuxedo lands and of the representations made by the respondents to the Tuxedo purchasers, was to my mind clearly inadmissible and should have been rejected by the trial judge. It is impossible to say what weight that evidence may have had on the mind of the trial judge in delivering his judgment in a case where the plaintiff and the defendant gave directly conflicting evidence as to the material representations alleged by the defendant to have been made to him and which induced him to enter into the contract now sought to be specifically enforced.

Idington, J. IDINGTON, J. (dissenting):—The appellant was induced on July 12, 1912, to enter into an agreement for the purchase of two lots described therein as lots Nos. 39 and 40 in block two in Tuxedo sub-division in North Battleford.

In the statement of claim the respondents sue for the balance of price of "lots 39 and 40 in block two in the City of North Battleford."

The counsel for appellant admitted the agreement, and also by another admission admitted that the respondent had title to the land mentioned in the statement of claim, but seemed to avoid any express admission that the land named in the agreement was the identical land referred to in the statement of claim.

At the close of the plaintiff's case thus assumed to be established, appellant's counsel took the objection that there was nothing to shew that the land described in the statement of claim was the land mentioned in the agreement.

Instead of counsel for plaintiff at once asking leave to amend his statement of claim or adduce proof of identity he did nothing, but allowed the trial judge to so reserve the point without objecting.

I cannot say that that was a very satisfactory disposition of the point. Nor can I say that I should have reached the same conclusion as the learned trial judge without giving an opportunity to amend or adduce further proof.

The court below having taken the view that it did of that part of the trial, and found from what, to my mind, is not quite unreasonable, the inference of identity, though I might not have drawn it, I certainly should not disturb that part of the judgment appealed from.

The whole question is only worth considering as illustrative of the course of the trial.

The main ground of appeal is that the court below erred, as I think it did, in granting a new trial on the ground of improper reception of evidence.

The appellant had pleaded as a distinct defence the following:—

> 3. In the alternative the defendant says that on or about the 12th day of July, 1912, the plaintiffs falsely and fraudulently represented to him that the plaintiffs were the owners of lots 39 and 40, in block 2, in a certain sub-division in North Battleford known as Tuxedo Park, that the said lots were good city lots, that the town was built to within two blocks of them, that the Canadian Pacific Railway was building on the section just beyond the said lots, and that the said lots were worth more than the price of $825.00 which the plaintiffs were asking for them, and were within one-quarter of a mile of the Canadian Northern Railway station in the city of North Battleford.

His own evidence, if believed, established these allegations of fact. Then, hoping no doubt, to prove the fraudulent intent of such misstatements, he called Mrs. Tracksell, who had been present at a sale to her deceased husband by the defendants, in January, 1912, of a lot in same survey, and next or near to the lots in question. Counsel for respondent at once, upon her

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being sworn, objected to her evidence. No ground for the objection was stated or appears in the case.

Her evidence really amounts to nothing more than that there was such a sale, and it seems to me inconceivable how or why its admission can be made ground for a new trial.

This was followed by evidence of another Tracksell relative to another sale of a lot in same survey by respondents to him in November, 1912. This witness testified to representations made to him on that occasion very similar in character to those charged in the above paragraph from the appellant's statement of defence.

His evidence was given, not as the court below in error states, under or subject to objection.

Not a word of objection thereto was uttered till after it had all been given, and then counsel for respondents said: "I have the same objection to this evidence." And then he proceeded to call his clients in reply to the defence made.

I cannot understand why such an utter disregard of the established principles governing the conduct of parties at a trial requiring them promptly and properly to object, if they have any reason to complain of the conduct thereof, should be tolerated as a basis of granting a new trial.

I observe from the respondents' factum that the appellant was not represented at the hearing of the appeal in the court below, and suspect this feature of the case was not observed by the members of that court.

Apart from any other considerations I think the failure to object at the proper time should have been held fatal to any application for a new trial upon the ground it is rested upon.

In the view I take relative to the possibility of such like evidence being admissible in support of a charge of fraud of such a character as set up, there is absolutely no ground for granting it.

Assume that the defendant had in mind the purpose of establishing a highly fraudulent scheme of the kind, in which beyond a doubt, as illustrated by the judgments in the case of *Blake* v. *Albion Life Assurance Co.* (1878), L.R. 4 C.P.D. 94, and *The Queen* v. *Rhodes* [1899] 1 Q.B. 77, and cases cited

therein, evidence of what had transpired between him accused and others than those immediately concerned, would be admissible and the attempt to do so failed by reason of the evidence falling short of what was expected, would that be any ground for granting a new trial?

The charge made, which I am for purposes of illustration thus assuming to have been of such a nature as to permit the evidence to go so far as to have been highly prejudicial to the party attacked and then failed, how could he, who lost on another ground other issues entirely, claim as the defendant does by reason thereof a new trial?

I incline to think the pleading I have quoted wide enough to let in evidence of any fraudulent scheme unless limited by specific particulars which should have been demanded if any limitation claimed to be put upon the inquiry.

There is in the next paragraph of the defence a charge of representation of the same facts in a way entitling appellant to relief which did not in order to get same necessarily involve such gross fraud as firstly charged.

On this the court below seemed to think, if the trial judge saw fit to proceed thereon he could rightly have found, as he did, but because he did not expressly repudiate being affected by the evidence adduced on the other issue, therefore, there must be a new trial.

I must respectfully submit that it is not a proper ground upon which to grant a new trial.

To hold so implies, that in every case wherein other issues may have been tried than those in which the plaintiff succeeds, the learned trial judge must by express language exclude all possibility of his mind having been prejudicially affected by having heard evidence on the other issues and in default of his doing so a new trial must be granted.

The presumption surely is that a learned trial judge has not misdirected himself unless he gives some indication of it other than apparent herein.

The evidence of George Boyd seems to me far from satisfactory and may have appeared more so to the learned trial judge.

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I think the appeal should be allowed with costs and the trial judge's judgment be restored.

ANGLIN, J.:—The evidence of similar misrepresentations made by the plaintiff to other prospective purchasers might have been admissible if his intent in making the misrepresentations to the defendant on which the latter relies in answer to this action of specific performance had been material to any issue in it which the court was called upon to determine. *Blake* v. *Albion Assurance Society* (1878), L.R. 4 C.P.D. 94, chiefly relied on by the appellant, was such a case. See too *Brunet* v. *The King* (1918), 42 D.L.R. 405 (annotated); 57 Can. S.C.R. 83; 30 Can. Cr. Cas. 16.

The issues in the present action were whether the alleged misrepresentations had in fact been made, their truth or untruth, their materiality, and whether the defendant had been induced by them to purchase. To none of these issues could the proof of false representations by the defendant made months afterwards to other persons, however similar in character, be relevant. It would not tend to establish the probability of the defendant's case upon any of them. It would be quite as relevant to attempt to prove that the plaintiff's reputation for veracity was bad with a view to establishing that he was a person likely to make false representations when it should be to his interest to do so. The unnecessary and immaterial allegation of the defendant in his plea that the misrepresentations on which he relied had been made fraudulently cannot, in my opinion, render relevant evidence otherwise irrelevant to the real issues presented for trial. I agree with the view of the Court of Appeal that the testimony here in question was improperly received.

While without it there may have been sufficient evidence to warrant the judgment dismissing the action, it is impossible to say that the testimony objected to may not have adversely influenced the trial judge's opinion as to the credibility of the plaintiff and thus occasioned a substantial wrong in the trial. Having received it, though subject to objection, and not disclaimed its having had any effect upon his mind, it is not unreasonable to assume that the learned judge treated it as admissible and that it, in fact, had what would seem to be its

probable effect upon his decision. *Allen* v. *The King* (1911), 44 Can. S.C.R. 331; *Loughead* v. *Collingwood* (1908), 16 O.L.R. 64; *Hyndman* v. *Stephens* (1909), 19 Man. L.R. 187.

In view of the absence from the statement of defence of any allegation that the land described in the agreement for sale was not the same as that described in the statement of claim and of the unqualified admission of the plaintiff's title to the latter made by counsel for the defendant at the opening of the trial, which the judge appears to have then accepted as conclusive on that branch of the case, the action should not, in my opinion, afterwards have been dismissed because of an unexplained discrepancy between the two descriptions.

I would affirm the judgment directing a new trial and dismiss this appeal with costs.

Mignault, J.

MIGNAULT, J.:—The Court of Appeal of Saskatchewan has decided that the appellant introduced irrelevant evidence of false representations made by the respondent to other persons to whom he endeavored to sell lots. It ordered a new trial because, in its opinion, such evidence may have influenced the trial judge in deciding that the respondent had made to the appellant (which he denied) false representations concerning the lots sold to the appellant. The counsel for the appellant has not convinced me that the judgment appealed from is clearly wrong. The evidence complained of was certainly irrelevant and it may have influenced the result. I would, therefore, dismiss the appeal with costs.

Cassels, J.

CASSELS, J.:—I concur with Anglin, J.

Appeal dismissed.

SERCOMBE v. TOWNSHIP OF VAUGHAN.

(Annotated.)

Ontario Supreme Court, Appellate Division, Riddell and Latchford, JJ., Ferguson, J.A., and Rose, J. February 7, 1919.

HIGHWAYS (§ IV. A—135)—MOTOR TRUCK WIDER THAN ALLOWED BY ACT—BREAKING THROUGH BRIDGE—NOT LAWFULLY ON HIGHWAY—MUNICIPALITY NOT LIABLE FOR INJURY TO MACHINE—OWNER LIABLE FOR DAMAGE TO BRIDGE.

The Load of Vehicles Act, 6 Geo. V., c. 49, s. 6. (Ont.) provides that "no vehicle shall have a greater width than 90 inches." A motor truck 96 inches wide, has, under this Act, no right to be upon the highway, and in respect thereof is a mere trespasser. The owner cannot recover damages for injuries to such truck caused by its breaking through a

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bridge on the highway, although the extra width may not have had anything to do with causing the accident. The owner is, however, liable to the municipality for the damage done by the truck, prohibited as it is from using the road.

[*Roe* v. *Tp. of Wellesley* (1918), 43 O.L.R. 214, *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1 (annotated), *Goodison Thresher Co.* v. *Tp. of McNab* (1910), 44 Can. S.C.R. 187, referred to.]

Statement.

APPEAL by defendants, the Municipal Corporation of the Township of Vaughan, from a County Court judgment in favour of the plaintiff for the recovery of $333.82 for damages for injury to the plaintiff's motor truck, which was running on a public highway in defendant township, when it broke through a bridge. The counterclaim was for the injury to the bridge. Reversed.

William Proudfoot, K.C., for appellants.

H. A. Newman, for respondent.

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner of a motor truck of dead weight 11,100 lbs. loaded with merchandise, which the trial judge finds on satisfactory evidence to have been about 8,000 lbs. The truck was running on a public highway in the Township of Vaughan, well within 8 miles an hour, when it broke through a bridge in the highway. The plaintiff sued for damages and was awarded $333.82 by His Honor Judge Coatsworth, who also dismissed the counterclaim of the defendants. The defendants now appeal.

There were several points fully and ably argued by counsel; but, in the view I take of the case, it can be disposed of adversely to the plaintiff on one simple ground.

The Load of Vehicles Act, 1916, 6 Geo. V., c. 49, by s. 6, provides that "no vehicle shall have a greater width than 90 inches, except traction engines"—"vehicle" being interpreted by s. 2 (*b*) as including motor vehicles such as this was; it is conclusively proved that "this vehicle," not being a traction-engine, was almost 96 inches wide. The plaintiff had no right to have such a vehicle on the highway at all, and in respect thereof he was a mere trespasser. The corporation owed him no duty except to refrain from setting traps for him and from maliciously or wilfully injuring him, and he must take the road as he finds it.

Cases such as *Goodison Thresher Co.* v. *Tp. of McNab*, 44 Can. S.C.R. 187; *Etter* v. *City of Saskatoon*, 39 D.L.R. 1; *Roe* v.

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Tp. of Wellesley, 43 O.L.R. 214, all have a bearing on the point, although not on all fours.

That the extra width had or might have had nothing to do with causing the accident has, I think, no significance—the motor truck should not have been there at all.

I would allow the appeal and dismiss the action, both with costs.

Riddell, J.

The same considerations dispose of the appeal against the dismissal of the counterclaim.

The plaintiff smashed the defendants' bridge unlawfully, and should pay for it—it is of no importance that the same thing might have happened had the plaintiff used a lawful instrument—the fact is he did not.

There should be judgment on the counterclaim for the sum necessary to replace the bridge, to be agreed upon by the parties, or, in the absence of agreement, on a reference.

The defendants should have their costs throughout on the County Court scale.

LATCHFORD, J.:—In this case, as in *Roe* v. *Tp. of Wellesley*, 43 O.L.R. 214, the motor vehicle was unlawfully upon the highway, and, therefore, the plaintiff can be afforded no redress.

Latchford, J.

Not only does his action fail, but he is liable to the municipality for the damage done by his truck, prohibited as that was from using the road.

The appeal should be allowed with costs here and below. If the parties cannot agree on the amount of the damages, there should be a reference.

FERGUSON, J.A., and ROSE, J., concurred.

Ferguson, J.A. Rose, J.

Appeal allowed.

ANNOTATION.

Annotation.

Liability of municipality for defective highways or bridges; negligence and proximate cause.

The cases relied on in the judgment of Riddell, J., in the *Sercombe* case (*ante* p. 131), apart from being distinguishable from the case to which they were applied, are hardly in accord with the modern trend of decisions dealing with negligence law. He cites the cases of *Goodison Thresher Co.* v. *Tp. of McNab* (1910), 44 Can. S.C.R. 187, affirming the majority of the Court of Appeal of Ontario, 19 O.L.R. 188; *Roe* v. *Tp. of Wellesley* (1918), 43 O.L.R. 214—a single judge decision; and the Saskatchewan case of *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1 (annotated), 10 S.L.R. 415.

Annotation.

In *Linstead* v. *Tp. of Whitchurch* (1916), 30 D.L.R. 431, 36 O.L.R. 462, the *Goodison* case was virtually repudiated and a diametrically opposite view reached by the Court. It must be remembered that in the *Goodison* case both Chief Justices, of Ontario (Sir Charles Moss, concurring with the trial judge, Anglin, J.), and of Canada (Sir Charles Fitzpatrick), together with Girouard and the present Chief Justice of Ontario, Sir William R. Meredith, dissented, Moss and Meredith, JJ., delivering strong dissenting opinions. Meredith, C.J.O., in the *Linstead* case, after carefully weighing the reasoning in the *Goodison* case and its weight as a precedent, came to the conclusion that "owing to the conflict of judicial opinion in the (*Goodison*) case, the question presented in this (*Linstead*) case should be treated as *res integra*."

In view of the *Linstead* case, the Saskatchewan case of *Etter* v. *Saskatoon* would hardly have any weight as a precedent, at least so far as Ontario is concerned, apart from the fact that it is distinguishable, in that the latter dealt with a statute which expressly prohibited the vehicle "to be used or operated upon a public highway" unless it complied with the statutory requirements.

In *Roe* v. *Wellesley*, the automobile, driven by an infant at a great speed, dropped into a hole at the edge of a bridge forming part of a highway. Latchford, J., said (and he might have made it the basis of his decision, on the principle of *causa causans*, or proximate cause, or ultimate negligence): "I desire to add that, in my opinion, no duty is cast upon a municipality to maintain its roads in such repair that they shall be safe for automobiles driven at the speed at which the plaintiffs were proceeding."

"The whole law of negligence in accident cases," says Lord *Sumner*, in delivering judgment in the *B. C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, "is now very well settled . . . and its application is plain enough. Many persons are apt to think that, in a case of contributory negligence, the injured man deserved to be hurt, but the question is not one of desert, but of the *cause* legally responsible for the injury. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsiblity for the wrongful act which has caused the damage. It is in search not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote."

This view seems to be followed in strong American decisions and is entirely in accord with the trend of decisions in modern negligence law. The Supreme Court of Delaware, in *Lindsay* v. *Cecchi* (1911), 35 L.R.A. (N.S.) 699, held that the failure of an automobile driver to have the statutory license will not render him liable for an injury in case of accident, unless such failure had some causal relations to the injury. The Supreme Court of Massachusetts in *Bourne* v. *Whitman* (1911), 209 Mass. 155, 35 L.R.A. (N.S.) 701, held that the breach of such statutory duty does not render the person so using the highway a trespasser, nor liable for injuries not due to his negligence. And there is abundant authority for the proposition that even to a trespasser there is a certain duty of protection: *Diplock* v. *Canadian Northern R. Co.* (1916), 30 D.L.R. 240, 53 Can. S.C.R. 376, 20 Can. Ry. Cas. 365, affirming 26 D.L.R. 544, 9 S.L.R. 31.

Annotation.

Negligence of the municipality in such case would be presumed by the application of the well-known principle of *res ipsa loquitur*. *Kearney* v. *London etc. R. Co.* (1871), L.R. 6 Q.B. 759. "The defendants were under common law liability to keep the bridge in safe condition for the public using the highway to pass under it," said the court. This decision has been followed in the State of New York, in the case of a building falling into the street. "Buildings properly constructed do not fall without adequate cause:" *Mullen* v. *St. John* (1874), 57 N.Y. 567, 569. See Pollock on Torts, 9th ed., p. 533.

In *Dick* v. *Tp. of Vaughan* (1917), 34 D.L.R. 577, 39 O.L.R. 187, a similar action was brought to recover damages because the plaintiff was compelled to travel by another way owing to the insufficient carrying power of the bridge. The action was dismissed because the damages were held to be too remote, but the duty of the municipality as to the safety of the bridge, and its liability in the event of accident, was not questioned. Meredith, C.J.C.P., remarking it to be one "owed as much to the beggar on foot, or the driver of a coach and four, as to the plaintiff; and a duty which any one of them equally might have enforced by laying an information against the municipality."

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

NEGLIGENCE (§ II A—75)—STATUTORY DUTY IMPOSED ON RAILWAY CO.—FAILURE TO COMPLY WITH—DUTY OF TRAVELLER APPROACHING TRACK—LIABILITY FOR DAMAGES.

Where a statutory duty is imposed on a railway company to sound the whistle and ring the bell of the engine when a train is approaching a highway at level rail, a traveller has a right to expect this to be done, and is not required to look to see if a train is approaching. The omission to carry out the statutory duty imposed amounts to negligence and renders the company liable for resulting injury.

[*Grand Trunk R. Co.* v. *McAlpine* (1913), 13 D.L.R. 618; *Smith* v. *South Eastern R. Co.*, [1896] 1 Q.B. 178, followed.]

Statement.

APPEAL from a judgment which awarded to the plaintiffs damages for injuries received through being struck on a level crossing by the defendants' train. The action was brought by M. H. Doyle for himself and as next friend of his five infant children.

W. J. Perkins, for appellant; *E. J. Campbell*, for respondent.

Lamont, J.A.

The judgment of the court was delivered by

LAMONT, J.A.:—The accident occurred about 6 o'clock in the evening (fast time) of December 19, 1916. The children were driving home from school in a single buggy, with the top up and side curtains on. The evening was cold, being 30 to 40 below zero, and the children were well wrapped up. From Lampman village the railway track runs in an easterly direction, and the travelled road

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is on the south side of the track for about three-quarters of a mile when it crosses the track at level rail and runs straight north. The children left Lampman and drove east along the road south of the track, and were going over the crossing when they were struck by the defendants' train, also coming from Lampman. As a result, the horse was killed, the buggy smashed and the children hurt. The buggy was being driven by John Lampman, a boy of 14, who for four or five years had driven over the same road to and from school. Between Lampman and the crossing, and at a distance of 80 rods from the crossing, there is a post known as the "whistling post.' The negligence which the plaintiffs allege caused the accident was the failure of the defendants to perform the statutory duty imposed upon them by s. 274 of The Railway Act, which is as follows:—

> 274. When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

The trial judge found that the whistle had not been sounded, nor the bell rung as provided by the Act, and that the determining cause of the accident was the defendants' failure to give these statutory warnings. From that judgment the defendants now appeal.

To succeed the plaintiffs must establish: (1) that the defendants were guilty of negligence, and (2) that such negligence was the proximate cause of the accident.

In my opinion, the evidence warranted the finding of the trial judge, that the defendants failed to sound their whistle and ring the bell as required by s. 274.

The engineer swore that he had sounded the whistle at the whistling post and rung the bell continuously until he reached the crossing, and a section foreman corroborated this. The foreman, however, the trial judge refused to accept as a credible witness. This left the testimony of the engineer the sole evidence that the statutory warnings had been given. It was open to the trial judge, in weighing this testimony, to view it in the light of the fact that the engineer was the man guilty of a dereliction of duty if the statute had not been complied with. On the other hand, the children testified that they heard no whistle at the whistling post; that they would have heard it had it been sounded. Then there is the evidence of Thomas Doyle, who lives a mile from the railway,

who said he watched the train until it reached the crossing, and who testified that the whistle was not sounded at the whistling post and not until it was close to the crossing. This evidence, accepted by the trial judge as it evidently was, justified him in reaching the conclusion that the statutory warnings had not been given.

The only other question involved is that of the contributory negligence of the children. It was admitted by the boy John and the other children that they did not look on approaching the crossing to see if a train was coming. They also admitted that, had they turned their heads, they would have had an unobstructed view of the railway track for over half a mile. On these admissions, it was strongly contended before us that the failure on their part to look for an approaching train constituted such negligence as disentitled them to recover, and that, in fact, the collision was due to their own folly and recklessness.

The rule as laid down by the Privy Council in *Grand Trunk R. Co.* v. *McAlpine*, [1913] A.C. 838, 13 D.L.R. 618 at 623, 16 Can. Ry. Cas. 186, is as follows:—

> Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. If, as in the example taken by Lord Cairns in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, the folly and recklessness of the plaintiff, and not the admitted negligence of the company, be the cause of the injury to the plaintiff, then the negligence of the servants of the company in omitting to whistle, for instance, as the train approached a station or level crossing would "be an *incuria*, but not an *incuria dans locum injuriæ*."

And in *Wabash R. Co.* v. *Misener* (1906), 38 Can. S.C.R. 94 at 100, Davies, J. with whom Idington and Duff, JJ. concurred, lays down the law on the point as follows:—

> I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose, blindly, recklessly or foolishly to run into danger, they must surely take the consequences.

The children having a clear view of the track and not having looked to see if a train was coming, were there any "special circumstances" which would excuse their failure so to do?

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The boy John does not appear to have been asked why he did not look before going on the track, but he was asked about the whistling post, and he stated that the train should whistle every time it came to it. Mildred Doyle gave this testimony:—

Q. You did not look to see if the train was coming? A. No. We did not expect it would be there at that time because it always went before.

And in cross-examination she said she knew the train would not ordinarily be running at that time. The train, it appears, on that occasion was running behind its scheduled time. Katie Doyle in her evidence said:

We never expected the train because it had always gone by that time, never as much as thought of looking. We thought if the train was coming it would whistle at the whistling post.

I can see nothing in the evidence to cast a doubt upon the correctness of this testimony, and I have no doubt the reason the children did not look for a train was because they thought the train had passed, and they believed that any train coming from the west would whistle at the post. Are these sufficient to excuse their failure to look?

Generally speaking, I do not think a person approaching a railway crossing is justified in concluding that a train has passed simply because the hour at which it is scheduled to reach the crossing has passed. In this country, railway trains do not run so infallibly on schedule time as to justify such a conclusion. We all know trains are frequently late. There may, however, be cases in which such a conclusion would be justified.

In *Rex.* v. *Broad*, [1915] A.C. 1110, at p. 1119, the Privy Council said:

In these circumstances, on the facts proved and apart from the by-law, it was for the jury to say whether there was contributory negligence on Broad's part or not, and if they thought that he reasonably believed, as a resident daily using the crossing, that the train had already passed, their verdict that he was not "guilty of negligence that led to the collision" must stand.

The only testimony as to how often the train was late is that of the plaintiff M. H. Doyle, who said it was not very often late. The children had for years been driving to and from school over this crossing and would know how often they found the train late. That they had an honest belief that at that hour the train would not be at the crossing, I think is established by the evidence. Was that belief reasonable? Was it such as a reasonable man

under the circumstances would have acted upon? As it was based upon years of experience, I am of opinion that—in the absence of evidence to the contrary—we cannot hold that it was not justified. While trains, generally speaking, are often late, particularly l ng haul trains, it may be that the train in question had theretofore been, practically speaking, always on time. Whether or not this circumstance excuses the children for not looking, the other one above mentioned, in my opinion, does. That is, I think they were justified in assuming that the whistle would be blown at the eighty rod post, and, as they would have abundance of time to secure their safety after the blowing of that whistle, they were entitled to go ahead until the whistle was blown.

In *Smith* v. *South Eastern R. Co.*, [1896] 1 Q.B. 178, the defendants' line crossed the highway at level rail. There was a gate-keeper's lodge at the crossing, where the defendants stationed an employee, Judges. It was this employee's duty under the regulations of the company, whenever a train was approaching the crossing, to see if the line was clear, and if clear to stand by the rails and hold out a white flag by day and a white light by night. An approaching train could readily be seen by anyone who desired to cross before he got to the rails. The plaintiff's husband went to the gate-keeper's lodge and inquired if his wife was there. The gate-keeper Judges was sitting in his lodge reading. On being told his wife was not there, he went out and attempted to go across the tracks at the crossing and was killed by the defendants' train. Judges did not warn him that a train was coming, nor did he go out to signal it. It was held that the plaintiff's husband in attempting to cross the tracks without looking for an approaching train was not guilty of contributory negligence. In his judgment, at p 183, Lord Esher, M.R., says:—

> The deceased man lived in the neighbourhood, and had been at the crossing on previous occasions. I think there was evidence from which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, whenever a train was passing over the crossing; and, that being so, they might, on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges remained in his house, no train was coming, and therefore he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think I am acting on the view expressed by Lord

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Cairns in the case of *Dublin, Wicklow and Wexford R. Co.* v. *Slattery, supra.* He seems in that case to have thought that, if a man had a right to suppose from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming.

See also *Toronto R. Co.* v. *Gosnell* (1895), 24 Can. S.C.R. 582, and *Toronto R. Co.* v. *King*, [1908] A.C. 260,269.

These observations, in my opinion, apply to the present case, inasmuch as here the railway company were under a statutory obligation to sound the whistle and ring the bell. The children relied upon the defendants fulfilling this obligation, and in my opinion they had a right so to do.

I, therefore, agree with the conclusion of the trial judge that the determining cause of the accident was the defendants' failure to observe these statutory requirements.

The appeal should be dismissed with costs.

Appeal dismissed.

MAN.

C. A.

COLLYER v. McAULEY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. April 4, 1919.

AUTOMOBILES (§ III B—210)—DRIVING CAR INTO SCHOOL YARD—FRIGHTENING HORSES WORKING IN YARD—MOTOR VEHICLES ACT (MAN.)—NEGLIGENCE—ONUS OF PROOF—TRESPASS—DAMAGES.

The defendant drove a motor-car into a school yard and around the school building to where the plaintiff was working with a team and scraper, neither party being aware of the presence of the other. The motor-car frightened the plaintiff's horses and caused them to run away one of them being injured.

The court held that the Motor Vehicles Act only referred to loss or damage arising out of the use of a motor vehicle on a public highway, but if this included a school yard, the evidence put in by the defendant displaced the onus of proof created by s. 63 of the Act, and replaced upon the plaintiff the onus of proving his case. Held, also, that even if the defendant was guilty of a trespass in driving his motor-car into the school yard, the damage which occurred did not naturally flow from the trespass and was not an ordinary consequence of the trespass and the defendant was not liable.

[*Bradley* v. *Wallace Limited*, [1913] 3 K.B. 629; *Heath's Garage* v. *Hodges*, [1916] 2 K.B. 370, referred to; see annotation 39 D.L.R. 4.]

Statement.

APPEAL by plaintiff from the decision of a District Court Judge in an action for damages for injuries to a horse caused by its being frightened by a motor car. Affirmed.

J. H. Chalmers, for appellant.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is an appeal from the decision of His Honour Judge Mickle in the County Court of Miniota. The cir-

cumstances of the case and the findings of law and fact made by the trial judge are set out in his written judgment, which is as follows:—

This is an action for negligence, under most peculiar circumstances. Plaintiff was working at a school-house with his team. The school property was enclosed. Plaintiff, although working with a scraper, was at the time of the accident which occurred shovelling or loosening material for the scraper, and in order to do so had dropped the lines of his team. One of the defendants came along in an auto, opened the gate of the school property and drove towards the corner of the school around which the plaintiff was. The plaintiff's horses take fright and run away, plaintiff grabbing for the lines, but failing to get them in time. One of the horses is injured and the plaintiff sues the defendants for negligence in driving. The defendants deny negligence and say the damage was caused by the plaintiff not having his horses under proper control.

The facts are fairly well agreed upon. Plaintiff relies largely upon s. 15 of the Motor Vehicles Act, together with s. 63 of the Motor Vehicles Act.

The general run of cases that have been decided deals with accidents taking place on the highways and the operation clauses of the Act relate to highways, so that it is a little more difficult to come to a conclusion. Neither ss. 15 nor 63 are limited to highways. S. 15 says: "which shall be sounded when it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle." One can easily see the necessity for sounding the horn when travelling on a highway, but on approaching a team not in sight and which could not be expected to be in such a place, can it be said there was a reasonable necessity for sounding the horn? I am loth to say the plaintiff was negligent because he did not have his team tied when he was standing beside them at his work. One of the horses was quiet, the other inclined to be fractious, but he had no more reason to expect an auto appearing on the scene in the school grounds than the man with the auto had to expect to run upon a team around the corner of the building. It does appear to me to come in that class of the cases referred to as "inevitable accidents," and viewing it in that light I must give a verdict for the defendants, with costs.

S. 63 of the Motor Vehicles Act, R.S.M. 1913, c. 131, is as follows:—

63. 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.

By s. 14 of c. 41 of the statutes of 1915, s. 63A was inserted immediately after the above s. 63. S. 63A is as follows:—

63.A In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time shall be liable for such loss, damage or injury, if it was caused by his negligence or wilful act, and the owner thereof shall also be liable to the same extent as the driver unless at the time of the injury the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

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In *McIlroy* v. *Kobold* (1917), 35 D.L.R. 587, 28 Man. L.R. 109, it was held by this court that under s. 63A the owner can only be liable if the injury was caused by the negligence or wilful act of the driver of the motor vehicle, and where the case is tried by a jury all facts to justify the entry of judgment by the judge must be found by the jury. It seems obvious that the effect of s. 63 is merely to place upon the owner or driver of the motor vehicle the onus of shewing that the accident which caused the loss or damage complained of was not caused by the negligence of such owner or driver. The section simply shifts the burden of proof from the plaintiff to the defendant. If then the defendant puts in evidence the facts relating to the accident shewing how it took place and that it did not arise through negligence for which he was responsible, he will be entitled to have the action dismissed unless the plaintiff is able to rebut the defendant's case and shew negligence on the part of the latter which caused the injury.

The present case is not one of negligent driving on a highway and causing injury thereby. In s. 2 (*b*) of the Motor Vehicle Act the expression "highway" or "public highway" is defined as meaning "any public highway or road, street, lane, alley, park, parkway, driving or public place within or outside of any incorporated city, town or village." The Act contains many provisions relating to operation, speed, rules of the road and other matters clearly designed for the protection of persons using a public highway from accidents resulting from the use of motor vehicles upon such highways. S. 63 only refers to loss or damage arising out of the use of a motor vehicle on a public highway as defined in the Act. It may be questioned whether the definition above quoted includes a school yard which is of a more or less private nature. If the definition does not include a school yard a *primâ facie* case of negligence was not made against the defendants by force of the section. But even if the section does apply to this case the evidence put in by the defence displaced the presumption created by the section sufficiently to replace upon the plaintiff the onus of proving his case.

The plaintiff urges that driving a motor car into the school yard and around to the back of the school was a trespass and that therefore the defendants were liable. I do not think that on the evidence we can find that the driver was committing a trespass.

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But, even if we assume he was committing a trespass, the damage which occurred did not naturally flow from the trespass and was not an ordinary consequence of the trespass. It was too remote. See *Bradley* v. *Wallaces Limited*, [1913] 3 K.B. 629, *per* Cozens-Hardy, M.R., at 633; *per* Kennedy, L.J., pp. 636-637; *per* Swinfen Eady, L.J., p. 641; also *Heath's Garage*, v. *Hodges*, [1916] 2 K.B. 370, 376.

Perdue, C.J.M.

I do not think that this Court should interfere with the finding of the trial judge upon the evidence given in this case. He has not found that the driver of the motor vehicle was guilty of negligence, a conclusion which is fully warranted by the evidence.

The appeal should be dismissed with costs.

HAGGART, J.A.:—I accept the facts as set out in the reasons of the trial judge. I do not think that any actionable negligence has been proved on the part of the defendants.

Haggart, J.A.

I would dismiss the appeal and affirm the judgment of Mickle, J.

FULLERTON, J.A., concurred in dismissing appeal.

Fullerton, J.A.

Appeal dismissed.

HENDERSON v. MAHER.

QUE.

C. R.

Quebec Court of Review, Fortin, Hackett and de Lorimier, JJ.
November 15, 1918.

ALTERATION OF INSTRUMENTS (§ II B—17)—ASSIGNMENT OF NOTE FOR COLLECTION—SUBSTITUTION OF HOLDER'S NAME AS PAYEE—NOT MATERIAL ALTERATION.

Altering a promissory note after it has become due and in virtue of an assignment for the purpose of collecting the amount thereof by the holder substituting his own name as payee in place of that of the bank in whose hands it was first placed for collection, is not a material alteration and the last payee is a holder for collection, subject to any defences the maker may have against the original payee.

APPEAL from the judgment of the Superior Court, Weir, J. Affirmed.

Statement.

This was an action on a promissory note for $3,077.33, dated at Montreal, November 24, 1914, signed by the defendant to the order of Howard H. Williams and Albert C. Hall, receiver of the Standard Plunger Elevator Co. The note was endorsed and transferred first to the Royal Bank for collection. The name of the latter was afterwards erased and that of the plaintiff was substituted therefor.

The action was contested on the following grounds: (*a*) the plaintiff is merely a *prêter-nom* of the receivers and is not the bearer

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of the note; (*b*) the receivers have been appointed by a foreign tribunal, and have no right to resort to any court of this province for work done within its limits;—(*c*) the company represented by the receivers is a foreign company and has never received a license entitling it to do business in this province;—(*d*) the said note was given for the construction of two elevators in an apartment-house in Montreal, the property of the defendant; but the said company never complied with the contract, plans and specifications, and divers serious defects developed, which are detailed in the defence; —(*e*) in order to permit the continued operation of the elevators, the defendant was obliged, from time to time, and after having put the company in default, to expend in repairs, large sums of money amounting to $3,194;—(*f*) therefore the plaintiff and his auteurs are without right to demand payment of this promissory note.

The Superior Court maintained the action by the following judgment:—

Seeing arts. 2 (par. *g*), 57, 74, 145 and 146 of the Bills of Exchange Act;

Considering that the plaintiff received the said promissory note after it became due, from the payees thereof, after endorsement by them to him, and also in virtue of an assignment by them to him for the purpose of collecting the amount thereof; that the alteration of the said endorsement of payee by the substitution of the plaintiff's name for that of the bank in whose hands it was first placed for collection from the defendant, is not a material alteration and the plaintiff is the holder thereof for collection, subject to any defence the maker may have as against the said payees, to wit: Howard H. Williams and Albert C. Wall, receivers of the Standard Plunger Elevator Co;

Seeing art. 79 of the Code of Civil Procedure;

Considering that the said Messrs. Williams and Wall were duly appointed receivers of the Standard Plunger Elevator Co. by the District Court of the United States in the District of New Jersey, with power to appear in judicial proceedings, and by bill of sale acquired from the said company all its personal property and rights of action; and from the said assets have duly transferred the said promissory note to the plaintiff herein;

Considering that the fact that, at the times in question herein, the said company, being a foreign company, had not taken out the license referred to in ss. 6099 *et seq.* of R.S.Q., did not deprive the said company, the said receivers, or the plaintiff, as their transferee, of the right to appear before the courts of this province for the maintenance of their claims; C.P., art. 79, *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (1910), 20 Que. K.B. 109, [1911] A.C. 78; A. & E. Encyc. of Law *verbo* Illegal Contracts p. 940.

[The following considerant referred to facts only.]

Doth dismiss the defendant's plea, reserving any right of damages he may have against the plaintiff as transferee of said promissory note; and doth

adjudge and condemn the defendant to pay and satisfy to the plaintiff the sum of $3,077.93, with interest from May 24, 1915, and costs.

Casgrain, Mitchell & Co., for plaintiff.

Blair, Laverty & Hale, for defendant.

Affirmed in review.

RIVERS v. GEORGE WHITE & SONS Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

DAMAGES (§ III C—80)—CONTRACT—WARRANTY—BREACH—MEASURE OF DAMAGES.

The measure of damages for breach of warranty is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. Knowledge of the circumstances under which the contract was made is the decisive consideration. If the parties contemplated or ought to have contemplated loss of profits as a proximate consequence of the breach, damages may be recovered accordingly.

[*Hadley* v. *Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, applied.]

Statement.

APPEAL by plaintiff from the trial judgment, allowing plaintiff certain damages for breach of an express warranty, but holding that he was not entitled to damages for loss of profits. Varied by adding to the amount awarded, the damage for loss of profits.

C. L. Durie, for appellant; *G. A. Cruise*, for respondent.

The judgment of the court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In this case the trial judge has found that there was breach of an express warranty that the machine in question was in good repair, and that the plaintiff is entitled to damages. This finding is not appealed from. He has also found that the vendor knew the purpose for which the machine was being bought. The evidence shews plainly that Gardiner, the vendor's agent, who made the sale to the plaintiff, was informed by the plaintiff that he intended to use the machine for threshing for both himself and a number of his neighbours with whom he had contracted to thresh. It was also known to the vendor through its agent Gardiner that there was an unusually large crop to be threshed; that there was a great shortage of threshing machines in the district where the plaintiff lived, and that there would be an exceptionally great demand for the services of such a machine. All these circumstances were within the actual knowledge of the vendor at the time the contract was made.

The trial judge, on these facts, allowed the plaintiff certain

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damages, but held that the plaintiff was not entitled to damages for his loss of profits. On this point his finding is as follows:—

I do not think I can allow plaintiff anything for loss of profits, because, although I am satisfied Gardiner knew the purpose for which the plaintiff wanted the machine, namely, to thresh for himself and other farmers, yet I do not think that knowledge is sufficient to charge the defendant with liability for loss of profits.

In *Leonard* v. *Kremer* (1913), 11 D.L.R. 491 at 495, 48 Can. S.C.R. 518, Idington, J., is thus reported:—

"The knowledge of the special circumstances which may so entitle to recovery for loss of profits has always been held as one of the essential conditions precedent to such recovery. But knowledge does not alone carry with it of necessity such liability."

In the case of *B.C. Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, 37 L.J.C.P. 235, Willes, J., developed so fully the current view of how and why knowledge may be a basis to act upon, I would refer any one desiring light to his whole judgment at pp. 508 *et seq.*

The pith thereof for my present purpose is contained in the following:—

"To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances, that he must know that the person he contracts with reasonably believed that he accepts the contract with the special condition attached to it."

In the case at bar, I do not think the knowledge was so brought home to the agent Gardiner that he must have known Rivers contracted to buy the machine believing that the defendant accepted the contract with the condition attached that it would be liable for profit on breach of warranty.

In the case of *Leonard* v. *Kremer* mentioned above, the Court *en banc* in Alberta (1912), 7 D.L.R. 244, 4 A.L.R. 152, awarded the plaintiff a certain amount for damages for loss of profits occasioned by the non-delivery of certain machinery by the defendant at the stipulated time. On appeal to the Supreme Court of Canada as cited above, this judgment was affirmed with a reduction of damages by an equally divided court. Idington, J., whose judgment is quoted in part above, held that on the facts of the case the damages were not recoverable.

In several cases in addition to the case of *B. C. Saw Mills* v. *Nettleship*, *supra*, of which *Horne* v. *Midland R. Co.* (1872), L.R. 7 C.P. 583, L.R. 8 C.P. 131, may be mentioned, the decisions tended to hold that there must be something amounting to an express or implied undertaking on the part of the defendant to be liable for special consequences of his breach of contract. That theory is fully developed in the decision cited by the learned trial judge.

This theory has been rejected by later decisions, which establish the principle that the defendant's liability is not created by agreement, or *quasi* agreement but is imposed by law.

A person contemplates the performance and not the breach of his contract; he does not enter into a kind of second contract to pay damages, but he is liable to make good those injuries which he is aware that his default may cause to the contractee. *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q.B.D. p. 670, Bramwell, L.J., at p. 674.

See also judgments of Brett, L.J., and Cotton, L.J., in the same case.

It may be observed that this theory "of a kind of second contract to pay damages" has been mainly developed in actions against carriers, on the ground that a common carrier has no discretion to decline a contract.

In my opinion the rule in *Hadley* v. *Baxendale*, 9 Ex. 341, 156 E.R. 145, applies to the present case. The effect of that rule and the law on the question involved is very clearly summed up by Mr. (now Sir) F. E. Smith, in an article in Vol. 16 of the Law Quarterly Review, p. 275, at p. 286, as follows:—

The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. If they contemplated, or ought to have contemplated, the consequences which have proximately followed, they are liable to pay damages accordingly.

In determining what consequences the parties may be reasonably supposed to have contemplated, the knowledge of the circumstances under which the contract was made, must be, not merely an important, but the decisive consideration.

The evidence clearly shews—and the learned trial judge has found—that the defendant had full knowledge of the circumstances under which the contract was made, and in my opinion loss of profits was a natural and probable result which must have been or ought to have been within the contemplation of the defendant. The plaintiff was very diligent in trying to remedy the defects in the machine, and went to a great deal of trouble in attempting to have necessary repairs made. It also appears from the evidence that it was impossible, under the circumstances of the time, for the plaintiff to secure another machine.

Owing to the very unsatisfactory nature of the evidence, it is a very difficult matter to estimate the damages which the plaintiff is reasonably entitled to on this branch of his case. Although the evidence takes up more than 5( )ages of the appeal book, it is

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very vague on the point involved. The evidence shews that the plaintiff did a certain amount of threshing for some twenty farmers, but does not shew how many days were actually occupied in that work, or how many days should have been necessary if the machine had been in good repair. There is a lot of evidence with regard to delays caused by non-repair, but none to shew the time lost by these delays. The plaintiff claims damages for loss of profits estimated at $75 a day for 75 days, which, according to some of the evidence, represented the whole threshing season; although I think that between 50 and 60 days would be nearer the mark. The time book shews that the machine was working throughout nearly the whole of September and October and for a considerable time in November, which months would practically include the whole of the threshing season. The threshing accounts put in shew a large amount of threshing done for an aggregate of 20 farmers, for which the plaintiff received a sum of about $4,000. This work, according to the evidence, was done at a net loss of $365, but the evidence does not shew how many days were actually occupied in doing this work, how much time was lost, or to what extent the loss of profit was solely attributable to the condition of the machine. The charges for threshing vary from 7c a bushel to 30c a bushel, and in some instances a charge of $10 an hour is made and in others $20 an hour. Under these circumstances, it is quite impossible to arrive with any degree of precision at the amount of damage sustained by the plaintiff, although, in my opinion, he did sustain very considerable damage. He has shewn, as has already been mentioned, that the work he did do, after calculating actual costs of operation and total receipts, was done at a net loss of $365. In my opinion, he is entitled to recover that amount. He has also shewn that owing to the faulty working of the machine he was obliged to accept $100 in settlement of an account against Mark Lee for threshing for which he was otherwise entitled to charge $278.41. I think he is also entitled to recover the difference, $178.41.

If the necessary information as to the actual number of days employed were available, damages which the plaintiff is undoubtedly entitled to could be calculated. But that information is lacking, entirely through the fault of the plaintiff, as well as information with regard to days lost which otherwise would have

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been occupied in work. At the same time, I consider that the plaintiff is entitled to some damages in addition to specific amounts allowed above, and I think that probably $300 will, at least approximately, meet the justice of the case.

The appeal will, therefore, be allowed with costs, and the cross appeal will be dismissed with costs, and the judgment below will be varied by adding to the amount awarded to the plaintiff the sum of $843.41. *Appeal allowed.*

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 10, 1918.

MORTGAGE (§ VI G—105)—SHORT FORMS ACT—POWER OF SALE—ASSIGNMENT BY MORTGAGEE—POWER EXERCISED BY ASSIGNEE—INADEQUACY IN PRICE—FRAUD—COLLUSION—PRESUMPTIONS.

A mortgage made in pursuance of the Short Forms of Mortgage Act (Ont.) contained the following power of sale: "Provided that the said mortgagee on default of payment for two months may on one month's notice enter on and lease or sell the said lands. Provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing and sale or any of them, may be exercised without any notice having been given as therein provided."

In an action by an executor of the deceased mortgagor, to set aside a sale of the mortgaged land by the assignee of the mortgagee, and also to set aside a mortgage given by the purchaser, the court held that the assignee of the mortgagee could validly exercise the power of sale upon three months' default, without notice, also on the evidence that the sale was made in good faith and without collusion and that the inadequacy in price was not so great as to lead to the presumption of fraud or negligence or unfaithfulness on the part of the assignee in the discharge of her duty in the exercise of the power of sale.

APPEAL from the judgment of Falconbridge, C.J.K.B. Reversed. Statement.

J. M. McEvoy, for the appellants Rylands, Logie, and Alice Marshall.

P. H. Bartlett, for plaintiff, respondent.

MULOCK, C.J. EX.:—These are three separate appeals by the defendants against the judgment of the Chief Justice of the King's Bench, who tried the case. Mulock, C.J.Ex.

The action was brought by Marcel Hoehn, executor of James Marshall, deceased, to set aside, as fraudulent and void, a conveyance of certain lands in the city of London to the defendant Rylands, made by Catharine Marshall, in exercise of a power of

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sale contained in a mortgage made by the said James Marshall to one Martha McMartin, and by the latter assigned to Catharine Marshall, and also to set aside a mortgage made by the said Rylands to one Elizabeth Logie.

The Chief Justice declared the plaintiff entitled to redeem on payment of the moneys owing on the mortgage to Elizabeth Logie, and these appeals are from that judgment.

The notes of evidence contain much irrelevant matter. The only facts which appear to me material to the issue are the following:—

James Marshall owned certain lands in the city of London, and, by deed bearing date the 14th December, 1914, made in pursuance of the Short Forms of Mortgages Act, conveyed the same by way of mortgage to one Martha McMartin for the purpose of securing payment of $285.75 with interest at 6 per centum per annum, the principal being payable in 12 equal semi-annual payments; and the mortgage contained the privilege to the mortgagor and his assigns of paying off the whole or any part of the mortgage-moneys when paying an instalment of principal.

Catharine Marshall, wife of the said James Marshall, did not bar her dower in the mortgaged lands.

The mortgage to Martha McMartin contained the following power of sale:—

"Provided that the said mortgagee on default of payment for two months may on one month's notice enter on and lease or sell the said lands: provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided."

James Marshall died, and by his will devised his whole estate to the defendant Alice Marshall. Thereupon Catharine Marshall, the widow, brought an action against Alice Marshall, devisee in possession, claiming dower in the mortgaged lands, and that action was settled by a consent judgment which awarded Catharine Marshall $140, being the agreed value of her dower, and $87.65 costs.

The plaintiff, as executor of the deceased James Marshall, for the purpose of meeting debts of the testator, desired to sell the

lands, and twice offered them for sale by public auction, but each attempted sale proved abortive. Meantime, the judgment of Catharine Marshall remaining unsatisfied, her solicitors desired to acquire control of the McMartin mortgage with a view to selling the mortgaged lands and realising therefrom enough to pay off the mortgage-debt and the judgment for dower. On the 30th December, 1916, Catharine Marshall's solicitors paid to Martha McMartin the amount owing on her mortgage, and she thereupon assigned the mortgage to Catharine Marshall. Alice Marshall was still in possession of the mortgaged lands; and, having learned that Catharine Marshall, through her solicitors, intended to sell the property under the mortgage, she (Alice) agreed with the defendant Rylands that if he would purchase the property and rent it to her she would attorn to him as a monthly tenant. Rylands then saw Catharine Marshall's solicitors and offered to purchase the property for $650. This offer was accepted and carried into effect. Rylands, through his solicitor, Mr. Winnett, on the 6th January, 1917, paid to Catharine Marshall's solicitors the sum of $650, and, by deed bearing date the 5th January, 1917, Catharine Marshall then conveyed to him the mortgaged lands.

The recitals in this deed shew that it was made by Catharine Marshall as assignee of the McMartin mortgage and by virtue of the power of sale contained therein. Rylands borrowed $500, part of the purchase-money, from the defendant Elizabeth Logie, giving her in security a mortgage on the lands in question and certain other lands owned by him. The deed from Catharine Marshall was duly registered in the proper registry office on the 6th January, 1917, at the hour of 21 minutes past 10 in the forenoon, and the mortgage from him to Elizabeth Logie was registered in the said office one minute thereafter.

In the amended statement of claim the plaintiff alleges "that the sale to the said Rylands was collusive and fictitious and that no moneys passed between the said Rylands and the defendant Catharine Marshall but that the sale was made or was intended to be made to one Alice Marshall, the added defendant . . . that the said Catharine Marshall knew, either personally or through her solicitors, that the said sale to the said Rylands was fraudulent and collusive and was made at an undervalue and for the purpose

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of defrauding the executor and the creditors of the estate of the said James Marshall . . . that the defendant William S. Rylands and the added defendant Alice E. Marshall entered into an agreement whereby the said lands were nominally conveyed to the said William S. Rylands, but were really and in fact conveyed to the said William S. Rylands in trust for and for the benefit of the said added defendant Alice E. Marshall," etc.

The plaintiff also charges that, when Elizabeth Logie advanced to Rylands the $500 and received from him the mortgage in security therefor, she "well knew that the said sale to her co-defendant was made collusively and fraudulently and at an undervalue, and the said money was advanced by her for the purpose of carrying out the said fraud and enabling the said sale to be effected."

The learned trial Judge does not find fraud, but says that, whilst "there were suspicious circumstances about the transaction . . . there is not enough herein to justify me in finding the defendants Rylands and Logie to have been parties to a conspiracy to cut out the executor;" and he directs redemption against Rylands and Logie without costs.

If the finding of the learned Chief Justice means that there was an absence of fraud on the part of Rylands and Elizabeth Logie, I agree with him. I have carefully studied the evidence and fail to discover in it any evidence casting any doubt on the *bonâ fides* of the sale to Rylands and the mortgage from him to Elizabeth Logie. In making an order for redemption, the learned Chief Justice in fact sets aside the deed to Rylands, apparently upon the ground that the sale to him was made at an undervalue, and the case narrows itself down to the one point—whether the sale to Rylands was at such an undervalue as to amount to a fraud on those entitled to redeem the McMartin mortgage and to deprive the Rylands purchase of the character of a *bonâ fide* purchase for value without notice.

The learned Chief Justice finds that the plaintiff had a *bonâ fide* offer of $1,000 for the property, and communicated that fact to Catharine Marshall's solicitor, shortly before he, on her behalf, sold the property to the plaintiff for $650; but there is no evidence that Rylands knew of this offer. At the trial there was evidence of value. Mr. Tull valued the property at $650; Mr. Winnett

at $700; Mr. Carey at between $600 and $700; Mr. Walsh at $770; Mr. Haskett at $1,000; Mr. Sinclair at $1,220; Mr. Wilson at $1,200.

The plaintiff in his affidavit on application for probate gave the value as $800. In June, 1917, when examined for discovery, he valued it at $1,000, and at the trial at $1,200. Sinclair's and Walsh's valuations had reference apparently to the time of the trial; and, as the evidence of the plaintiff shews that the property had increased in value $400 since December, 1916, it would be necessary to reduce by that amount the valuations of Sinclair and Walsh. Apparently the property was rising in value and was not worth as much in January, 1917, as later.

The evidence shews that, when Rylands was negotiating to purchase, it might be difficult for him to obtain possession as against Alice Marshall; and, therefore, he was unwilling to purchase, and only agreed to do so after an arrangement was come to with Alice Marshall whereby, he agreeing to let her remain in possession as his tenant, she agreed to attorn to him. Twice before the sale to Rylands, the executor had offered the property for sale by public auction, but each attempted sale proved abortive. On the second sale, namely, in December, 1916, Alice Marshall attended and objected to it. She was devisee in possession, and apparently was determined to retain possession, and had recently instituted legal proceedings and had registered a *lis pendens* against the property. Her attitude was sufficient to dampen any sale, and it was to the advantage of those entitled to redeem that her opposition be removed if not at too great a cost; and I think that the arrangement effected by Catharine Marshall's solicitor whereby Alice Marshall became a consenting party to the sale, which resulted in the net sum of $650 being realised, was, from the standpoint of those entitled to redeem, a wise one. When Haskett made his offer of $1,000, the *lis pendens* referred to was on record. Doubtless he would have required its removal. This might have proved a tedious and expensive matter to the vendor; so that it does not follow that his offer would have netted to the vendor the full sum of $1,000.

The value of real estate is largely a matter of opinion, and a buyer naturally takes a conservative view of the value of what he contemplates purchasing. Even if the property in question was

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worth $200 or $300 above the price at which Rylands was purchasing it, one would not be justified in assuming that he considered he was making other than a fair purchase.

The only possible ground for impeaching the sale is inadequacy of price, but inadequacy is a matter of degree. Mere inadequacy is not sufficient; it must be so gross as to lead to the presumption of fraud. That is, the inadequacy must be so great as to lead the purchaser to the conclusion that the mortgagee is negligent or unfaithful in the discharge of his duty, which is to bring the property to the hammer under every possible advantage to his *cestui que trust: Downes* v. *Grazebrook* (1817), 3 Mer. 200, 205, 36 E.R. 77; *Chatfield* v. *Cunningham*, 23 O.R. 153, 166; *Warner* v. *Jacob* (1882), 20 Ch. D. 220.

The plaintiff's counsel relied on *Latch* v. *Furlong*, 12 Gr. 303, but the decision in that case did not turn wholly on inadequacy of price. The mortgagee made no effort to obtain the fair value of the property, and informed the Sheriff and the purchaser's agent that "all he wanted was to get the money due him, and he would let the property go." Thus the purchaser was aware that the mortgagee was failing in his duty towards his *cestui que trust*. There is nothing of this nature in the present case. Rylands had no reason to believe that the property was not being fairly sold.

The plaintiff's counsel also contended that the mortgagee only, and not Catharine Marshall, her assignee, was entitled to exercise the power of sale contained in the mortgage. This point is concluded by (1891), *Barry* v. *Anderson*, 18 A.R. (Ont.) 247, in which it was held that the assigns of the mortgagee could validly exercise the power of sale contained in the assigned mortgage.

Further, it may be that the prior registration of the deed to Rylands may protect Elizabeth Logie in respect of her subsequently registered mortgage.

Further, there is no evidence impeaching her *bonâ fides* in respect of her mortgage, and she is entitled to maintain it, and also to have maintained the foundation upon which it rests, namely, the deed to her mortgagor, Rylands. In view, however, of the conclusion which I have reached as to the validity of the deed itself, it is not necessary to refer further to the mortgage to Elizabeth Logie.

For these reasons, I think the judgment appealed from should be set aside with costs and the action dismissed. Inasmuch as

the plaintiff in his statement of claim has made charges of fraud against the defendants, they are entitled to the costs of the action.

CLUTE, RIDDELL, and SUTHERLAND, JJ., agreed with MULOCK, C.J. EX.

KELLY, J.:—The following facts are taken from the evidence of the plaintiff's witnesses:—

On the 14th October, 1914, a mortgage was made by James Marshall, since deceased, to Martha McMartin, for $285.75; on the 30th December, 1916, this mortgage was assigned by the mortgagee to the defendant Catharine Marshall.

On the 5th January, 1917, a conveyance, purporting to be under the power of sale contained in the mortgage, was made of the mortgaged property by Catharine Marshall to the defendant Rylands for the expressed consideration of $650; and on the same day a mortgage was made by Rylands, the purchaser, to the defendant Elizabeth Logie for $500, upon this same property and other property of the mortgagor; the sale was completed on the 6th January, 1917, and the deed to Rylands and the mortgage to Elizabeth Logie were on that day registered, the registration of the mortgage following immediately upon that of the deed.

The defendant Catharine Marshall, who resided in Detroit was the wife of the above mentioned James Marshall, who resided in London, where the property mortgaged to McMartin is situate. Alice Marshall resided with James Marshall, and by his will he made her his sole devisee. In an action for dower by Catharine Marshall, after James Marshall's decease, a settlement was arrived at by which it was agreed that Catharine Marshall should be paid $140 and $87.65 costs, and judgment was entered accordingly, and, it is said, was registered against the property.

The plaintiff, Marcel Hoehn, is the executor of the will of James Marshall.

About September, 1916, the executor made an abortive attempt to sell the property, there being other debts, as well as the mortgage, due by the testator, but the sale, it has been sworn to, was interfered with by the defendant Alice Marshall, who was in actual possession of the property. An application afterwards made to the Court for an order for administration was refused.

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A second attempted sale by auction by the executor, on the 2nd January, 1917, was also abortive, there being no bids, except by the auctioneer and the defendant Alice Marshall, who, it was conceded, was without means and altogether unable to carry out any purchase she might undertake to enter into.

The sale to Rylands and the mortgage to Elizabeth Logie are attacked chiefly on the ground of fraud in making the sale, the allegations being that there was collusion or a conspiracy amongst Catharine Marshall, Alice Marshall, and the purchaser and his mortgagee, and that the selling price was greatly below the value of the property. The learned trial Judge finds that there were suspicious circumstances about the transaction, but that there is not enough to justify him in finding the defendants Rylands and Logie to have been parties to a conspiracy to cut out the executor. Judgment was given for redemption as against the defendants Rylands and Logie, upon payment of $650 and interest from the 5th January, 1917, but without costs, and directing that, on payment of that sum, Elizabeth Logie "do execute a discharge of the said mortgage to the plaintiff in this action." The defendants Rylands, Logie, and Alice Marshall have appealed; Catharine Marshall also gave notice of appeal, but was not represented on the argument.

All the evidence at the trial, except on the question of value of the property, was by witnesses called by the plaintiff. There was evidence that on the 2nd January—the day of the second abortive attempt at sale—the plaintiff's solicitor had a verbal offer of $1,000 for the property from one Haskett, and in the reasons for judgment there is a finding that the executor had this *bonâ fide* offer, and that this was communicated to the solicitor who was assuming to exercise the power of sale, and who did carry through the sale at $650.

The trial Judge's finding, exonerating the defendants Rylands and Logie from the charge of being parties to a conspiracy to cut out the executor, is, I take it, intended to mean that they were innocent of any such complicity in the transaction as would deprive them of the advantage resulting to one in the position of an innocent purchaser for value. There is ample evidence to justify the finding in respect to the absence of such complicity on the part of these two defendants. The theory is advanced that Rylands was merely acting in the purchase as agent or representative of Alice Marshall. It is

manifest that he was desirous of assisting Alice Marshall, whom he had known for several years, and who had, off and on, worked in his house. She was in possession of the property, and had made claim to ownership thereof; a sale under the mortgage or under the judgment for dower to a stranger would endanger her chances of remaining in possession. If a purchase were made by one friendly to her, her chance of remaining in possession would naturally be improved; and so she approached Rylands, who then saw Mr. Winnett, her solicitor, in the belief that he (Winnett) was about to sell the property; the latter's answer was that he had nothing to do with it, and that he (Rylands) would have to see Mr. Toothe, and that he could make his own deal, Mr. Toothe being of the firm of solicitors representing Catharine Marshall in making the sale.

Toothe was apparently not friendly to Alice Marshall, and that there was any communication between Winnett and Toothe in respect of Rylands going to the latter's office is denied. The course pursued by Rylands would indicate that in arranging the details of the purchase he exercised just such reasonable care as one would expect from an ordinary purchaser buying for himself. He protected himself against Alice Marshall's possession (which was evidently adverse) by procuring from her a written document declaring her position not as one having any right to possession, founded on a claim of ownership, but as his tenant at a rental which she thereafter paid to his solicitor for him.

When the trial came on, Rylands was overseas in military service, and his evidence was not obtained. Alice Marshall was called for the plaintiff, and in her examination in chief she has this to say, in respect to Rylands purchasing:—

"Q. Mr. Rylands told you that if he could buy the property you would be the first one to have the chance to buy it, didn't he? A. Yes.

"Q. Did Rylands tell you that you would be the first person that could buy in the property? A. Mr. Rylands told me he would give me the first chance to buy it, that I could have the property back.

"Q. That is what he said? A. I beg your pardon?

"Q. That you could have the property back, the first person to buy it. A. Yes.

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"Q. At what he paid for it? A. I don't know, he never said what he paid for it; I did not say what he paid for it or for the same amount.

"Q. You were going to keep possession of the property and you were going to get it back and have the first chance? A. Yes.

"His Lordship: He did not say the price? A. No, no price mentioned.

"Mr. Bartlett: He told you what he had paid for it? A. I knew what he paid for it.

"Q. Did Mr. Winnett tell you that the property was going to be sold and you had better get some friend to go and buy it for you? A. I went to him and he said it was going to be sold, and so I went to see a friend of mine.

"Q. To buy it for you? A. Yes.

"Q. Who was the friend? A. Mr. Rylands, the man I worked for.

"Q. And he was buying it for you, was not he? A. He had taken it over.

"Q. He was buying it for you? A. No, not as I know of.

"Q. Why did it make any difference to you whether he was a friend of yours or not? A. He had taken it over and I had worked for him.

"Q. He was a friend of yours? A. He was a friend and I worked for him.

"Q. That is why you took him up there? A. Yes, I told him to take it over, to go up and see Mr. Winnett because they were going to sell it, and I was going to be put outdoors.

"Q. For you? A. Yes."

And on cross-examination:—

"Q. And he took it over? A. Yes.

"Q. And you have been paying rent for it ever since? A. Yes.

"Q. You don't know what price he will charge you when you come to buy it back? A. No."

The objection that the power of sale under which the sale was made to Rylands could not be validly exercised by the assignee of the mortgage, is met by authority. Admittedly it was without formal notice to those entitled to or interested in the equity of redemption. The mortgage was made expressly in pursuance of the Short Forms of Mortgages Act, the power of sale being in these words:—

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"Provided that the said mortgagee on default of payment for two months may on one month's notice enter on and lease or sell the said lands: provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided."

The first of these follows the form in the Act, and no objection was taken to it in that respect; but it was urged that the additional form is such as to make it purely personal to and exercisable only by the mortgagee, and not by the assignee. Had the latter form stood alone without such reference to the preceding statutory power as made the terms of the latter apply to it (so far as they could be made applicable), there would have been good ground for the plaintiff's objection. The default mentioned in the latter of the two powers is "default of payment as in foregoing proviso," and the powers which on such default were to become exercisable without notice were "the foregoing powers of entry, leasing, and sale or any of them," and which, by reference to column 2 of schedule B. of the Short Forms of Mortgages Act, R.S.O. 1914, ch. 117, are found to be exercisable by the mortgagee, his (or her) heirs, executors, administrators, or assigns.

The case is not within the authority of *Re Gilchrist and Island*, (1886), 11 O.R. 537, but nearly resembles in its facts *Barry* v. *Anderson*, 18 A.R. (Ont.) 247. There the provisions as to sale were: "Provided that the said mortgagees, on default of payment for one month, may, on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice." The decision by three of the four Judges who composed the Court was that the power of sale could be validly exercised by the assigns of the mortgagees.

Osler, J.A., in his reasons, said, referring to the latter of the two clauses (that which provides for sale without notice) p. 249:—

"This clause is to be read just as if the previous clause had been set forth in its extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column 2 of the schedule, the extended form. Reading the second clause as following the

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extension it declares that, in the event it provides for, the said power of sale and entry may be acted upon without notice. All the terms of that power, therefore, except as varied by the terms of the 2nd clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee."

And Maclennan, J.A., with whom Hagarty, C.J.O., agreed, said:—

"The power here is the short form, prescribed by the statute, on default of payment for a month and ten days' notice, with this addition: 'And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice.' When this is read with the preceding proviso in its extended form, I think it plainly enables the same persons to exercise the power in the one case as in the other."

There is a further question, whether, in the manner in which the sale was conducted, the assignee of the mortgage committed any breach of a duty which, as holder of the mortgage, she owed to those beneficially interested in the equity of redemption. Whether there was such a breach of duty does not, in view of the finding of the trial Judge, and in the light of the evidence to which I have already referred, affect the position of the defendants Rylands and Logie, whose title, as far as the part they took in the transaction is concerned, remains unimpaired.

In his reasons for judgment, the learned trial Judge says, referring to the duty of a mortgagee to a mortgagor when exercising a power of sale, that that duty was shamelessly disregarded in the present case. He also says that the executor's solicitors were so hopelessly supine in their conduct as to have invited what actually took place. This latter finding, to my mind, very materially affects the situation with relation to what is the proper inference to be drawn from the two findings, and the evidence applicable thereto. Catharine Marshall had a judgment in her favour, chargeable against the land, which was allowed to remain unpaid for a considerable time, and with no prospect in sight of immediate payment. Attempted sales of the property were abortive, at one of which at least there was interference by Alice Marshall, who

was in possession, and who also claimed ownership of the property. Such an occurrence would certainly tend, not only to deter persons from purchasing, but also to depreciate the value to an intending purchaser; and so the prospects of payment of the judgment from moneys derived from that source were lessened. There was nothing illegal in Catharine Marshall's procuring, through her solicitor, the assignment of the mortgage, even though the money were advanced for the time being by the solicitor. She had the legal right to make sale under the powers in the mortgage without notice. The matter then comes down to whether, in the events which happened, the sale was effected with proper discretion, and not at a fraudulent undervalue—for, if it were made under these latter conditions, it would be open to successful attack. The Court will not interfere merely on the ground that the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud: *Warner* v. *Jacob* 20 Ch.D. 220; *Colson* v. *Williams* (1889), 58 L.J.Ch. 539.

A mortgagee has his own interest to consider as well as that of the mortgagor, and his duty is to keep within the terms of the power, to exercise the power *bonâ fide* for the purpose of realising the security, and to take reasonable precaution to secure a proper price; and the Court will not inquire whether he was actuated by any other motive: Halsbury's Laws of England, vol. 21, para. 450, p. 254.

Taking the evidence of the solicitor, who, on the 2nd January, 1917 (the day of the second attempted sale), was acting for the executor (the plaintiff), what then happened was this: Within half an hour after the attempted sale, the vendor's solicitor (Mr. Toothe) called him up by 'phone, and he told Mr. Toothe that the property not having reached the reserve bid, it had been withdrawn from sale, and that he had an offer of $1,000 for it; Mr. Toothe then told him they were going to sell under the power in the mortgage for $650, which he thought was enough for it. There is no evidence that Toothe was told who the person was who is said to have made the $1,000 offer, and the executor's solicitor admits that he did not offer to pay the mortgage, though Mr. Toothe said at the time that he was going to sell and would not wait, and there is no evidence that any person on behalf of the executor then took any steps to carry out an acceptance of the $1,000 offer, or to satisfy the debts or either of them, held by

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Catharine Marshall; while the executor's solicitor admits also in evidence that not only was he warned on the 2nd that the property was to be sold under the mortgage, but also that on the 5th Mr. Toothe wrote to him that he was going to sell.

On the question of value there is evidence of several witnesses on each side. The learned trial Judge accepts the statements of the plaintiff's witnesses as against those of the defendants' witnesses where there is a conflict between them. In determining whether the sale was at a gross under-price, the knowledge possessed by the vendor is not to be overlooked. In the inventory filed by the executor on application for probate, the value of this property was put at $800. Catharine Marshall's solicitor personally examined the property, and states that he believed then that it was worth not much in excess of the selling price; and, as an element affecting the value for selling purposes, there was the fact that Alice Marshall was holding possession against the executor, and claiming to be entitled to ownership; the vendor's solicitor swears that he considered the price was a fair one if a purchaser could be gotten to take the possession of Alice Marshall—that is, to accept the property while she remained in possession.

The opinions of those who were called to give evidence of value differ materially, and it is not made clear just when some of them made their valuations. Considering all the circumstances at and leading up to the time of the sale, I have come to the conclusion, with the greatest respect for the opinion of the learned trial Judge, that the selling price was not so low as in itself to be evidence of fraud.

I am of the opinion that the appeals must succeed with costs.

On the argument the appellants' counsel stated that the defendants Rylands and Logie, notwithstanding that they claimed to be entitled to succeed, were not insisting on retaining the property, provided they were repaid their money with interest and costs. While this Court has nothing to do with that suggestion, it occurs to me that if these defendants are still of the same mind, there is an opportunity for the plaintiff to recover back the property and realise something from the equity if it is now as valuable as he claims it is.

Appeals allowed.

HOLT v. MAHER.

QUE.
C. R.

Quebec Court of Review, Guerin, Maréchal and Allard, JJ. November 16, 1918.

VENDOR AND PURCHASER (§ I E—28)—AGREEMENT FOR SALE OF LAND—SPECIAL CLAUSE—FAILURE TO PAY INSTALMENTS—RIGHTS OF PARTIES.

An agreement for sale of land contained the following clause: "The first party will have the right to cancel this agreement and the same shall *ipso facto* be cancelled without its being necessary to put the second party in default, should the latter fail to pay any instalment of price or interest within ninety days after maturity and in such event the vendors shall retain all payments made to them on account of the price or interest as liquidated damages for such default."

The court held that this clause was exclusively in favour of the plaintiff and that the defendant had no right to avail himself thereof to cancel the agreement and avoid payment of the balance of price.

[*Gagnon* v. *Lemay* (1918), 42 D.L.R. 161, followed.]

Statement.

APPEAL from the judgment of the Superior Court, Monet, J. Affirmed.

The plaintiff sues for the sum of $2,987, being overdue instalments under certain agreements of sale of subdivision lots, as set forth in the declaration.

The defendant opposes to the action the clause of the agreement recited in the above summary. He contends that the above stipulation operates as much in his favour as for the plaintiff, and, seeing that more than ninety days have passed since the maturity of certain instalments of interest which the defendant neglected to pay, the plaintiff is without right of action for the same, the contract having been cancelled *ipso facto*.

The Superior Court dismissed the plea and maintained the action on the grounds that the clause was exclusively in favour of the plaintiff and that the defendant had no right to avail himself thereof to cancel the agreements of sale and avoid payment of the balance of price.

Brown, Montgomery & McMichael, for plaintiff.

Blair, Laverty & Hale, for defendant.

Maréchal, J.

MARECHAL, J.:—The present appeal is from a judgment of the Superior Court, rendered on June 16, 1917, maintaining the plaintiff's action with costs.

The action was for $2,987.71, balance of the purchase price and interest on lots sold to the defendant on September 1, 1912, as per agreements filed in the record.

The only point to be decided is the interpretation and the legal effect of the following clause contained in all the contracts sued upon. (See headnote.)

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This clause, according to the defendant's contention, is a resolutive condition which, when accomplished, effects of right the dissolution of the contract and operates for the benefit of both parties. The plaintiff, on the other hand, submits that such a clause is a penal clause stipulated in favour of the vendor alone, making the deed voidable only at his option.

The court of first instance maintained the plaintiff's contentions, following the constant jurisprudence of the Superior Court of this province, and also that of the Court of Appeals in the case of *Gagnon* v. *Lemay* (1917), 27 Que. K.B. 59. This latter judgment was affirmed by the Supreme Court (1918), 42 D.L.R. 161, 56 Can. S.C.R. 365, which held that

> Where in a deed of sale of promise of sale, it is stated that such deed would become null and void *ipso facto* without *mise en demeure*, if the buyer failed to make any payment in capital or interest at the specified dates, such stipulation is exclusively in the interest of the seller, who has the right to choose between the rescission of the contract or its execution, the obligation of the buyer remaining absolute and without alternative.

The defendant's attorney urged before this Court that the present case should be distinguished from the case of *Gagnon* v. *Lemay*, for the reason that the promises of sale, containing the clause in dispute, were made out by the plaintiff himself and therefore should work in favour of the defendant as well as of the plaintiff.

The fact that the promises of sale were made out by the vendors is a mere incident which cannot alter the legal rights and obligations of the parties under the contract itself.

The judgment of the first court is unanimously confirmed.

Appeal dismissed.

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SLANEY v. CITY OF SYDNEY.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Mellish, J. April 12, 1919.

NEGLIGENCE (§ I D—70)—SNOW AND ICE ON SIDEWALK—FRONTAGE OWNERS RESPONSIBLE FOR REMOVAL—CITY POWER TO REMOVE AND CHARGE EXPENSE TO OWNERS—NEGLECT BY CITY TO REMOVE IN REASONABLE TIME—LIABILITY.

The plaintiff, in consequence of ice and snow on one of the principal streets of the defendant city, slipped and fell, suffering injuries for which he claimed damages. There was a city by-law which required the city to keep streets in repair. The trial judgment was in favour of the plaintiff.

Drysdale and Mellish, JJ., following *Maguire* v. *Corporation of Liverpool*, [1905] 1 K.B. 767, held that the appeal should be allowed and the

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action dismissed on the ground that there was no by-law requiring the city to remove snow and ice from the sidewalks, the obligation to do so was on the frontage owners, the city simply having permission to do so and charge the cost to the owners.

Russell, J., and Ritchie, E.J., were of opinion that the appeal should be dismissed on the ground that the failure to remove snow and ice from the sidewalks came within the definition "non-repair" and the city being charged by statute with the duty of keeping the streets in repair, failed in that duty, in allowing the slush to remain on the sidewalk, and as it had the means of removing it and failed to do so within a reasonable time it was guilty of negligence.

Statement.

APPEAL from the judgment of Chisholm, J., in favour of plaintiff in an action brought to recover damages for injuries sustained by plaintiff in falling on a sidewalk of one of the public streets of defendant city owing to the alleged negligence of defendant in failing to remove an accumulation of snow and ice from the sidewalk in question.

Finlay McDonald, K.C., for appellant.

A. D. Gunn, K.C., and *J. McG. Stewart*, for respondent.

Russell, J.

RUSSELL, J.:—I am of opinion that the judgment of the trial judge in this case should be upheld. The evidence is to the effect that at the place where the accident occurred the snow had been permitted to accumulate from time to time throughout the winter and the proprietor of the adjacent property had been permitted to leave it in that condition while those on either side kept the sidewalk clear. This, of course, does not bear directly upon the question at issue but it tends to support the case of negligence against the city on which the claim is founded. On the day before the accident there was an accumulation of slush which a night's frost would convert into ice. The ice so formed would necessarily be rough and treacherous, as it was. The fact, if it is a fact, that hundreds passed over it without stumbling or falling does not prove that it was safe. It only proves that they were fortunate. The fact that the slush was only a few inches deep, if it is a fact, does not seem to me to be important. It was the slippery and uneven surface that caused the accident and that surface would be the same with a few inches of frozen slush as with a few feet. The case of *Caswell* v. *St. Mary's Road Co.* (1869), 28 U.C.Q.B. 247, which was decided before the change of the law in Ontario, which made the corporations liable only in the case of gross negligence, shews that the failure to remove snow or ice from the sidewalks comes within the definition of non-repair.

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The case of *City of Vancouver* v. *McPhalen* (1911), 45 Can. S.C.R. 194, establishes it as the law of this country that the question whether an individual who suffers special damage from the indictable neglect of a municipal corporation has a right of action against the municipality is a matter of inference from the terms of the statute, and it further decides that an individual so suffering may maintain such action although no right of action is expressly conferred by the statute unless something in the statute itself or in the circumstances under which it was enacted justifies the inference that no such right of action was meant to be conferred. There is nothing that I can find in the statute relating to the City of Sydney to support an inference contrary to the general principle as expounded in the case referred to by Duff, J. that where a duty rests upon an individual or a corporation of such a character that an indictment would lie for default in performing it, an action also will lie at the suit of a person who by reason of such default suffers some peculiar harm beyond the rest of His Majesty's subjects. On the contrary, the evident departure in the language of the Act incorporating the inhabitants of the Town of Sydney as a city from the language used in the statute, s. 34 of 1885, c. 87, incorporating them as a town, seems to indicate a like departure from the principles which theretofore might have been held applicable to the claims of individual sufferers from the negligence of the municipal authorities. The earlier statute, in terms, only conferred powers. Probably it would have been held that the negligent failure to exercise those powers would have furnished ground for an indictment and it is also probable, if not certain, that in deference to a number of decided cases and the dicta of some very eminent judicial authorities it would have been held that no right of action was to be inferred from the terms of the legislation. The later statute does not merely confer powers, it imposes a duty in clear and absolute terms, by enacting, c. 174 of 1903, s. 249, that the city council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney . . . and no others. The suggestion has been made that the purpose of this section is merely to limit the liability of the city to certain streets and to exclude all others. But this object could have been accomplished without any such significant change

of phrase as has been made. The legislature could simply have enacted that the powers of the council with respect to the making, maintaining and improving of the streets should be restricted to the desired extent. They must have had some further object in view when, instead of leaving the provision as it stood in the earlier Act, to the effect that the council should have such and such powers, they imposed a duty upon the city by enacting that the city shall keep in repair all such streets as prior to the passing of the Act have been dedicated to the town, etc.

Of course, the law imposing upon the city the duty of keeping the streets from falling into disrepair in consequence of snow and ice must be reasonably interpreted and applied. I cannot say that it has not been so applied by the trial judge in this case. If it had been shewn that the authorities had been attentive to their duty with reference to the condition of the street at this place and that a sudden change in atmospheric conditions had taken them by surprise, I should have taken a different view of the matter. As the case stands, the evidence shews that they had been continuously and persistently negligent. I am, therefore, of opinion that the appeal should be dismissed.

Drysdale, J.

DRYSDALE, J.:—Under the modern authorities a statutory obligation to repair roads does not of itself render the corporation liable to an action for damages for non-feasance as distinguished from misfeasance. And whether such a liability is imposed must be determined by the language of the Act of Parliament relied upon. Here the question is one of non-feasance and there is no Act imposing on the defendant corporation liability to remove ice and snow from the streets or sidewalks. This obligation is placed upon the frontage owners with permission to the town corporation to remove it at the expense of such owners. There is no argument to be made upon the statute that a new civil liability is imposed upon the town in favour of an injured party. The modern authorities are all collected in *Maguire* v. *Corporation of Liverpool*, [1905] 1 K.B. 767, which over-rules *Hartnall* v. *Ryde Commrs.* (1863), 4 B. & S. 361, 122 E.R. 494, and which I take to be a correct review of the cases from *Cowley* v. *The Newmarket Board*, [1892] A.C. 345, and *Pictou* v. *Geldert*, [1893] A.C. 524, down to the present time.

I would allow the appeal and dismiss the action.

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RITCHIE, E. J.:—The plaintiff, on March 4, 1917, in consequence of ice and snow on the sidewalk of one of the principal streets of the defendant city, slipped and fell, breaking his collar-bone. The statement of claim charges that the defendant city was bound to keep the streets in repair, and that the personal injuries were caused by its failure to do so, and by negligently allowing the ice and snow to accumulate and remain on the street. The plaintiff has the judgment and the city appeals. The trial judge has made distinct findings of fact. I quote from his judgment:—

I find that the accident was caused by the slippery condition of the sidewalk. The question as to whether that condition was caused by negligence on the part of the defendant corporation is not so easy to decide. The city was charged with the duty of keeping the sidewalk in repair. Does the city fail in that duty in allowing the slush to remain on the sidewalk in the winter season and to become frozen and slippery? I have come to the conclusion that the city failed in performing its duty. The city permitted the snow to remain there for some time; it was aware of the condition, for one of its officers had ordered the adjoining owner to clear the sidewalk off, and its officers could not fail to be aware that in the early part of March a lowering of the temperature was very like to take place and the slush likely to be frozen over night. The street in question was one of the principal streets in the city; thousands of people travel over it by day, or at all events on Sunday. The condition of the street on the day of the accident could have been prevented; the city had means to clear the sidewalk and failed to employ those means. It failed, in my opinion, in performing a statutory duty, and was guilty of negligence by reason of such failure.

Beyond all doubt or question there is the most ample evidence in support of the findings; this is so clear that I refrain from prolonging this opinion by quotations from the evidence.

C. 174 of the Acts of the province for the year 1903 is the Act incorporating the City of Sydney; s. 249 of the Act is as follows:—

The city council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney by resolution of its council, and all streets laid out under any law of the province and no other.

There is no contention that the street in question is not one of the streets referred to in the section which I have quoted.

The city was bound by statute to keep the streets in repair. I think that the question in this case is, does the fact that the city negligently allowed the ice and snow not only to accumulate, but to remain to its knowledge for a long time in a dangerous condition constitute non-repair within the meaning of the statute? If the answer to this question should be made in the affirmative, then

the city has been guilty of statutory negligence. Where there is a duty imposed by statute and a failure to perform it, such failure may constitute negligence or at all events be *primâ facie* evidence of negligence, but this is not invariably so. For instance, if a street which the corporation is bound by statute to repair becomes suddenly out of repair and dangerous, and before the corporation has a reasonable time to repair, a person is injured by such dangerous condition of the street, he would have no action against the corporation. But when as in this case there is knowledge of the dangerous condition and far more than ample time to remedy that condition, which could easily have been done by spreading sand or ashes on the sidewalk, then there is negligence in the failure to perform the statutory duty. I am of opinion that under the facts of this case there was a clear violation of the statutory mandate to keep the street in repair.

In Smith on Negligence (1887), at p. 101, the following rule is laid down:—

> Where a corporation are charged with the duty of keeping its streets in repair, and of exercising a general supervision over them, it is bound to keep them free from all obstructions and defects against which due care can guard.

It would not have been a difficult task to exercise "due care" as to this sidewalk. The spreading of sand or material of a like nature would have made it safe; this the defendant city recognized because on some occasions it was done. On this occasion it was not done. The case of *Luther* v. *City of Worcester* (1867), 97 Mass. 268, is very like this case. The evidence there was, p. 269:

> That the sidewalk was bad, and had not been shovelled off; that there was quite a ridge in the middle of this sidewalk, some 15 or 20 ft. long, and clear on each side; and had been so for some days; ice and water and snow, like, along the sidewalk.

The condition in this case was, I think, quite as bad, and the neglect was as bad or worse, and for as long a time or longer. The accident happened in front of the Roy property. I quote from the evidence of the superintendent of streets on cross-examination—

> Q. If you were going to church regularly last year you know you would almost need a stepladder going past the Roy property; you would step on to the snow when you passed Forbes' Court? A. I have seen it so.
>
> Q. Then, when you got to the Lansdowne you had to practically step down again? A. I suppose you would have to.
>
> Q. And that lump of ice and snow was not a banana peel, but was ice and snow? A. Yes.

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Q. And last winter was not a bad winter as far as storms were concerned, during January, February and March? What we would call a very good winter? A. Fairly good.

I quote from the plaintiff's evidence:—

Q. What was the nature of the accident you met with? A. I was passing along there and I was taken right off my feet.

Q. How; what took you off your two feet? A. Nothing but a solid cake of ice, and it was kind of a slope, and I was taken from my two feet and I was right tossed up.

It is clear that this cake of ice which was an obstruction on the sidewalk was suffered to remain for an unreasonable length of time. The frozen slush spoken of in the evidence would inevitably result in unevenness or roughness.

Coming back to the *Luther* case, Bigelow, C.J., p. 271:

It cannot be supposed that the legislature, in making towns liable for damages caused by defects in highways, intended to establish a rule or standard of diligence to which it would be impracticable to conform by the use of the utmost vigilance and care. It would seem to be a sufficiently strict interpretation of the statute to hold that under its provisions a city or town would be liable if it neglected to take due precautions against accidents arising from the accumulations in the highways of ice or snow in drifts or ridges, or from its being in such condition from unevenness or roughness or other causes as, combined with its slippery nature, would render it unsafe and dangerous to passengers.

Bigelow, C.J., explains and distinguishes the earlier Massachusetts cases. It would not as it seems to me have been any great degree of "vigilance and care" for the City of Sydney to have caused sand or similar material to be put on this dangerous sidewalk.

The Ontario statute on this subject differs from our statute; it provides that "except in cases of gross negligence a municipality shall not be liable for injury caused by ice or snow upon a sidewalk."

German v. *City of Ottawa* (1917), 39 D.L.R. 669, 56 Can. S.C.R. 80, is a case under this statute. It was held by a majority of three to two of the Judges in the Supreme Court of Canada that failure to sand or harrow a sidewalk before 9 a.m. of February 2, when the conditions calling for it only arose on that morning, if negligence at all, is not "gross negligence" and the city is not liable for personal injury caused at that hour by ice on the sidewalk, especially if it was not a place of special danger nor on a street of heavy traffic and did not call for immediate attention.

The difference in the facts between that case and this is marked. A dangerous condition arising on the morning of the day of the accident is a very different thing from a dangerous condition

existing more or less through an entire winter. I think it is clear that if the judges who were of the majority had before them the facts of this case it would have been regarded as a case of "gross negligence."

Anglin, J., at p. 675, said:—

That at the time of the unfortunate occurrence the sidewalk was in an extremely dangerous condition is not controverted. Whether the failure of the city employees to prevent that condition arising, or to remove it before 9 a.m. on Wednesday the 2nd of February, amounted to "gross negligence" (defined by this court as very great negligence, *City of Kingston* v. *Drennan* (1897), 27 Can. S.C.R. 46 at 60); which is the statutory condition of the defendant's liability (R.S.O. c. 192, s. 460 (3)), is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it. It is obvious that the state of the weather immediately prior to the accident, and the relative situation of the place where it occurred must be taken into account in determining whether there was such a failure to take advantage of reasonable opportunity to prevent or remove the admitted danger, as amounted to gross negligence.

The judge then goes on to shew from the evidence that in consequence of weather conditions sanding or harrowing the sidewalk would have been futile.

In this case it is, I think, clear that there was ample notice to the City of Sydney of the danger, and equally ample opportunity to remove it.

The Ontario Act is to be found at p. 47 of 27 Can. S.C.R. It provides as follows:—

Every public road, street, bridge and highway shall be kept in repair by the corporation, etc.

Later on comes the proviso to which I have referred, which I think indicates that it was considered that a corporation would be liable for ordinary negligence in respect of snow and ice and the proviso was adopted to render the burden resting upon the corporation not so onerous. The proviso is an amendment to the Act imposing upon the corporation the liability to keep in repair. The remarks of Sedgewick, J., in *City of Kingston* v. *Drennan*, 27 Can. S.C.R., at p. 55, might well have been made in regard to this case; they are, I think, distinctly applicable. That judge said:—

The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair; in such a condition that the traveller using them with ordinary care might do so with safety. There was evidence (and I think sufficient evidence) to justify the jury in finding a breach of that obliga-

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tion. That evidence . . . shewed that the slope was unnecessarily, unreasonably and unsafely steep; that its existence and character must have for some time before the accident been brought to the knowledge of the authorities, or at least they must be presumed to have had such knowledge, and that it was a feasible, simple and inexpensive matter to remove all occasion of injury.

The slope of which Sedgewick, J., speaks was caused by snow and ice. In this case, the evidence of the superintendent of streets which I have quoted shews that the slope was greatly increased by the snow and ice.

In Denton on Municipal Negligence (1906), p. 165, that author lays down certain conclusions as proper to be drawn from the decided cases. One of these conclusions is:—

To make the presence of ice or snow a defect rendering it out of repair, the walk must be dangerous or not reasonably safe for pedestrians.

If this is the result of the cases, the facts do not permit the defendant city to escape liability.

In *Walker* v. *City of Halifax* (1883), 16 N.S.R. 371, it was held by Sir John Thompson, delivering the judgment of the court, that a case of negligence was made out against the city under the following facts: The municipal streets were in such a condition from the accumulation of ice and snow hardened into irregularities of surface, that the plaintiff, the owner of a line of omnibuses, had his vehicles injured and suffered from loss of custom. The non-repair continued most of the winter of which the city had notice.

Sir John Thompson's judgment is, I think, in point in this case. Mr. Justice Sedgewick regarded it as in point. In the *City of Kingston* v. *Drennan*, 27 Can. S.C.R. at p. 59 he said:—

Reference may also be had to the Nova Scotia case of *Walker* v. *City of Halifax*, 16 N.S.R. 371, where Mr. Justice (afterwards Sir John) Thompson delivered an elaborate judgment (subsequently affirmed by this court) upon the liability of a city for damage caused by *cahots* on a public street. This case was overruled by the Privy Council in *Pictou* v. *Geldert*, [1893] A.C. 524, but upon another ground.

Wilson, J., in delivering a judgment concurred in by Sir William Richards, afterwards Chief Justice of Canada, puts the principle upon a very reasonable basis. The judgment I refer to is in *Caswell* v. *St. Mary's Road Co.*, 28 U.C.Q.B. 247, at p. 254, he said:—

It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and, if so, from what cause . . . or process, whether the persons liable to repair the road could

reasonably and conveniently, as regarded expenditure and labour, have made it safe for use. If the obstruction or danger could properly and reasonably have been removed, then the persons on whom the burden lay to keep the road in order should be held to the fulfilment of their duty to make it safe and useful for the public, at whatever season of the year or from whatever cause the impediment or difficulty may have happened.

Caswell v. *St. Mary's* was a case of snow which could have been removed having been left on the highway.

I refer also to *Shepherd* v. *Midland R. Co.* (1872), 25 L.T.N.S. 879.

The mere presence of ice making a sidewalk slippery and, therefore, dangerous may not always constitute negligence, ut when the condition is known to the corporation and is allowed to continue for an unreasonable length of time, though it could easily have been remedied, I think a case of negligence arises. However, in this case, it was a "solid cake of ice" that took the plaintiff off his feet. Three cases were cited by the city solicitor: *Forward* v. *City of Toronto* (1888), 15 O.R. 370; *Ringland* v. *City of Toronto* (1873), 23 U.C.C.P. 93; *Kingst* v. *Drennan*, 27 Can. S.C.R. 46.

Forward v. *Toronto*, I distinguish. In that case there was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there, nor that the city had notice of the condition of the street before the day of the accident.

Ringland v. *City of Toronto* is, I think, also distinguishable. It was a case of the mere presence of ice and the happening of the accident. There was no evidence that the city had allowed the ice to remain on the sidewalk or that it knew of its existence.

Kingston v. *Drennan* is, I venture to think, an authority against the city.

It cannot be the law in this court that the plaintiff has no cause of action because the statute does not in terms give the right to bring the action (as the Ontario statute does) because to so hold would be to go contrary to the Supreme Court of Canada. The statute under consideration in the *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, was as follows: "Every such public street, etc., shall be kept in repair by the corporation."

The words in the statute under consideration in this case are "shall keep in repair." Neither statute in terms gives the right of action.

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Ritchie, E. J.

Davies, J., now Chief Justice of the Supreme Court, after quoting the statute, said, p. 196:

It is not contended by the appellant that for a neglect of this statutory duty amounting to a nuisance an indictment would not lie, but that a civil action by an injured person for damages has not been given and will not lie. As I understand the argument it is that, in the absence of clear and express language in the charter making the corporation liable in civil actions for special damages sustained by individuals in consequence of the corporation's breach of duty in failing to keep the streets in repair, no action will lie. I am not able to accept that argument. I have examined all the leading cases and authorities cited by the appellant and have reached the conclusion that express language creating civil liability for damages caused by the failure to perform a duty expressly imposed by a statute upon a municipal corporation is not necessary. It is sufficient if a legislative intention to create such liability may fairly be inferred from the statute as a whole.

If this liability to repair is one transferred from a body or authority on which it previously rested that would be by no means conclusive against the plaintiff; it would be an element for consideration in construing the statute, but not in itself a controlling element. The Chief Justice of Canada in the Vancouver case said, p. 196:

If the duty imposed is one transferred from a body or authority on or with whom it previously rested and which body or authority was not in itself liable in civil actions for non-feasance then very clear, if not express, language would be required to be shewn in the statute imposing this additional liability upon the transferee corporation. In all cases it must, in the last resort, be a question of the intention of the legislature to be gathered from the whole statute.

If the duties imposed are discretionary or permissible merely and not absolute, or, if absolute, adequate means are not given to carry them out, then very clear language must be used to found civil liability upon.

In this case the duty to keep in repair is not discretionary or permissible merely, it is absolute, imposed in very clear language, and with adequate means to carry it out.

I think the words of the statute are so absolute and clear that, upon its true construction, the absolute liability to keep in repair is created in terms. In the case of transference of liability from one body to another to impose liability upon the latter body which did not rest on the former all that is required is language strong enough to indicate the intention of the legislature. In the case of *Pictou* v. *Geldert*, [1893] A.C. 524, at 527, Lord Hobhouse, speaking of transferred liability, said:—

In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed.

This is the kind of language which I venture to think the legislature has used in the Sydney City Charter.

In *Maguire* v. *Liverpool*, [1905] 1 K.B., at p. 790, speaking of transferred liability, Romer, L.J., said: that the question of liability was "one to be gathered from the wording of the special Act."

But I do not decide that this is a case of transferred duty. I think there is much to be said against that view. No duty to repair is to be found in the County Incorporation Act, in the Towns Incorporation Act or in the special Act incorporating the Town of Sydney. The statutory duty to repair and the consequent civil liability for non-repair is for the first time imposed in the Sydney City Charter. I refer to the language of the Lord Chancellor in *Municipal Council of Sydney* v. *Bourke*, [1895] A.C. 433, at p. 444.

In my opinion the case of *Pictou* v. *Geldert* is clearly distinguishable. In that case there was no statute directly imposing the obligation. Lord Hobhouse, at p. 529, makes this very clear. Speaking of the County Incorporation Act, which was the statute he was considering, he said: "It is to be observed that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges."

I am tempted to deal with the line of cases of which *Pictou* v. *Geldert* is one, and the only reason I do not do so is because they have all been dealt with and distinguished by the Supreme Court of Canada in *Vancouver* v. *McPhalen*.

Since the case of *Pictou* v. *Geldert* it has of course been the law in Nova Scotia that municipal bodies apart from statute were not liable for mere non-feasance. This, I think, makes the intention of the legislature clear and easy to understand, namely, that an obligation was intended to be created. But it is not necessary to struggle as to intention when the words of the statute are clear and plain.

The power given by the city charter to make by-laws to compel householders to remove snow does not in my opinion relieve the city from liability; it is merely a provision intended to aid the city in the fulfilment of its duty to keep the streets in repair.

I would dismiss the appeal with costs.

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Mellish, J.

MELLISH, J.:—This is an action against the City of Sydney by the plaintiff for damages for personal injuries.

The plaintiff sustained these injuries by slipping and falling on an icy sidewalk in the city and it is claimed that this condition of the sidewalk was brought about by the defendant's neglect of a statutory duty to keep the street in repair by allowing snow and ice to accumulate thereon.

The Act incorporating the City of Sydney was passed in 1903 (c. 174). Several sections (248-266) of this Act come under the heading of "Streets." The first and second of such sections are as follows:—

248. The legal title to all streets, roads, highways, lanes, alleys, sidewalks, bridges, squares and thoroughfares in the City of Sydney is hereby vested absolutely in the corporation of the City of Sydney.

249. The city council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney by resolution of its council, and all streets laid out under any law of the province and no other. But no street now opened or hereafter opened or dedicated to the public shall be chargeable upon the said city unless the same has been accepted by a resolution of the city council.

S. 265 provides as follows:—

265. The city council shall have power to make by-laws and ordinances in respect to all the matters hereinafter specified, and may from time to time amend or repeal such by-laws, that is to say:—

(4) For compelling all persons to remove all snow and ice from the roofs of the premises owned or occupied by them; and to remove and clear away all snow, ice and dirt and other obstructions from the sidewalks, streets and alleys adjoining such premises, and also to provide for the cleaning of sidewalks and streets adjoining vacant property or the property of persons who for twenty-four hours neglect to clean the same, and to remove and clear away snow and ice and other obstructions from such sidewalks and streets at the expense of the owner or occupant in case of his default, and in case of non-payment to charge such expenses as a special assessment against such premises, to be recovered in like manner as other rates and taxes. The council may, in the by-law passed for the purpose of the preceding clause, define certain areas or streets within the city within or upon which the by-law shall be operative.

Under this subsection the following by-law was passed and was in force at the date of the accident:

67. The tenants, occupants, and in case there shall be no tenant, the owner of any building or lot of land bordering on Charlotte St., between DesBarres and Lover's Lane, and on Dorchester St., between the Esplanade and the I.C.R. and on any other street in the city where there is, or shall be, a permanent sidewalk of concrete, asphalt, or earth supported by a stone or wooden curb shall, after the ceasing to fall of any snow, if in the day time within five hours, and in the night time before one o'clock in the afternoon

succeeding, cause the same to be removed, therefrom, and shall also cause the gutter to be cleaned and kept clear of ice and snow, and if said sidewalk is not cleared promptly the city engineer is authorised to have the same done and the cost of same shall be a charge on the said property and may be sued for and recovered by action in the City Civil Court.

This by-law was put in by permission of the court on the hearing of the appeal from the decision of Chisholm, J., who found for the plaintiff and gave judgment in his favour for $350 damages and costs.

The facts of the case disclose that the concrete sidewalk upon which the accident happened extends for a considerable distance in front of the property of one Dr. Roy. A cross section of the street at the point where the accident happened shewn on the plan put in evidence as being about 38 feet north of Forbes' Court, indicates that the Roy property slopes rather abruptly at this point to the fence forming the street boundary and that the concrete sidewalk is located on the level about ten feet from this fence. It would also appear that snow in the ordinary course of nature would collect at the foot of the incline and extend across the sidewalk on more or less of a slope.

It appears that in daylight on Sunday the 4th March, 1917, the plaintiff slipped and fell on the sidewalk in question which was in an icy condition and a "kind of a slope" (p. 8, 1, 29.)

It also appears that the ice and snow had not been removed from this sidewalk during the winter. There is evidence, however, that a snow plow had previously passed along this sidewalk and that the superintendent of streets had put sand on this sidewalk on Februay 27. It is also proven by a policeman that on the day before the accident the sidewalk was covered with slush and that on this day the owner of the adjoining property was notified to remove it, which he failed to do. The trial judge found that the defendant nevertheless failed in its duty in allowing the slush to remain on the sidewalk and to become frozen and slippery; that the city had means to clear the sidewalk and failed to employ those means; and was so guilty of negligence in failing to perform a statutory duty and gave judgment accordingly in favour of the plaintiff.

The question arises whether under the foregoing statutes and by-laws a right of action has been conferred on any person for damages sustained by reason of the failure of the city to keep the

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streets in repair. There also arises the question as to what is meant by keeping the street in repair; and then the further questions whether the city did so fail, and, if so, whether the accident was caused by such failure.

Whether ss. 248 and 249 above quoted are intended to impose upon the City of Sydney a liability for non-feasance, or a liability greater than that which is imposed by reason of the city owning and controlling the streets is, I think, a question of construction in the light of all the circumstances.

The legislation is special and I think no case has been cited dealing with precisely similar conditions; and I am not convinced that any rule of construction can be deduced from the decided cases which precludes a construction of this particular statute to the effect that it was the intention of the legislature to confer on the city council the power of determining by resolution what streets they should keep in repair, that is, reasonably fit for travel as streets, and that such duty when once assumed by the city council would involve the consequence of liability to any person suffering damage by reason of their failure to perform it.

Under the pleadings it would appear that the liability to keep the streets of Sydney in repair is admitted, whatever that may mean; but there is no allegation in the pleadings as to whether or not this particular street was accepted by resolution of the city council and I doubt whether it is a fair inference from the pleadings that it was so accepted. There is no evidence on the point. But assuming that the statute gives a right of action for non-repair and assuming that the city council had accepted the street in question, I am still of opinion that the plaintiff has failed to establish a case against the defendant. I do not agree that the city is liable to remove snow or ice from the sidewalk. The by-law is made under the scavenging section of the Act, 265 (4), which places such liability on the frontager. I agree that under decided cases a street may be out of repair within the meaning of the Act by reason of the natural accumulation of snow or ice in sufficient quantity and extent, but that is another matter. I think it would be a misuse of words to say that this particular street was out of repair the day before the accident because this particular sidewalk was slushy. It might become dangerous by the slush freezing and the city, to prevent this, took the proper

steps to have the slush removed. To render the city liable in a case such as the present even under the assumptions above referred to, I think it is necessary to shew that the street was dangerous for persons using the same with ordinary care and that the city had notice of such dangerous condition and failed to remedy it, and that the damage complained of resulted from such failure. I recognize the fact that contributory negligence is not pleaded in this action, but I am merely dealing with the matter of actionable non-repair, and I do not think such actionable non-repair is established by merely shewing that a particular portion of the street was dangerously slippery, nor by the facts proven and found in this case.

I would allow the appeal and dismiss the action with costs.

The following authorities may be referred to: *Acton District Council* v. *London United Tramways*, [1909] 1 K.B. 68; *Burns* v. *City of Toronto* (1878), 42 U.C.Q.B. 560; *McKellar* v. *City of Detroit* (1885), 57 Mich. 158.

Appeal dismissed on equal division of the court.

SALT v. TOWN OF CARDSTON.

Alberta Supreme Court, Stuart, J. March 18, 1919.

1. STATUTES (§ II A—98)—MUNICIPAL ORDINANCE (ALTA.)—CONSTRUCTION OF.

The purport of s. 87 of the Municipal Ordinance (Alta.) is referable to the actual physical condition of the travelled road bed and while a town could, no doubt, under s. 85, erect street lights, as the words used in s. 87 except the general word "works" all refer to the actual road bed, the word "works" itself should also be confined to things done in the way of improving that road bed, as distinguished from anything done to furnish better lights thereon, which form only an incidental feature of the system erected as a commercial undertaking by the town not in exercise of its governmental functions but in its capacity as a *quasi* private corporation, under powers given it in its incorporating ordinance (see Ordinance 43 of 1901).

2. HIGHWAYS (§ II A—21)—RIGHTS OF TRAVELLER TO WHOLE WIDTH—UNIMPROVED PORTION—ARTIFICIAL OBSTRUCTION—INJURY—LIABILITY OF CORPORATION.

In the case of an ordinary highway, although it may be of varying and unequal width running between fences, unless there is evidence to the contrary a traveller is entitled to use the whole space between the fences and is not confined to the part which is kept in repair for the more convenient use of carriages or foot passengers. A horseman on the unimproved part of the highway, although he cannot recover damages if his horse stumbles against a boulder, or steps into a depression in the ground in its natural state, is entitled to damages if he is injured by his horse coming suddenly in contact with an artificial obstruction of an unusual nature, and one which is practically invisible at the time of day when the accident occurs.

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ACTION by a rancher to recover damages for injuries caused by his saddle-horse running astraddle of a guy wire attached to an electric light pole on one of defendant's streets. Judgment for plaintiff.

C. F. Jamieson, for plaintiff; *David Elton*, for defendant.

STUART, J.:—The plaintiff, in the year 1917, was a rancher carrying on business at Boundary Creek, some 13 miles from the Town of Cardston. On October 2, 1917, he, with some other men assisting him, was driving a herd of about 75 head of steers into the Town of Cardston to ship them in pursuance of an agreement he had made for the sale of them. He drove them into the limits of the town upon and northerly along a street which crosses a creek passing through the town limits, known as Lee's Creek. Over this creek, upon the street in question, the government of the Province of Alberta had erected a steel bridge over 300 ft. in length. At the southern end of this bridge there was an earth embankment or fill, serving as an approach, which at the end of the bridge was some 6½ ft. high. The actual present bed of the creek would appear from the plan put in evidence to be no more than about 60 ft. wide or thereabouts. The steel bridge was, therefore, carried over a considerable flat between the end of the approach and the creek bed. The plaintiff and his men drove the cattle upon the approach and thence upon the bridge. They were on horseback, as is usually the custom with ranchers in this province, when driving cattle. The plaintiff, in following his cattle, had proceeded a short way upon the bridge when his attention was directed to the fact that 3 or 4 of his animals had not gone on the bridge but had slipped to the side of the approach and of the bridge and were going along the flat, though still upon the street, towards the creek. As the street was not fenced at this point the plaintiff turned back to go down after them. He rode his horse down the side of the embankment just at the end of the bridge and turned northward again after the animals. It was about 6.30 or 6.45 p.m. and though darkness had not entirely fallen it was quite dusk. As his horse went ahead she came in contact with a guy wire which had been attached to an electric light pole erected in the road allowance or street about 7½ ft. from the easterly boundary of the street and which had been anchored to the ground some 25½ ft. from the pole. The angle of this wire

was about 45 degrees. The horse walked or trotted astraddle of the wire and the consequence was that she was thrown sideways to the right and the plaintiff was thrown off upon the ground and very seriously injured.

The plaintiff sues the town for damages resulting from the accident.

Before the case was reached on the list, upon request of counsel for the parties, I heard an argument upon a preliminary objection to the effect that inasmuch as the action was not begun until September 13, 1918, that is, nearly a year after the accident happened, the plaintiff must fail on account of the provisions of s. 87 of the Municipal Ordinance, which fixes a period of 6 months after the accident within which an action for damages for non-repair must be begun. I was not sufficiently convinced at the time that the limitation of time there provided for really applied to the facts of the case, so far as I understood its nature from the pleadings, to feel justified in deciding that the action should be dismissed and it, therefore, went to trial.

After the evidence was heard this objection was renewed, and it forms the first serious point in the case and should be dealt with first.

The Town of Cardston was incorporated as such by Ordinance No. 43 of 1901, and s. 2 of that ordinance enacts that, except as in the special ordinance afterwards provided, the provisions of the Municipal Ordinance and amendments are incorporated with and declared to form part of the ordinance. S. 85 of the Municipal Ordinance enacts that every municipality shall have jurisdiction over all highways within the same. S. 87 enacts as follows:—

> Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts and approaches, grades and other works made or done by its council and on default so to keep in repair shall be responsible for all damages sustained by any person by reason of such default but the action must be brought within 6 months after the damages have been sustained.

There is nothing in the special ordinance of 1901 which conflicts with this enactment, and it, therefore, in general, applies against and in favour of the defendant town.

The pole to which the guy wire was attached was one of a number of poles erected upon the streets of the town by the town council under the authority, as I think, contained in a special Act of the provincial legislature, being c. 37 of the statutes of 1907.

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This statute is entitled "An Act to amend Ordinance No. 43 of the Ordinances of the North West Territories, 1901, entitled 'An Ordinance to incorporate the Town of Cardston.'" S. 1 of the Act says that: —

The town shall have power to construct, build . . . maintain, manage and conduct . . . gas . . . electric or any other artificial light . . . and all buildings, machinery and appurtenances necessary in connection therewith.

S. 3 empowers the council

to make and enforce by-laws, rules and regulations for the general maintenance or management or conduct of any public works constructed or maintained under this Act . . . and for the collection of the rates and charges for the supplying of . . . gas or electricity or other means of providing light or power hereunder and for the renting of fittings, machines, apparatus, meters or other things leased to consumers and for fixing such rates, charges and rents, etc.

In general the town is given such powers in the succeeding sections of the Act as are ordinarily granted to private corporations subject to municipal approval and consent, including the power of expropriation of and entering upon the lands of private persons necessary for the carrying out of any of the enterprises or operations referred to. S. 8 says that

The town and its servants under its authority may for the said purposes enter and pass upon or over any such lands and the same may cut and dig up, if necessary, and may lay down pipes, excavate ditches, *erect poles and wires* through the same, and in, upon, through, over and under the highways, streets, lanes, roads, squares, bridges or other passages whether the same be within the town or not . . .

Sub-s. 2 of s. 8 says:—

All lands not being the property of the town and all highways, streets, lanes, roads, squares, bridges, or other passages so dug up or interfered with shall be restored to their original condition without unnecessary delay.

S. 9 says:—

For the purpose of any such public work the town may sink and lay down pipes, wells, tanks, reservoirs and erect poles, wires and buildings and other conveniences and may from time to time alter all or any of the said works as well in the position as in the construction thereof, as they may deem advisable.

S. 16 says:—

The town shall not be liable . . . generally for any accidents due to the operation of any public work unless such accident is shewn to be directly due to the negligence of the town or its employees.

S. 20 says:—

The town shall construct all public works and all apparatus or appurtenances thereunto belonging or appertaining or therewith connected and *wheresoever situated*, so as not to endanger the public health or safety.

Section 35, which, I think, is worthy of attention in this regard says:—

It is hereby provided that any public work or works constructed or acquired under this Act . . . shall be held to be entirely separate from all other assets of the municipality and shall not be liable for any debt of the municipality heretofore or hereafter contracted by the municipality on the credit of the municipality at large, and such public work or works, land . . . shall be and are hereby specially charged with the repayment of any sum or sums of money which may be borrowed at the credit thereof by the town for the purposes thereof and for any debentures which may be issued therefor; and the holders of such securities shall have a preferential lien and charge on the said works, land, appurtenances and revenues for the securing of the payment of the same. . . .

Now, it was admittedly under the powers bestowed upon the town by this statute that the council in the year 1907 constructed and began to operate the electric lighting system of which the pole in question and the guy wire supporting it were part.

In these circumstances, the precise question is whether or not the system of poles and wires erected for these purposes on the street comes within the meaning of the words contained in s. 87 of the Municipal Ordinance above quoted. I have come to the conclusion that it does not.

Even under the *ejusdem generis* rule itself, I think this must be the necessary conclusion. It is true that there are authoritative decisions which place a limit upon the application of this rule and if the words of the section had been "and all other works of whatever kind or nature" it would possibly have been improper to apply it. I think there are decisions which declare that such wide and all inclusive words ought not to be restricted in their meaning by the *ejusdem generis* rule. But those are not the words used. It is to be observed that s. 87 follows upon s. 85, which gives the municipality "jurisdiction over all highways." I think it is, under the authority thus conferred that the municipality acts when it proceeds to "make or do" "sidewalks, crossings, sewers, culverts, approaches, grades and other works," and that the electric lighting system in question was not constructed under this authority at all. I am, therefore, unable to understand how the expression "other works" can be held to include works which admittedly the municipality had no power under the ordinance to construct. A consideration of the sections of the Act of 1907, which I have quoted, and of the whole Act, leads inevitably in my mind to the conclusion that the system of poles and wires in question was a work intended mainly and primarily for the pur-

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pose of supplying light and power to the private houses and business buildings in the town and only incidentally as a means of improving the highways by street lights.

The whole purport of s. 87 seems to me to be referable to the actual physical condition of the travelled road bed and while the town could no doubt, under s. 85, have erected street lights, it seems to me that as the words used in s. 87, except the general word "works," all refer to the actual road bed, the word "works" itself should also be confined to things done in the way of improving that road bed itself as distinguished from anything done to furnish better lights thereon to see by, at any rate where the lights in question are not erected separately, and distinct from a general lighting system for private consumers, but form only an incidental feature of a system undoubtedly erected as a commercial undertaking by the town not in the exercise of its governmental functions but in its capacity as a quasi private corporation.

In McQuillan, Municipal Corporations, vol. VI., para. 2680, it is said:—

> Municipal ownership, in the usual and common acceptance of that term must of necessity carry with it the same duty responsibility and liability on account of negligence that is imposed upon and attaches to private owners of similar enterprises. For example, it is settled beyond dispute that a municipality which operates its own water, electric light or gas plant acts in a private and not a governmental capacity and is liable for its negligence in connection therewith.

In *Brantman* v. *City of Canby* (1912), 138 N.W. 671, it is said by the court, p. 672:—

> The city here conducted its plant precisely as would one to whom it might have granted a franchise with perhaps this difference; that a municipality does not expect much profit, if any at all, from its ventures to serve public and private convenience. The facts of this case do not sustain the contention that the city in operating its lighting plant, was performing a purely governmental function even if it be conceded that a distinction may here be made between that part of the equipment which served the public and that which served private consumers. Such a separation or distinction we regard unimportant.

Just what the point involved in that case was is not clear, as I have not the full report available. But it seems to me to be clearly the true situation that it was under the Act of 1907 that the town erected the system of poles in question and that its main purpose was to furnish light to private consumers. Furthermore, the evidence shews that the necessity of guy wires depends to a very material extent upon the weight of the wires to be carried

by the poles, and obviously this was much increased by the fact that wires for private consumers had to be so carried. It is indeed by no means at all to be inferred that a guy wire would have been needed at all if merely the wires necessary for street lighting and nothing else had been carried by the poles.

See also Dillon on Municipal Corporations, 5th ed., vol. IV., para. 1670, and vol. III., para. 1303.

Some light may, I think, be thrown on the question by considering what the position would be if under s. 35 of the statute of 1907 above quoted the persons holding securities upon the electric light system and works had foreclosed or sold to realize their money. Certainly the poles on the streets would have gone to the foreclosing mortgagee or purchaser and would have become private property, and the town would have had to pay him for their street lights. Indeed, it is probably the case that even as it is one department of the town administration pays the light department a certain amount for the lights as a matter of bookkeeping at least.

Then again, the Act of 1907, by s. 8, specifically grants the town the right to erect poles upon the public streets and lanes. This provision would surely not have been inserted if the town already had the right to erect poles on the streets for the purpose intended.

My opinion, therefore, is that the system of poles in question here cannot properly be considered as coming within the meaning of the words "other works" where they occur in s. 87 of the Municipal Ordinance, but that that system must be treated as having been erected purely under the Act of 1907 and that, therefore, the preliminary objection as to the limitation of time cannot be sustained.

We come, then, to the question of liability itself.

In Biggar's Municipal Manual, 11th ed., p. 669, it is said:—

> According to our law (based on that of England) the telephone company has no right to use the streets without having received legislative sanction, either directly, or indirectly through the action of properly authorised municipal bodies. The right of the public is to have the whole width of the road preserved free from obstructions, and it is not confined to that part which is used as the *via trita*. So that the effect of Canadian legislation is to legalize the obstruction created by the poles so far that they cannot be abated or complained of as a public nuisance, but this still leaves open the question whether the company may not suffer in damages for particular injury to a traveller, if the obstruction is found to be dangerous.

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I think these remarks apply equally against and for the municipality where under special necessary legislation it has been granted authority to construct and maintain either a "telephone or electric light system and to use the public streets as a place for erecting its poles.

As to the right of a traveller to use the whole street, the leading case seems to be *Regina* v. *United Kingdom Electric Telegraph Co.* (1862), 2 B. & S. 647, 121 E.R. 1212, 31 L.J.M.C. 166, 9 Cox C.C. 137 at p. 144. At the trial Martin, B., instructed the jury thus:—

> 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 repair for the more convenient use of carriages or foot passengers.

Upon a motion for a new trial for misdirection this opinion was upheld by Cockburn, C.J., Crompton and Blackburn, JJ. The law as thus stated has been accepted as finally decided in a number of cases cited upon the page of Biggar just referred to.

Indeed, I do not understand that the defendant ever seriously questioned this proposition. We must obviously distinguish between the right of travellers to have the *via trita*, the ordinarily travelled portion of the road, kept in reasonable repair, and the simple right to go upon any portion of the highway whatever, which latter undoubtedly exists, subject, of course, to the exercise by the highway authority of its governmental powers in the way either of temporary interruption or of the erection or causing of constructions such as bridges or ditches necessary to the performance of its duty to keep in repair the travelled highway intended for conveyances.

The ground of liability upon which the plaintiff must rest is, of course, not at all failure to keep in repair. If it had been merely that he would have been at once out of court owing to the limitation of time. The real ground upon which the plaintiff's case must rest is simply this, that he was a traveller on horseback, that he had an unquestionable right to go upon that portion of the highway where the accident occurred, and that although he is not entitled now, even if ever, to complain of any failure to

keep in repair, he was entitled to demand that any works erected on the highway by the town under the statutory authority given by the statute of 1907 should neither be negligently maintained or operated nor be constructed in such a way as to endanger the public health or safety, which latter, as I shall shew, is not by any means the same thing as the former. These are the obligations which the statute of 1907 places upon the corporation by ss. 16 and 20 above quoted.

Now it so happened that a statute in substantially the same terms as those of s. 20 was under consideration in our Appellate Division and in the Supreme Court of Canada in the case of *Raffan* v. *Canadian Western Natural Gas Co.* (1914), 18 D.L.R. 13, 7 A.L.R. 459. The court had there to construe the meaning of s. 11 of the ordinance respecting Water, Gas, Electric and Telephone Companies, c. 103 of 1911, which reads:—

> The company shall locate and construct its gas or waterworks or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.

Walsh, J., who tried the action, had instructed the jury that the company was not liable in the absence of negligence. In view of the provision of s. 11 just quoted, the Appellate Division held that this was misdirection and ordered a new trial. An appeal to the Supreme Court of Canada was dismissed, Davies and Duff, JJ., dissenting. Harvey, C.J., said, p. 15, after quoting the section:—

> It is, therefore, apparent that the statutory authority is limited and if the company has gone beyond the limit it is without statutory authority (and again p. 16) I am of opinion that in this case it is not a question of nuisance or no nuisance. It may be that what would endanger the public health or safety would be a nuisance in some cases at least but what is material here is not whether it is a nuisance but whether it endangers the public health or safety. . . . It follows that if danger to the public safety has ensued the works were not located and constructed so as to prevent it, since they did not prevent it.

Both in the Appellate Division and at Ottawa two points were much discussed which were not raised here, but even if they had been the decision was in both courts adverse to the defendant. These contentions were (1) that the section was meant to protect the public generally but not individuals, and (2) that it referred merely to the period of construction and not to subsequent conditions. Much of the discussion in both judgments deals with these points.

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In the Supreme Court of Canada the views expressed by the Chief Justice of Alberta, who delivered the judgment for the court, were upheld and approved by the majority.

For instance, the Chief Justice of Canada said (8 W.W.R. 676 at 677-8):—

I am of the opinion that the statutory authority invoked by the company is not absolute but qualified and that they are legally liable for all damages that may result from the location construction and operation of their works. The intention of the legislature could not have been in enacting s. 11, to give a remedy which already existed at common law if the company was guilty of negligence . . . I am, therefore, of the opinion that on the true construction of the section it appears to be the intention of the legislature to make exception by this section to the general principle that for the consequence of any nuisance, public or private, which may result from the carrying out of their corporate powers, the company would not be liable in the absence of negligence.

Anglin, J., said: "I agree that there must be a new trial for the reasons assigned by the Chief Justice of Alberta." He had also already said:—

If it should be found that the defendant's gas pipes and apparatus were so constructed or maintained that they "endangered the public health or safety," it being conceded that the plaintiff was injured owing to an explosion of gas which had leaked from their pipes, they are liable to him without proof of negligence on their part, unless they can shew that the true proximate cause of the accident was not a breach of the duty imposed by s. 11 but the conscious act of another volition, p. 689.

It is true that in parts of these judgments the liability seems to be traced to *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, and to a strict statutory limitation of a granted authority to do what that case forbids. But it seems to me that on the whole the principle is the same in both cases. It was not a matter of highway rights in the *Raffan* case, but of the collection of a dangerous substance under statutory authority. But whether a corporation be authorized by statute to collect a dangerous substance or to make an erection on a highway where any member of the public has a right to be, it seems to me to follow from what was said that in either case if danger to the safety of the public or to individuals results from the manner in which the authority is exercised, then the act is without authority at all, with a consequently resulting liability for the injury done, even if no negligence is shewn.

With respect to s. 16 of the Act of 1907 I think it is clear that it does not apply to this case. That section refers to accidents due to the "operation" of any public work and enacts that in

order to make the town liable for such an accident it must be shewn that it was directly due to the negligence of the town or its employees. S. 20, on the other hand, deals specifically with the method of "construction." In my opinion, it is a question not of "operation" but of "construction" that is now involved, so that s. 16 does not have the effect of making inapplicable the decision and opinions in the *Raffan* case as to the immateriality of the absence of negligence.

Now what was the situation of the plaintiff? He was going where he had an absolute right to go, and that not merely out of some idle curiosity or from a casual whim, but in pursuance of his own very important and serious business. More than that, he was not doing by any means an unusual or extraordinary thing. It surely cannot be suggested that, in Southern Alberta, known throughout the continent as a ranching, as well as a farming country, it would be an unexpected and exceptional occurrence that a rancher in driving his cattle into the town to ship them should find some of them, instead of crossing a bridge over a stream, preferring to walk on the ground and wade through the stream itself. Cattle which have been driven 13 miles would be very likely to sense the proximity of a stream of water. There was absolutely no obstacle in the way of a fence along the side of the approach to force them upon the bridge and it was, as it appears to me, one of the most likely things in the world to happen that some of them should do what these cattle did. So that I think that, while the plaintiff cannot be blamed for their doing so, on the other hand the fact that cattle might do so is not something which ought to be looked upon as so unlikely or so exceptional that the persons erecting the electric light poles should not be expected to anticipate the possibility that it would occasionally happen.

The plaintiff was on horseback, which is the usual and convenient method of driving cattle. He went after his cattle along a part of the highway where he had a right to go and which was left fully open for him. No doubt he had no right, as against the town as a highway authority, to expect that portion of the highway to be smoothed and levelled for his passage. And if his horse had stumbled, through contact with a boulder, or through stepping into a depression, or through other unevenness in the

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surface of the ground in its natural state, and he had been hurt in consequence, he would, of course, have had no ground of complaint. But ranchers' saddle horses are, as is well known, very adept at keeping their feet in such a place. They become accustomed to avoiding boulders and badger holes and to making a quick recovery if they should step against or into them.

But here the horse went suddenly astraddle of an artificial obstruction of an entirely unusual nature and also of such a kind as to be practically invisible at such a time of the day. I think it is not only practically unjust, but also in theory not in conformity with the law, to suggest to a man in the plaintiff's position that he should look upon what happened to him as one of the unlucky accidents of life for which no one should be responsible, just as if the wire was a natural accidental obstruction and his horse had stumbled over it as he might stumble over a log or a badger hole or a boulder. As I said, his horse was doubtless accustomed to these things.

Can it be seriously argued that this portion of the works was "so constructed as not to endanger the public safety?"

As a matter of fact, it did endanger the public safety in the sense in which that phrase was interpreted in the *Raffan* case. It caused suddenly a great injury to one individual proceeding upon natural and proper business upon a portion of the highway where he had a right to be.

Of course, the permissive authority given by the statute cannot be so narrowly restricted as to make it impossible to exercise it at all. Specific authority is given to erect poles, and therefore for the mere erection of a pole in the ground as such there could be no possible liability. But there is no specific authority given to erect guy-wires.

In the *Raffan* case Harvey, C.J., said (18 D.L.R. at p. 16):—

> I have, however, come to the conclusion, on the principle that statutory provisions imposing a restriction for the benefit of the public upon a company being granted unusual powers should be liberally construed in the public interest, that the correct view to take of the section is that it means to provide that the works shall be so located and constructed that no danger to the public health or safety shall ensue, without regard to time.

Now whether as against a municipal corporation which itself has been granted such an authority the rule of strict construction should apply or not may be a question, as will be seen by com-

paring these words of the Chief Justice with what he said in *Purmal* v. *City of Medicine Hat* (1908), 1 A.L.R. 209, but it will be noted that in the *Raffan* case the judgment, referring to *Purmal* v. *Medicine Hat*, says, p. 17: "In that case there was no question of restriction upon the defendants' statutory authority as is pointed out here."

It will be observed that the principal authority relied upon in the judgment in the *Raffan* case was *Midwood* v. *Citizens of Manchester*, [1905] 2 K.B. 597, an action also against a municipal corporation which had been given the statutory power usually given in England to what are there called "undertakers."

In my opinion, in the circumstances of this case, the defendant corporation must be held to have violated the provisions of s. 20, unless it has shewn that it was not practically possible to exercise the authority given it in any other way. So far was it from shewing this, that there were, by the evidence, shewn to have been three other methods of construction which would have made the construction far more safe than it was: First, by carrying the electric light wires across the stream by means of attachment to the bridge (as to which, however, possibly consent was necessary from the Public Works Department of the provincial government, and it may be that the bridge was the later of the two constructions); secondly, by means of a prop against the pole on the north side (which was, however, shewn not to be quite so sound a principle of construction); and thirdly, by means of a guard of boards placed upon the guy wire in its present position.

Whatever may be said of the first and second alternatives, it was in my opinion clearly shewn, and natural reason confirms it, that a board guard over the wire not only was easily feasible at slight expense, but would also certainly have made the guy wire much safer than it was in its unguarded condition.

It was not a question whether the defendant was negligent in not guarding the wire or took all reasonable care. The question is were the poles, authorized to be placed upon the street, so constructed as not to endanger the public safety? As was intimated in the *Raffan* case, the answer to this is given by the fact that the public safety was endangered by the method of construction adopted. If it was practicable and possible to have made the guy wire safer than it was then I think the defendant is liable.

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The evidence shews that it was. The question of negligence in the usual form, viz., was the place or construction reasonably safe or did the defendant take reasonable care, is a question in my opinion which does not need to be asked in the circumstances of this case.

I have no doubt whatever that had a board guard been placed on the wire the accident would not have occurred. The difference in visibility at the time in question or even at any time of day between such a board guard and a mere wire is so great that I have no doubt whatever that either the plaintiff's horse would have by itself avoided the obstruction or the plaintiff himself would have discerned it and guided his horse away from it.

I should like to add that even aside from the statute of 1907 and from s. 20 it would appear to me that even though given authority to erect poles on the street the defendant corporation would be liable for the setting of what was no less than a trap, for an unauthorized act of misfeasance in placing the unprotected guy wire where they did and that even if it had been necessary to charge them with negligence in the exercise of their statutory power they should be held guilty of negligence in the circumstances and that the act in question not being one done under s. 87 of the Municipal Ordinance, nor one of "operation" as before explained, they are liable on this ground as well.

There was a suggestion of contributory negligence which clearly was not made out. The plaintiff's idea as to whether he was trotting was no doubt different from that of the witness Rollins, but it seems to me that his horse must have been trotting when he struck the wire. But even from the evidence of Rollins it is clear that the plaintiff had some difficulty in urging his horse down the embankment. The distance between the bottom of the embankment to the guy wire was so short that it seems to me impossible that a horse which had to be kicked with the rider's heels to be induced to go down the embankment could have developed any very reckless speed by the time the wire was reached. Nor was it absolutely dark. Rollins saw the horse and rider some 60 or 70 feet away. In such a condition I do not think a slight trot, which is really all that the horse could have attained, was a negligent speed.

Whether there can be a defence of contributory negligence

when there is a liability on the defendants even aside from a charge of negligence is a question I need not consider.

The chief ground upon which I place liability may not have been definitely stated in the claim which was rested upon negligence, but all the possible facts were brought out and in substantial effect the proper pleading would have been the same.

I think, therefore, the defendant is liable for damages and it remains to fix the amount.

I do not propose to discuss this question in much detail. He must be compensated (1) in a rough and ready way for his pain and suffering, (2) for the legitimate expenses to which he was put, (3) for loss of time in his occupation up to date, and (4) for the permanent injury, if any, resulting from the accident. I award the damage under these various heads as follows:—(1) $1,200, (2) $2,500, (3) $1,800, (4) $4,500; total, $10,000.

I think the fact that the expert physicians at Rochester failed to discover the most serious fracture practically relieves the plaintiff from any charge of not having taken the best course as to medical advice. With the decreased value of money I do not think $10,000 is an excessive amount and it probably errs on the other side. There will be judgment for the plaintiff for that amount with costs.

I may, perhaps, properly add that I think the councillors of the town, as trustees for the taxpayers, were quite justified, in my opinion, in defending the action in the circumstances, even assuring that this judgment should be upheld if the case goes further.

The plates or pictures in the medical text books referred to in the evidence of Dr. Lynn were, in effect, treated as exhibits, but not filed as such, because the proper edition of the book could always be made available. *Judgment accordingly.*

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Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 6, 1918.

GUARANTY (§ II—12)—TO BANK OF INDEBTEDNESS OF COMPANY—BANK HOLDING ALSO OTHER COLLATERAL SECURITY—ASSIGNMENT FOR CREDITORS—BANK PROVING CLAIM AND VALUING SECURITIES—SUBSEQUENT CONVEYANCE BY ASSIGNEE TO BANK—RELEASE OF GUARANTOR.

The plaintiff was the holder of a written guaranty given by the defendant to secure the repayment to the bank of part of the indebtedness of a

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manufacturing company. In addition to the defendant's guaranty the bank held as collateral security for its claim against the company, a mortgage against the lands of the company, a mortgage on the plant, machinery and chattels of the company and an assignment of book debts. The company made an assignment for the benefit of creditors. Thereupon the bank proved its claim and valued its securities at the amount of the claim as filed—subsequently the assignee with the approval of the inspectors, conveyed all his right, title and interest in the mortgaged property of the company to the bank and received from the bank a certain sum of money and a release of the book debts.

The court held that the bank must be held to have accepted the conveyances in satisfaction of their claim against the company and to have thus determined any liability the defendant was under to pay any part of the debt.

[*Union Bank of Canada* v. *Makepeace*, 38 D.L.R. 361, 40 O.L.R. 368, reversed.]

AN appeal by the defendant from the judgment of Middleton, J., 38 D.L.R. 361 of the 9th October, 1917, upon the trial of an issue, finding that the appellant had not been discharged from liability as surety, but was liable to the plaintiff bank upon a guaranty; and an appeal, also by the defendant, from an order of Sutherland, J., of the 1st August, 1917, dismissing an appeal from a report of the Master in Ordinary, dated the 5th March, 1917, whereby the amount due by the appellant was fixed at $3,179.66.

The reasons for the order of Sutherland, J., were as follows:—

August 1, 1917. SUTHERLAND, J.:—The Specialty Manufacturing Company was a customer of the plaintiff bank at Grimsby on and prior to the 2nd February, 1914, at which date the company was indebted to the bank in the sum of $11,000 or thereabouts, represented or covered by the notes of the company or its customers for the most part, and by an actual overdraft of $922.26.

On the 2nd February, 1914, the defendant, Sophronia J. Makepeace, signed the following guaranty:—

"To the Union Bank of Canada:—

"In consideration of the Union Bank of Canada making advances to the Specialty Manufacturing Company, of Grimsby, Ont., either by the discount of negotiable securities, consisting of bills of exchange or promissory notes, or by overdrafts or otherwise, from time to time as the said bank may think fit, I hereby guarantee payment in full of such negotiable securities or overdrafts; but providing that the liability under this guaranty does not exceed the sum of $2,500 at any one time. This is a continuing guaranty, intended to cover any number of transactions and I agree that the said bank may deal or compound with any of the

parties to the said negotiable security, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto. It is also agreed that the guarantor shall be liable to the extent of the above amount for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which shall be owing from the Specialty Manufacturing Company, of Grimsby, Ont., to the said bank; provided that this guaranty shall subsist notwithstanding any change in the partners of the firm, but the said bank shall not be bound to exhaust all such recourse against other parties previous to making demand upon me for payment of above named amount, the intention being that Union Bank of Canada shall have the right to demand and enforce this guaranty, in whole or in part, from the guarantor."

Upon this guaranty an action was brought, and the defendant, an elderly woman, resisted liability on the ground that she did not understand it imposed upon her any financial responsibility. The action was tried before Middleton, J., who came to the conclusion that no fraud, misrepresentation, or misconduct of any kind on the part of the plaintiff bank, when the guaranty was obtained, had been proved; and he accordingly gave judgment for the plaintiff bank for the amount claimed with interest and costs: (1915) 9 O.W.N. 202.

An appeal was taken therefrom, and a note of the judgment of the Appellate Division (17th March, 1916) is found in 10 O.W.N. 28. It upheld the trial Judge in his finding that the defendant had failed to prove that she did not know that what she signed was a guaranty, but varied his judgment by holding that the guaranty was for debts "to be incurred only." I quote from the judgment of the Appellate Division:—

"This Court doth order that the said judgment of the 20th day of November, 1915, be varied, and as varied be as follows:—

"(1) This Court doth declare that the guaranty in the pleadings mentioned is a valid and subsisting security, and doth adjudge the same accordingly.

"(2) And this Court doth further order and adjudge that it be referred to the Master in Ordinary of this Court to take the following accounts and make the following inquiries:—

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"(*a*) To inquire and state what advances were made by the said plaintiff to the Specialty Manufacturing Company between February 2, 1914, and April 23, 1915, under the guaranty in the pleadings mentioned.

"(*b*) To inquire and state what payments, if any, have been made on account of the said advances."

A reference to the Master in Ordinary followed, and the Master made his report dated the 5th March, 1917.

At the date of the guaranty the account was overdrawn $922.26. This has been charged against the defendant.

Masten, J., in his judgment in the Appellate Division, says:—

"I am of opinion, however, that the guaranty is operative only in respect to advances made after its date. The wording of the guaranty itself is not distinct. The more usual form of such a guaranty expressly covers past as well as future advances, and if that were the case evidence would not be admissible to shew the contrary, but here there is no such provision, and I think that the evidence adduced at the trial, not being at variance with the express terms of the guaranty, was properly received, and that it makes it plain that the intention of the parties was that this guaranty should relate only to future advances made by the bank to the principal debtor."

Between the 2nd February, 1914, and the 23rd April, 1915, notes given by the debtor, the Specialty Manufacturing Company, to the plaintiff bank, matured and were the subject of discounts or renewals, and the bank advanced moneys to the extent of $266.56 in connection therewith, which the Master has allowed.

The defendant on the appeal from the Master's report says that the interest on the notes so outstanding is not an advance within the meaning of the guaranty. I do not think it was intended that as between the bank and the debtor a line was to be drawn across the account at the date of the guaranty: the customer and bank were to continue their dealings with each other thereafter; and the former, as payments were made, could direct the application to be made thereof. If he did not do so, and they were carried into the account by the bank, the rule in *Clayton's Case* (1816), 1 Mer. 572, 35 E.R. 781, as stated by Lord Halsbury, L.C., in *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca,"* [1897] A.C. 286, at p. 290, would be the one to be applied, namely:

"Where an account current is kept between parties as a banking account, 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other'."

Applying this principle, it seems to be clear that the item of $922.26 was thus paid by the earlier payments in the account, which would be properly applicable to it.

It is said that as between the bank and the debtor the account was treated in this way, and that enough payments were made by the debtor between the dates named to pay the said sum of $266.50, as well as the $922.26 of the actual overdraft. The debtor made no specific application of its payments, and automatically in the account they were applied in payment of the overdraft and the $266.50. The account ran on, and, the ultimate overdraft being the amount claimed by the plaintiff bank herein, the Master found and reported the defendant liable therefor. I cannot think that the judgment of the Appellate Division was intended to preclude the debtor from paying, after the date of the guaranty, sums on account of the overdraft and in payment of accrued interest on the notes in connection with advances by the bank subsequent to the date thereof.

In the evidence before the Master, Edward M. Dawson, an assistant-inspector of the plaintiff bank, stated:—

"Q. Current when? A. On the date the guaranty was signed, February 2nd, 1914. The account is operating in the ordinary way, and the first payments that have come in to the credit of the account are naturally to be applied on the oldest existing advance.

"Q. Was the account a continuing account? A. Yes.

"Q. And these payments were made generally on the account? A. Yes, these payments are applied generally on the overdraft."

The guaranty is a "continuing guaranty, intended to cover any number of transactions," and one in which the guarantor was to be held liable "to the extent of $2,500" of the amount "for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which

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shall be owing from the Specialty Manufacturing Company, of Grimsby, Ont., to the said bank."

I am therefore of the opinion that the Master was right in finding as he did in clause (1) sub-clause (1) as to the item of $266.56, and in sub-clause (3) as to the mode of appropriating the payments in connection with the item of $922.26. Reference to *Thomson* v. *Stikeman* (1913) 14 D.L.R. 97, 29 O.L.R. 146, 17 D.L.R. 205, 30 O.L.R. 123.

There is no hint in the documents that the credits coming in from the debtor shall only be applied to actual new advances. The payments made by the creditor were appropriate credits in the account, making the earlier credits balance the earlier debts. The debtor placed the money in the banker's hands and in effect said to him, "You apply the money in the account as you like," and payments as received were automatically applied on the earlier debts.

It seems to me this is the proper mode to deal with the account, having regard to the terms of the guaranty and the terms of the judgment of the Appellate Division. I think that it was incumbent upon the guarantor, in a continuing and running account such as this, to prove that the payments have been made and applied on actual new advances—or otherwise they could properly be applied as they were.

On all grounds, I think the appeal from the Master's report must be disallowed with costs.

W. S. MacBrayne, for appellant.

D. C. Ross, for the plaintiff bank, respondent.

Ferguson, J.A.

FERGUSON, J.A.:—(After setting out the facts as stated in the headnote) I cannot help but think that the evidence taken before the Master, which explains and throws much light upon the documents in the case, was not as fully considered by the learned trial Judge as it would have been had he not been led away from it by the contentions of the appellant's counsel; for it would appear that counsel at the trial, founding his right to succeed on a view of the law with which the learned trial Judge after consideration did not agree, urged upon the trial Judge the view of the facts which he adopted.

The judgment appealed from is founded upon the hypothesis

that, prior to the conveyances, the assignee had, by an express or implied election, lost his right to redeem, from which it is deduced that the conveyances were mere formalities. The learned trial Judge says (38 D.L.R. 361 at p. 365, 40 O.L.R. 368):—

"All that was done was, that the assignee formally renounced the worthless right to redeem he had already lost, and the creditor formally withdrew a right to rank, which did not exist, against an estate which amounted to nothing—*Ex nihilo nihil fit.*"

I had prepared and at one time intended to incorporate herein a comprehensive review of the facts, in which were set out in order of date all the documents and correspondence, also some of the oral testimony; but, on second thoughts, I have concluded that it is sufficient to say that, after a most careful consideration of the evidence, I am of opinion that the act of the parties, the oral testimony, the documents, and other circumstances proved, are inconsistent with the hypothesis that there was an election by the assignee, and are consistent only with the view that there had not been an election and consequent loss by the assignee of his right to redeem the mortgaged premises, and that the learned trial Judge erred in finding to the contrary, from which it follows that it is unnecessary to consider the interesting questions of law discussed by the learned trial Judge as to whether or not a creditor who has valued his security under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 25, and has been allowed to retain it, thereby extinguishes his claim against his debtor to the amount at which his security was valued, and as to whether or not that question was decided in *Bell* v. *Ross*, (1885), 11 A.R. (Ont.) 458, or *Taylor* v. *Davies* (1917), 41 D.L.R. 510, 41 O.L.R. 403.

In my opinion, the rights of the parties must be ascertained on the basis that, at the time the conveyances were made and accepted, there had been no election under the Act, and that the conveyances were given to complete an actual sale of the equity of redemption in the mortgaged premises, and that the questions for our consideration are: What were the terms of sale? Was the sale made on the terms expressed in the resolution of the 8th December, 1915, or did that resolution so inaccurately and improperly state the terms and real intention of the parties that it should be disregarded and the sale be held to have been in fact made without any special terms or intention, express or implied, so that the Court might and

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should infer that the mortgagee in accepting the deeds did not intend either to merge his security or to estop himself from thereafter asserting as against the mortgagor a claim for the payment of the mortgage-debt? And could he preserve this latter right and at the same time actually discharge the estate of the debtor and his assignee from any claim in respect of the mortgage-debt?

The terms of sale and intention of the parties thereto are questions of fact, and I shall deal with those questions first.

It is not disputed that the deeds dated the 13th November, accepted and registered some time later, were signed by the assignee as a result of an acceptance by the bank of the assignee's offer of sale under date the 8th November (exhibit 21), which, when read along with exhibit 24, Mr. Tilley urges, furnishes us with the evidence of the contract of sale according to the true intent and meaning of the parties, and which contract, he says, was not, according to the true intent of the parties, varied in form or effect by the subsequent acts or declarations of the parties.

It may be that the bank took and all along entertained a different view of the meaning and effect of the offer of the 8th November from that entertained by the assignee. It is plain that the inspectors and assignee, by the resolution of the 8th December, expressed a different view of the effect of the transaction to that now put forward on behalf of the bank; and it is also clear that the bank knew of the views expressed in that resolution before it accepted the deeds and paid the consideration-moneys therein mentioned; and, unless we can find that the resolution of the 8th December did not express the view of the assignee, I do not see how we can, in face of the bank's acceptance with knowledge of the assignee's views and intention, relieve the bank from the effect of its acceptance.

I am of the opinion that the assignee, in making the offer shewn by exhibits 21 and 24, did not consider that he was making nor did he intend to make an offer on terms differing materially or in effect from the sale which was previously authorised by the inspectors when they instructed the giving and extending of the MacConachie option, which had expired only on the 5th October.

In *North of Scotland Mortgage Co.* v. *Udell*, (1881), 46 U.C.Q.B. 511, Hagarty, C.J., at p. 516, says:—

"The rule of law follows what would surely be the understanding of ninety-nine persons of ordinary intelligence out of one hundred,

that if the mortgagee accept a release of the equity of redemption, nothing further being said on either side, the natural presumption must be that the charge is merged in the complete ownership of the inheritance."

And at p. 517:—

"From all the authorities I gather that in the simple case of the mortgagee taking a conveyance of the equity of redemption, the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to shew a contrary intent or result."

What ground is there for saying that the assignee entertained a view of the meaning and effect of his offer of the 8th November different from what Mr. Chief Justice Hagarty says would be the view of ninety-nine out of one hundred persons? I can find none; and, therefore, I see nothing strange in the assignee, on being asked by Mr. Raymond for evidence of his authority to execute the deed, assuming that the resolution authorising the MacConachie option accurately stated the intent and effect of the transaction proposed by exhibits 21 and 24, and authorised it except that its form might need to be changed so as to permit of some one other than MacConachie's client being the purchaser (if that client was not in fact the bank).

In his oral testimony taken before the Master the assignee takes the position that the resolution of the 8th December actually stated his intention, and that the deed was executed by him under the authority thereby conferred, and the resolution was put forward by the assignee and the inspectors as the evidence of the assignee's right to execute. The plaintiff's local manager joined in the resolution and signed it in the presence of the bank's local solicitor, who witnessed it and caused it to be forwarded to Mr. Raymond as evidence of the assignee's powers; and at the trial the bank's manager says that the deed was executed under the authority of that resolution. Mr. Raymond was quite alive to the necessity of the assignee having directions from either the creditors or the Judge of the County Court before making a sale; and, before advising the bank to accept the deed, register it, and pay the $300 consideration-money, he asked for and received the resolution of the 8th December; he admits reading it over and advising the bank that it was sufficient to carry out the contemplated purchase and sale; and I

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cannot see how there can be any question as to that resolution meaning that the bank was to pay for the property $300 over the amount of its claim and was also to assign the book-debts. It paid the $300 and released the book-debts, but now refuses to pay itself.

The resolution of the 8th December reads:—

"Hamilton, Ont., Decr. 8th, 1915.

"Whereas at a meeting of the inspectors of the Specialty Manufacturing Company, held at the Village Inn, Grimsby, on July 13, 1915, at which were present three (3) inspectors of the estate, Messrs. Marsh, Brook, and Darley, the following resolution was passed:

"'Moved by Mr. Marsh

"'Seconded by Mr. Brook

"'That, providing an offer can be secured of sufficient money to pay off the Union Bank's claim in full, with in addition three hundred dollars ($300) for expenses of assignee, inspectors, and solicitor, and the balance of the book-debts and trade-paper, now in the hands of the Union Bank, to be handed to the assignee in trust for the creditors, said offer be and is hereby accepted. The assignee is authorised to sell and transfer all the company's assets other than said book-debts to the prospective purchaser, deal to be consummated thirty (30) days from this date July 13, 1915.'

"And whereas, at a subsequent meeting of inspectors, said date for consummation of the deal was extended to October 5, 1915, we, the undersigned inspectors of the Specialty Manufacturing Company, Grimsby, hereby authorise and instruct the assignee of the said estate to sell the assets as above mentioned to any purchaser on above mentioned terms on or before December 18th, 1915.

"Witness our hands and seals this 8th December, 1915.

"Beverley Brook (seal) Witness:

"J. A. Marsh (seal) G. B. MacConachie."

"E. B. Darley (seal)

What more natural than that Mr. Raymond should think that that resolution accurately expressed even the bank's real intentions. This debt was incurred at the Grimsby branch of the bank. Mr. MacConachie, the local solicitor, and Mr. Darley, the local manager, were parties to it; the bank had valued the mortgaged premises at a sum exceeding its total claim at the time the writ for foreclosure

was issued on the 2nd November, 1915; the bank had gone into possession of the premises and not only leased them but had entered into a written agreement binding it to sell the premises to the lessee at his option at a sum which the witness Carter (at p. 137 of the evidence) says was approximately the amount of the bank's claim—and, though it may not have been known to any of the parties at the time, a comparison of the affidavit of claim with the recitals and redemption clauses of the mortgage shews that the mortgages were not in fact (as claimed) held by the bank as security for the total indebtedness.

Every circumstance, except the fact that after taking the deeds the bank did not submit to a dismissal of this action, points to the conclusion that it was a most reasonable thing for the bank to accept conveyances of the properties on the terms of that resolution of the 8th December; and I cannot think that the continuance of this action should be seized upon now and magnified so as to lead us to conclude that even the bank did not intend to do in effect what it did in form. There are other circumstances connected with this transaction which, looking back, are more difficult to explain than why the bank continued the Makepeace litigation. For instance, why, if the bank intended to preserve its rights against Mrs. Makepeace, did not Mr. Raymond reserve its rights against her and the debtor and her rights against the assignee? Or, again, why did the bank, holding securities to the full value of its claim and the guaranty of Mrs. Makepeace in addition, file a claim with the assignee? It was not intending to rank upon the estate. I refuse to speculate as to the why or the wherefore of such actions in arriving at the intention of the parties; I prefer to be guided by what they said and did at the time rather than by argument as to the probabilities or even sworn statements of intention made long after the events, when the circumstances are changed, and other considerations are present to the minds of the deponents and counsel, even if it be assumed that the witnesses are now perfectly honest in giving their recollections and the argument reasonable.

Therefore I find as a fact that the conveyances were given and accepted in satisfaction of the bank's claim against the Specialty Manufacturing Company, and that the defendant was thereby freed from liability. Had I reached a different conclusion and been of the opinion that the real transaction between the parties

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was a sale of the equity of redemption by the assignee to the bank, nothing being said on either side, I would nevertheless doubt that the circumstance of the prosecution of the Makepeace guaranty would in itself be sufficient to rebut the usual presumption that the purchaser of an equity of redemption undertakes to indemnify the vendor against the mortgage-debt (*Waring* v. *Ward* (1802), 7 Ves. 332, 32 E.R. 136, *Boyd* v. *Johnston* (1890), 19 O.R. 598); or that a mortgagee-purchaser accepts the conveyance in satisfaction of the mortgage-debt (*North of Scotland Mortgage Co.* v. *Udell, supra*); and I would also doubt the right and power of an assignee for the benefit of creditors to enter into a transaction which would release or discharge the obligation which equity attaches to such a sale, an obligation which the assignee must, I think, be taken to hold not only for the benefit of the estate in his hands, but for the benefit of the *cestuis que trust*, which includes the debtor, so as to relieve him of his personal obligation on the mortgage. In other words, I doubt the right of the assignee to sell, assign, or release any equitable rights which accrue to him by operation of law on a sale of the trust estate, and which he must be taken to hold as trustee for the benefit of the debtor, as well as for himself: see *Higgins* v. *Trusts Corporation of Ontario* (1899), 30 O.R. 684, (1900) 27 A.R. 432, and the authorities and principles there discussed.

But it is not, as I view the case, necessary to decide these questions of law or the question as to what was the effect of the release by the bank of its right to rank upon the estate, without reserving the right of Mrs. Makepeace to do so, as was the case in *Brown* v. *Coughlin* (1914), 28 D.L.R. 437, 50 Can. S.C.R. 100. I prefer to rest my judgment on the opinions I have expressed in reference to the facts.

This appeal was consolidated with and argued along with an appeal from an order of Sutherland, J., dated the 1st day August, 1917, pronounced on an appeal from the report of the Master on the taking of the accounts; but, if I am right in the view I have expressed on the questions involved in the appeal from Middleton, J., it is not necessary to consider the accounts or to deal with the questions raised on the reference or in the appeal from Sutherland, J.

For these reasons, I would allow both appeals and direct judgment to be entered on further directions, declaring that the

defendant is not indebted; the defendant to have the costs of both appeals and of the proceedings subsequent to the judgment of the Divisional Court directing the reference to take accounts.

MACLAREN, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A.:—I agree with my brother Ferguson that these appeals should be allowed.

There was not, on the agreement for the release of the equity of redemption, any reservation of the bank's rights against the surety; and, in giving up the bank's claim, the bank released any claim the surety might have, and so interfered with the surety's rights.

Hodgins, J.A.

HODGINS, J.A. (dissenting):—Appeal from the judgment of Middleton, J., dated the 9th October, 1917, finding that the appellant was liable upon a guaranty to the respondent; and also from an order of Sutherland, J., dated the 1st August, 1917, dismissing an appeal from the report of the Master in Ordinary, dated the 5th March, 1917, whereby the amount due by the debtor was fixed at $3,179.66.

The respondent bank, in addition to this guaranty, had a mortgage on the lands and premises of the Specialty Manufacturing Company and a chattel mortgage on the plant, machinery, and chattels of the company and an assignment of book-debts.

The guaranty was for the ultimate balance, not exceeding $2,500, after all moneys obtainable from other sources had been applied on the debt.

The company assigned for the benefit of creditors to W. P. Thompson on the 9th April, 1915, and the respondent proved its claim on the 22nd April, 1915, at $13,707.39, and valued its securities as follows: book-debts, $250; mortgage and chattel mortgage, $13,457.39. This action against the appellant was begun on the following day, the 23rd April, 1915. On the 2nd November, 1915, the respondent entered suit for foreclosure in respect of the land mortgage. Subsequent thereto and on the 13th November, 1915, the assignee granted and quitted claim to the respondent all his estate and interest in the lands, for the expressed consideration of $300. On the 8th January, 1916, the assignee transferred to the respondent the goods and chattels mentioned in the chattel

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mortgage, the consideration being stated as "$300 and other good and valuable consideration."

The appellant contends that this deed of the equity of redemption had the effect of merging the charge created by the mortgage, and that the debt has been extinguished. Looking at the terms of the mortgages, which are limited to securing payment of promissory notes and discounted paper for the sum of $15,000 and renewals thereof and interest thereon, it would appear that, when the claim was proved, the amount covered by the mortgage was $12,640.45, while the security therefor was valued at $13,457.39.

The question to be determined is whether the effect of the transaction above stated was to discharge the debt and so to free the appellant.

A few days after the foreclosure action was begun, namely, on the 8th November, 1915, the appellant's solicitors, who appear to have been acting also for the assignee, wrote the general solicitors in Toronto of the respondent the following letter:—

"We are acting for Walter Thompson, the assignee of the above estate. There were expenses incurred as assignee, and it has been impossible to collect them from any source. We would transfer all the title to you without the proceedings under the foreclosure if you would pay the expenses to date, say about $300. This would give you immediate possession without any trouble and would also reimburse the assignee for his outlay.

"Let us know whether this would be satisfactory to you."

There is no clear evidence as to when this offer was accepted, but the quit-claim deed was prepared by the assignee's solicitor and sent to the assignee in a letter dated the 16th November, 1915, reading as follows:—

"We enclose quit-claim for signature, which has been approved by G. B. MacConachie. I am going away for a few days, and you can execute it and hand it over to Mr. MacConachie upon receipt of $300."

On the following day the assignee (exhibit 23) sent the quit-claim deed to Mr. MacConachie, the local solicitor at Grimsby of the Union Bank.

In his evidence, Mr. MacConachie says that he arranged with the assignee that, before paying the consideration-money mentioned in this deed, he would send the document to Messrs.

Raymond & Co., general solicitors for the bank, for their approval and that he did send the document to Toronto.

On the 19th November Thompson wrote to MacConachie a letter (exhibit 24), as follows:—

"While the 'quit-claim deed' only included the real estate in this matter, it was understood at the meeting of creditors that I was to convey to the Union Bank, or any other purchaser, all chattels which are not affixed to the freehold. In other words, I was instructed to release, for the amount in question, all the assets of the above company to the Union Bank, which I understand is the arrangement between us."

The assignee in that letter, in stating that it was understood that he was to convey to the bank "or any other purchaser" all chattels which are not affixed to the freehold, refers to the original meeting of creditors; and the conclusion which he draws from the authority there given is, that he is entitled to convey all the assets to the bank, as well as the real estate covered by the mortgage. As the chattels were all manufacturing plant and machines in the building on the lands, and practically fixtures, the conclusion is not unreasonable.

The respondent's solicitors having sent over a form of resolution to be passed by the inspectors, the assignee wrote to MacConachie a letter, dated the 22nd November, 1915, which is as follows:—

"I am in receipt of your letter of 20th inst. and note contents. At the original meeting of creditors Messrs. Darley, Brook, and Marsh were appointed inspectors. At the second meeting of creditors, which was called to discuss the position of the Union Bank in the matter, the following resolution was passed:—

"'Moved by W. S. MacBrayne, acting for Mrs. Woolverton, seconded by E. J. Woolverton, that the whole matter of the realisation of the assets and the position of the Union Bank be considered by the assignee and inspectors, and in consultation with the solicitor for the assignee, Geo. S. Kerr, K.C., the inspectors be given full power to take action or realise upon the assets of the estate in any way that they may deem advisable. Carried.'

"A subsequent meeting of inspectors was held at the Village Inn, Grimsby, at which time the assignee was instructed to sell the assets of the Specialty Manufacturing Company for the sum of $300.

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"If the Union Bank knew these facts, they would perhaps not make it necessary for me to call a general meeting of creditors now. Of course, if it is necessary it can be done, but it will entail considerable expense and trouble to all concerned.

"Kindly let me hear from you, and oblige."

A previous letter of the assignee of the 17th August, dealing with the option given on the 13th July, speaks of extending that option "to purchase our interest in the estate for $300." This is consistent with the subsequent correspondence, and indicates clearly that the view of the assignee throughout was that the conveyance was to include just the assignee's interest, and the amount received was to pay his expenses. In view of the position taken by counsel for the appellant, the assignee and his solicitor are now put in a singular light. For the letter of the 22nd November gives the meaning of the inspectors' resolution, dated the 13th July, 1915, so much relied on before us, as it was understood by the assignee. The terms of that resolution are as follows:—

"Moved by Mr. Marsh

"Seconded by Mr. Brook

"That, providing an offer can be secured of sufficient money to pay off the Union Bank's claim in full, with in addition three hundred dollars ($300) for expenses of assignee, inspectors, and solicitor, and the balance of the book-debts and trade-paper, now in the hands of the Union Bank, to be handed to the assignee in trust for the creditors, said offer be and is hereby accepted. The assignee is authorised to sell and transfer all the company's assets other than said book-debts to the prospective purchaser, deal to be consummated thirty (30) days from this date, July 13, 1915."

I do not wonder that, with that letter of the 22nd November before the bank's local and general solicitors, they may have failed to realise that the payment of the $300 would be used to draw the bank into a position different from that which both parties intended it should occupy.

I am quite unable, upon these documents or upon the evidence given at the trial, to conclude that what the assignee offered to give, and what the bank's solicitors agreed to pay for, can be stretched so as to include satisfaction of the large debt of the bank and the consequent release of the surety then being vigorously sued. The trial of the case against her took place on the 25th

October, 1915, and the judgment was pronounced on the 20th November, 1915, so that it seems idle to suggest that the respondent was actively engaged in giving away its rights against the surety during the period just subsequent to the trial, or that, after judgment had been given in its favour, it registered a deed defeating it.

With the exception of the forwarding of a copy of the resolution of the 13th July, 1915, and the extensions of the time-limit thereafter given, everything done and written by the parties, both before and after, is opposed to the argument that the bank was proceeding as a purchaser upon that resolution, instead of carrying out the simple transaction of acquiring by deed the equity of redemption in lieu of foreclosing it. The assignee himself suggested transferring the machinery and chattels as already mentioned; and, if the bank allowed the assignee to collect the book-debts, that does not do more than make it accountable for the amount realised as a credit on the amount due the bank—they were valued at only $250. And, as the amount due is $3,179.66, and the sum collected was said to be about $300, the appellant would derive no benefit from an account.

Assuming then that the real bargain was as I have indicated, the question arises: what was the effect of it, coupled with the formal withdrawal by the bank of its claim upon the estate on the 7th January, 1916? Merger is, of course, a question of intention as between the parties to the dealing which is said to produce it.

The bank had, through its agent, a prospect of realising upon its security by disposing of the property. It had proved its claim in such a way as to entitle it to retain its security or to require the assignee to take it over at a 10 per cent. advance. The right of foreclosure existed, subject to this statutory option, and the getting in of the equity of redemption would, provided the assignee agreed to give it up, enable a sale to go through whereby the whole purchase-money was to go in discharge of the debt—without any question being raised as to title because of the assignee's outstanding equity or his statutory rights.

The bank was, as banks always are, desirous of liquidating its security, and it would have been folly in it to have done anything which could have resulted in compelling it to accept the property

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in discharge of its debt, especially as the chance of selling appeared to be fading away.

It was also at the moment actively pursuing the surety by action upon the bond.

Under these circumstances, no intention to merge the debt can or ought to be implied from the transaction. Where the fact was that merger would be clearly against the interests of both parties concerned that consideration was held to be sufficient to rebut any such presumption. This I believe to be the *ratio decidendi* of such cases as *Adams* v. *Angell* (1877), 5 Ch.D. 634; *Thorne* v. *Cann*, [1895] A.C. 11; *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch. 726, 734, [1898] A.C. 321; *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; *Manks* v. *Whiteley*, [1912] 1 Ch. 735, 760.

It was not to the advantage of the bank to release its debt, and the interest of the assignee was in no way served by such a release. All he desired was to get enough to pay his expenses and to be formally cleared of responsibility in regard to the bank as a creditor.

Furthermore, the appellant must be held to have undertaken her liability upon an understanding similar to that stated in the case of *Rainbow* v. *Juggins* (1880), 5 Q.B.D. 422, 423, thus:—

"Where a man enters into a contract of suretyship, he, it is true, bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled; but he makes that bargain with reference to the law of the land, and if the law of the land says that under such and such circumstances certain things must take place in order to enable the creditor to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of those things taking place."

As I understand the figures stated in its formal claim, the bank was precluded by the statute from receiving anything out of the estate, if the assignee accepted the proof and did not elect to take over the security. The valuation of the security was larger than the claim recoverable under the mortgage by $816.94, and the only right the creditor had was to rank for its claim after deduct-

Value.....	$13,457.39
Mortgage debt	12,640.45
	$ 816.94

ing the valuation, i.e., in this case nothing, or to rank for the difference between the stated value and the gross claim if the assignee elected to take over the security. If he did so take it over, the assignee would have had to pay the valuation plus an increase of 10 per cent., which would be $2,162.67 more than was recoverable under the mortgages according to their terms, because they do not cover the overdraft amounting to $1,066.94.

Value.....	$13,457.39
10 %.....	1,345.73
	$14,803.12
Mortgage-debt	12,640.45
	$ 2,162.67

Can it then be said that, in withdrawing a claim on the estate, the bank gave up anything? I think not. The statute had taken it away before the release was given, because, under it, it was impossible for such a claim to rank, and the release of the equity of redemption put an end to the assignee's taking the security over. It is not the filing of the claim but its being entitled to rank that must determine the rights of the parties: *Deacon* v. *Driffil*, 4 A.R. (Ont.) 335.

As I understand the law, a creditor can recover against a surety although he has not proved on the estate of the debtor, and he is not bound to prove unless he has been required to do so by the surety. But if he does prove he is not entitled to withdraw that proof to the detriment of the surety, unless the guarantee-agreement permits him to do so, without being liable to account for what may have been lost by not persisting in his proof. I can see, however, no possible harm or loss by what was done. There were no assets outside the securities held by the bank; and, if there had been, the statute itself made it impossible, as events turn out, for the bank to make out any claim upon them.

The result of the release of the equity of redemption was to vest in the bank the legal and equitable estates; so that, in the event of the surety paying the debt, the security could be turned over to her not only unimpaired but enhanced by what was done.

I do not regard the release by the assignee as precluding action on the covenant against the debtor. It is not the scheme of our Act to discharge the debtor when he makes an assignment for the benefit of his creditors. It simply creates a trust fund for the payment of debts, and leaves him liable for the debt less what the

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secured creditor may receive from the assignee. If the effect of what was done was to extinguish the right of the assignee to redeem, yet the creditor could still sue the debtor, who, notwithstanding a foreclosure or a release by the owner of the equity of redemption, remains liable, subject only to the condition that the mortgagee must be able to restore the pledged estate on payment being made: *Walker* v. *Jones* (1866), L.R. 1 P.C. 50; *Kinnaird* v. *Trollope* (1888), 39 Ch.D. 636; *Stark* v. *Reid* (1895), 26 O.R. 257.

It is not necessary, in view of the facts of this case, to consider the effect of the decision of *Bell* v. *Ross*, 11 A.R. (Ont.) 458, discussed in *Taylor* v. *Davies*, 41 D.L.R. 510, 41 O.L.R. 403.

This appeal from the judgment of Middleton, J., should be dismissed with costs.

In regard to the appeal from Mr. Justice Sutherland's judgment, I agree with his conclusions.

The item of $266.56 is properly charged as made up of new advances. The discounts of new notes renewing old ones were put to the credit of the account, which was charged with the overdue notes; the difference, which represented the interest or discount on the new note, increased the overdraft, and was a new item, and I think a new advance within the meaning of the guaranty as expounded by the Second Divisional Court. But as to this item and that of $922.26 (the amount due before the guaranty) the moneys which came in afterwards were either automatically or in the case of the $922.26 specifically, though subsequently to the last judgment herein, applied upon them, and so they disappear. I think the rule in *Clayton's Case* was properly applied. See *Cory Brothers & Co. Limited* v. *Owners of Turkish Steamship "Mecca,"* [1897] A.C. 286.

As to the remaining contention that the balance due is only $706.98, instead of $3,179.66, this does not appear to have been before Mr. Justice Sutherland. But, having gone through the calculations submitted, I think the respondent's solicitors have reached the correct result from the actual dealings between the parties. Practically the difference between the two totals is produced by ignoring all the discounts granted during that time, and treating the difference between the debit and credit sides of the current account due to them as if they did not exist and had never

existed. Most of these are covered by the doctrine of the appropriation of payments already referred to.

I think the appeal from Mr. Justice Sutherland's judgment should be dismissed.

Appeals allowed (HODGINS, J.A., *dissenting*.)

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THE SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

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Ex. C.

Exchequer Court of Canada, Cassels, J. March 7, 1919.

EXPROPRIATION (§ III E—165)—CROWN RAILWAYS—SHUNTING-YARD—SCHOOL—COMPENSATION—HARBOUR—RIPARIAN RIGHTS—CONSEQUENTIAL INJURIES.

The Dominion government, in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard.

Held, Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the B.N.A. Act, and no title to water lots thereon could pass under a provincial grant. *Maxwell* v. *The King* (1917), 40 D.L.R. 715, 17 Can. Ex. 97, followed.

2. The fact that the suppliant had been allowed a crossing over the railway tracks to reach the beach where its lots were situated, did not give it an irrevocable license as against the Crown, nor could it under the circumstances claim such license as a riparian proprietor, nor could such license be considered as an element of compensation.

3. The injury having been caused by the operation of works on lands other than those taken from the suppliant, the latter was not entitled to compensation therefor.

PETITION of right claiming compensation and damages against the Crown.

T. F. Tobin, K.C., and *L. A. Lovett*, K.C., for suppliant.

T. S. Rogers, K.C., and *J. A. McDonald*, K.C., for respondent.

Cassels, J.

CASSELS, J.:—A petition of right filed on behalf of the suppliant, claiming compensation and damages against the Crown, for certain lands belonging to it expropriated for the purpose of the government railways in Halifax and damages to other lands said to be held therewith.

The suppliants claim the sum of $500,000. The respondent denies that the suppliants are entitled to any compensation but have offered a certain sum in full of any alleged claim.

The case was tried before me in Halifax, commencing on September 25 last. At the conclusion of the case, counsel requested an opportunity of putting in written arguments. The last of these arguments was received about February 1 last.

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EX. C.

THE SISTERS OF CHARITY OF ROCKINGHAM v. THE KING.

Cassels, J.

Owing to other engagements I have been unable to consider the case at an earlier date.

The case is one, in some respects, of considerable importance. I have occupied considerable time in considering the evidence and authorities.

The supplicants are a corporate body (the charter granted by statute of Nova Scotia in 1864). The amending Acts were consolidated by c. 81 of the statutes of Nova Scotia for the year 1907. The purpose of the organization is educational and charitable, extensively educational.

I had the pleasure, accompanied by counsel for the plaintiffs, and for the Crown, of paying a visit to the academy, and was most courteously received and shewn over the establishment from top to bottom. I may say that I have never seen more complete buildings for the purposes of an educational establishment, and it is lamentable the effect upon the academy of what has taken place. I will describe subsequently how the works tend to injure an establishment of this character.

The main grievance, as appears from the evidence, is the creation and operation of a shunting yard partly in front of the academy, and between them and the waters of Bedford Basin. The shunting yard is almost entirely on land reclaimed from Bedford Basin vested in the Crown. There are 14 tracks in this shunting yard, and all the freight cars in and out of the City of Halifax by the Intercolonial Railway, now a part of the government railways, are made up in this yard. Ordinary knowledge without the aid of the evidence in the case would indicate the effect of such a yard partly in front of an institution of this character. There are about 140 pupils ranging from 5 years old up to the time when they graduate, and it may be said that all of these pupils are practically resident pupils. There are in addition about 140 novitiates who reside at the academy.

My thanks are due to the railway company for their kind consideration during the two hours occupied in going over the institution, in refraining from making the slightest noise in their yards. All operations apparently ceased while I was inspecting the institution, and I am glad to believe that the railway authorities must have been aware of my visit.

In order to understand the case, it is necessary to consider

the situation on the ground. Exhibit No. 1 in the case is a plan shewing the location and layout of the property. The buildings are erected on lands purchased from time to time by the corporate body to the west of a public road which has been in existence from time immemorial.

Some time between the years 1850 and 1854 what was called the Nova Scotia Railway was constructed. This railway subsequently formed part of the Intercolonial Railway. All the papers in connection with this old railway apparently have been lost. At all events none of them have been procured. This railway was constructed immediately to the east of the public road, and extended nearly to high water mark along the harbour. At this time there were no riparian rights as far as can be ascertained between high water mark and the eastern side of the railway right of way except as to a small strip of land to the east of the railway, and between the railway and high water mark apparently of no value to anyone. The railway was not obliged to give any rights of crossing over their tracks whereby anyone from the road could reach the waters and no crossings existed in fact until about 20 years later when two crossings, which I will refer to, apparently were allowed to be used. As I have stated the land between the railway and high water mark had apparently no value to anyone. The properties owned by the corporation were purchased at different periods and from different persons. The first purchase was made in September, 1872. It is what is marked "cottage" on plan near the public road. On September 14, 1872, one water lot was purchased. The water lot in question was a post-Confederation grant, and was a grant from the provincial government.

I had occasion in the case of *Maxwell* v. *The King*, 40 D.L.R. 715, 17 Can. Ex. 97, to consider the question whether or not Bedford Basin was a public harbour at the time of Confederation. I came to the conclusion for the reasons set out in the report of that case that Bedford Basin at the time of Confederation formed part of the harbour of Halifax, and became the property of the Dominion by virtue of the B.N.A. Act. That case was not appealed.

In the present case counsel for the suppliant admitted that they could not claim title to the water lots, acquiesing in my decision in the *Maxwell* case.

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There are two knobs of land to the east of the railway, one is said to contain about 220 sq. ft., and is between the railway and the high water mark at the place marked "the bath house." The other is a knob of land between the railway and the high water mark at the place marked "esplanade," which is said to contain about 1,220 sq. ft.

At the time of the expropriation in this case, which was on March 9, 1913, it is admitted that the suppliant had title to these two knobs of land by prescription. They did not get title to either of these knobs of land except a title under the Statute of Limitations. These two parcels of land were not included in any of the various conveyances granting the lands to the suppliant.

It may be important also to notice that between the two knobs of land there is also a small piece of land to the east of the railway and between the railway and the high water mark, as to which no claim has been made on the part of the suppliant, their proof being confined to the two knobs of land that I have referred to.

In 1873, the suppliants having obtained title to the cottage in question, erected an enclosure at the place where the bath house is for the purpose of enabling the young ladies to bathe in the waters of Bedford Basin, and the railway permitted them to cross their tracks to reach this bathing enclosure, and subsequently erected a gate to the way leading across their track. The sisters and the pupils from that time forward were accustomed to cross the track during the bathing season to reach this bathing enclosure.

According to the evidence given before me, in the fall of 1872 what is called the main building was erected. This is said to have been completed by September, 1873, the cost being $8,750. The erection of the north wing was commenced in 1882, and was completed in the year 1885, at a cost of $27,256.33. The south wing was built in the year 1888, at a cost of $42,440.38. In 1891, farm buildings were erected at a cost of $2,953.40. In 1901 a laundry building was erected at a cost of $17,359.35. An additional wing was erected in 1903, at a cost of $36,660, and in 1904 the chapel and annex were erected at a cost of $208,635.87.

I may mention in passing that the chapel in question is a beautiful church and very imposing.

In addition to these various items there was the cost of the lands acquired and the improvements to the property. The cost of the land is placed at $16,060 and the improvements to the land at $125,120. The cost of the bathing house subsequently erected and also of the small wharf which I will refer to later are not included in these items.

I am mentioning these figures to shew the great outlay that the suppliants have made on their premises.

According to Mr. Roper, at the prices in force at the time of the expropriation, the premises could not be erected for less than $900,000 to $1,000,000.

The suppliant, subsequent to the making of the enclosure erected a bathing house on the spot marked "bathing house," taking the place of the former enclosure. The only evidence of anyone qualified to pass on the question of value is that of Mr. Roper, who placed the value of the crib-work and the bathing house at the sum of $5,500, at the date of expropriation, March, 1913.

The suppliant apparently being of opinion that their title to the water lot was valid, commenced to fill in the waters of the harbour, and created what is marked on the plan "the esplanade." It was admitted at the trial by counsel for the suppliant that the esplanade was entirely on land filled in and below high water mark. Jutting from the eastern portion of the esplanade a small wharf was erected in the year 1904, and rebuilt in 1907. Mr. Mosher, an expert in regard to wharves, placed what would be the cost of construction in 1913 at the sum of $1,350.

The cost of the filling-in of the esplanade between March, 1899, and June, 1912, is stated to be about the sum of $12,829.16. There is no evidence of the exact time when this filling was made.

The cost of the crib-work is not included in the cost of the filling in of the esplanade.

According to the witness Harris, who acted as one of the government appraisers, the Crown tendered for the bathing house the sum of $1,610. He makes it up as follows: 9,600 ft. of land at 5 cents a foot, $480; bathing house, $300; crib-work, $530; fence, $170 = $1,480. To this he adds 10 %, $148, = $1,628.

If the suppliants are to be allowed for the cost of the bathing house and the wharf, I would accept the valuations of Mr. Roper

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and Mr. Mosher; and as the Crown are willing to reimburse the suppliants for these amounts, I think they should receive these two amounts of $5,500 and $1,628 with interest from the date of the expropriation.

It is clear that the suppliant acquired no title to the land filled in and called "the esplanade." When they commenced the fill they had not acquired any title to the land above high water mark and furthermore they have never acquired title as against the Crown.

The Crown apparently never raised any objection and the railway allowed the two crossings, one for the bathing house, the other to the wharf. I would refer in this connection to the case of the *Att'y-Gen'l of S. Nigeria* v. *Holt & Co.*, [1915] A.C. 599. The facts in the case before me are not similar to those in the *Nigeria* case. See also *Wood* v. *Esson* (1884), 9 Can. S.C.R. 239, and *Ratté* v. *Booth* (1886), 11 O.R. 491, 494; 15 App. Cas. 188, 193. It may also be well to refer to the Statutes for the Protection of Navigable Waters, R.S.C. (1906), c. 115, amended, 9 & 10 Edw. VII. (1910), c. 44, 8 & 9 Geo. V., c. 33 (24 May, 1918).

I am of opinion that while at the date of the expropriation the suppliants were the owners in fee of the two parcels of land, the one containing 220 ft., and the other containing about 1,220 ft., and should be assumed to be riparian proprietors of these two parcels, it cannot be held that there was an irrevocable licence on the part of the Crown to have the crossings to the bathing house and the esplanade and wharf for all time as against the Crown. These erections are on Crown property, and no title passed to the suppliants for work done on a public harbour. The value of the riparian right in respect of these two small pieces of land between the railway and high water mark is very small, if of any value detached from the right to the esplanade and the bathing house. It must not be lost sight of that no riparian right existed in favour of the properties of the suppliant bounded by the highway and the right to the two parcels of land of 220 and 1,220 sq. ft. was acquired under the Statute of Limitations and became perfect years after. See *Giles* v. *Campbell* (1872), 19 Gr. 226; *Cockburn* v. *Eager* (1876), 24 Gr. 409, as to riparian right (if authority be necessary), and *Holditch* v. *Canadian Northern R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, as to the properties not being held together.

A serious question and one of importance is whether or not any legal claim can be made on the part of the suppliants in respect of the grave injury caused to the institution by the use of the property in front of their buildings and between the eastern boundary and the railway land reclaimed by the Crown from the bed of the harbour as part of the shunting yard. Had no portion of the suppliants' property been taken, the damage would be the same, but no legal claim for damages could be allowed. So far as the railway right of way is concerned, it has been in existence since the year 1854. At first but one track was laid on this right of way. At the time of the expropriation I gathered that there were two extra tracks, but I fail to see how any claim can be raised in regard to any user of their right of way for the purposes of their railway. The 14 tracks used as a shunting yard are mainly on lands the property of the Crown. It is possible that one track may be over what is called these two knobs of land which I have described; but the injury which has been occasioned to the suppliants by reason of the placing and use of the shunting yards at the present location, is an injury caused by the operation of the works on lands other than lands taken from the suppliants.

Our courts have followed the decisions in the English courts under the Land Clauses Acts, and I think that I am bound by the English decisions. Authorities in the United States can be found where the law is decided in a manner different from the law as enunciated in the English courts. I have pointed out I am bound as I think by the English authorities approved of in our own courts. See *Paradis* v. *The Queen* (1887), 1 Can. Ex. 191; *The Queen* v. *Barry* (1891), 2 Can. Ex. 333; *Brown* v. *The King* (1909), 12 Can. Ex. 463, 471; *The King* v. *Macpherson* (1914), 20 D.L.R. 988, 15 Can. Ex. 215; *The King* v. *Wilson* (1914), 22 D.L.R. 585, 15 Can. Ex. 283, 288, affirmed by Supreme Court.

In the case of *Cowper Essex* v. *Local Board of Acton* (1889), 14 App. Cas. 153 at 161, Lord Halsbury states, as follows:—

My Lords, with reference to the main question I have had less difficulty, since I take it that two propositions have now been conclusively established. One is, that land taken under the powers of the Lands Clauses Act, and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established and that is, that where part of a proprietor's land is taken from him, and the future use *of the part so taken may damage the remainder of the* proprietor's

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land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

In this *Cowper Essex* case the Lord Chancellor uses these words, p. 161:

That where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder.

In the *City of Glasgow Union R. Co.* v. *Hunter* (1870), L.R. 2 Sc. & Div. 78, the land taken was a portion of the land in the rear. The damage claimed was for the injury to the land by the construction of a bridge on the front of the property. It was held that a claim for damage caused by the operation of the railway was not within the statute. The reasoning of this case put by Lord Chelmsford, that the land being in the rear of the property, it must be treated as if no land had been taken and the damage therefore was caused by something authorized by the statute.

The *Stockport* case (1864), 33 L.J.Q.B. 251, has been confirmed in the *Cowper Essex* case. In that particular case there is strong language to the effect that the mischief must be caused by what is done on the land taken.

In the case of the *Duke of Buccleuch* v. *Metropolitan Board of Works* (1871), 5 E. & I. App. 418, the property was fronting on the Thames. There was a valuable riparian right. There was a causeway which gave access from the property at low water to the river. The authorities expropriated the causeway and built a road in front of the property and between the property and the river. There was a large amount of damage to the property by reason of dust and noise, etc. The owner, however, was held entitled to compensation for this damage by reason of his riparian right having been taken away, and not by reason of the causeway being expropriated. Had the taking of the causeway let in the other damage there would have been no necessity to allow the damage to him as a riparian owner.

In Halsbury, vol. 6, p. 42, will be found a statement of the law, and a reference is given to a case in the Court of Appeal in England, *Horton* v. *Colwyn Bay and Colwyn Urban District Council* [1908] 1 K.B. 327. In that particular case the respondents constructed an intercepting sewer. The sewers were in part constructed on land the property of the claimant; the pumping station

and the reservoir were constructed on land the property of other persons. The head-note states that the present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes. Held, that as the acts of user, the contemplation of which caused the depreciation, could be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers," of the Public Health Act within the meaning of s. 308 of that Act, and consequently that the claimant was not entitled to any compensation under that Act in respect of that depreciation.

Lord Alverstone, C.J., at page 333, states as follows:—

It was contended by Sir Robert Finlay in his most interesting and able argument that, in addition to the compensation that was included in the £871 for the damage done by the actual construction of the sewer in his land, the claimant was entitled to compensation for the general damage which he alleged was occasioned to his property by the construction of the whole of the sewage works, according to the principle recognized by the House of Lords in *Cowper Essex* v. *Acton Local Board*.

The Chief Justice, at p. 336, states as follows:—

Sir Robert Finlay next contended that, although the pumping station was not on the claimant's land, it was of no use to the respondents unless the sewage could be brought to it; that the pumping station, when regarded simply as a building, did not injure the claimant's land, but that what did cause injury was the erection of a pumping station which was intended to be used in connection with a scheme for the disposal of sewage, and that as it was necessary for that purpose to pass the sewage through the claimant's land, the claimant was in a position to veto, not merely the construction of sewers on his land, but the carrying out of the whole system of sewage works. If that contention is sound, the claimant would be entitled to receive this further sum of money as compensation; but I desire to point out that the argument goes a great deal further than anything that was suggested in the *Cowper Essex* case, and it seems to me that it is directly opposed to the principle that was recognized in *City of Glasgow Union R. Co.* v. *Hunter*, L.R. 2 Sc. & Div. 78.

He then proceeds:—

But Lord Watson in the *Cowper Essex* case, when referring to *Ogilvy's* case (1855), Macq. 260, and to *City of Glasgow Union R. Co.* v. *Hunter*, said that in both these cases "land had been taken from the claimants for railway purposes; but the use complained of as injurious was not of that part of the railway constructed on the land so taken, and was held in both cases to afford no ground for statutory compensation. It appears to me to be the result of those authorities which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

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And then proceeds to deal, at p. 337, with the case of *Rex* v. *Mountford*, [1906] 2 K.B. 814.

Again, at p. 339, the Chief Justice emphasizes it, quoting from the *Tilbury* case, 24 Q.B.D. 326, and the *Metropolitan Board of Works* case. Referring to a judgment of Bigham, J.:—

I think it is clear that the exercise of the statutory powers referred to and contemplated by the learned judges in the *Tilbury* case consists of something done on the land taken from the claimant by the public body, or on land held by him. Such an exercise of the statutory powers alone concerns him. The statutory powers exercised elsewhere, though they may depreciate the value of his property, cannot in my opinion be relied upon for the purpose of increasing the compensation recoverable. In my opinion that is a perfectly accurate statement of the result of the authorities as they now stand, and if the principle of the *Cowper Essex* case is to be extended so as to give a claimant the right to compensation for injury resulting from the user of land other than his own, it can only be done by a decision of the House of Lords.

Buckley, L.J's., opinion was to the same effect.

Having regard to these authorities I have reluctantly come to the conclusion that the suppliants are not entitled to claim the damages which will necessarily be occasioned by the use of the property partly in front of their building as a shunting yard.

I would allow the two amounts of $5,500 and $1,628.

These sums are ample to include 10 per cent. for compulsory taking.

The suppliant is entitled to an additional sum for the loss of any riparian rights by reason of the expropriation. If $500 be allowed I think, having regard to my findings, it would be ample. In all judgment will be entered for $7,628 and interest from March, 1913, to date of judgment and costs to the suppliant.

Judgment accordingly.

QUE.

C. R.

C. E. DEAKIN Ltd. v. HARRIS CONSTRUCTION Co.

Quebec Court of Review, Archibald, A.C.J., Martineau and Panneton, JJ. November 15, 1918.

EVIDENCE (§ VI A—515)—CONTRACTOR TO FURNISH MATERIAL AND LABOUR —PAROLE EVIDENCE TO PROVE EXTRA WORKS DONE BY SUB-CONTRACTOR IN ACCORDANCE WITH AN AGREEMENT.

Where a contractor is to furnish material, labour and skill in a contract for work by estimate, parole evidence is admissible to prove that certain extra works were done by a sub-contractor in accordance with an agreement between him, the contractor and the proprietor, and that such work was charged as extras and apart from the contract price, and also to prove the cost of the work.

Article 1690 of the Civil Code (Que.) has no application as between a general contractor and a sub-contractor.

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APPEAL from the judgment of the Superior Court, Greenshields, J. Affirmed.

In 1914, the defendant company contracted for certain concrete, brick work, etc., for certain buildings to be erected, that is, a boiler house at St. Malo for $3,900; and a power house at Bergerville, for $7,810, according to plans and specifications.

The plaintiffs were the sub-contractors for part of the contract. During the course of the construction of the boiler house, the defendant requested them to perform other works. The balance of price due for these extras, amounting to $1,281.90, is claimed by the plaintiff's action.

The defence was based on the following grounds: (*a*) no authorization was given to perform the extra works; (*b*) all the works made by the plaintiffs were paid for;—(*c*) these works were badly done and the material furnished was not of the quality agreed upon.

The issue between the parties appears to be only one of fact, but an interesting question of evidence was raised, and decided in favour of the plaintiffs by the following reasons:

Considering that by the tender made by the plaintiff, C. E. Deakin Ltd., now in liquidation, and dated July 2, 1914, the said C. E. Deakin Ltd., undertook to do all the concrete work, brick work, steel work, carpentry, joinery and roofing, for the construction of two boiler houses, one at St. Malo, Quebec, and another at Bergerville (or Sillery) Quebec, for the total sum of $11,710, the whole being part of the general contract which the defendant had with the proprietor;

Considering that part of the work necessary for the construction of the said two boiler houses, was certain excavation work which was specially excepted from the said tender, and the cost of which amounted to the sum of $625, for which the defendant admits its liability, and for which the plaintiffs have been paid;

Considering that the furnishing of boilers and engines was no part of the construction of the said buildings, and the installation or placing thereof formed no part of the contract of the said plaintiff C. E. Deakin Ltd., with the defendant;

Considering that the setting of the boilers in the said two power-houses, and the installation or erection of the foundation for the engine, was not, in like manner, a work covered by and included in the tender made by the plaintiff, C. E. Deakin Ltd., and said works were not part of the contract between C. E. Deakin Ltd., and the defendant;

Considering that the plans and specifications submitted to the plaintiff, C. E. Deakin Ltd., and upon which it tendered, did not shew or include the setting of the said boilers or the construction of the foundation for the engine, and there was nothing in said plans or specifications to shew the extent of said works or the material to be used therein;

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Considering that it is established that the plaintiff, C. E. Deakin Ltd., did the work under an agreement between it and the defendant company, by which the said company was to be charged, and agreed to pay, the actual cost thereof, plus 10%, which amounts to the three items sought to be recovered by the present action;

Considering that the defendant company was the general contractor, and the plaintiff, C. E. Deakin Ltd., was a sub-contractor;

Considering that parole testimony, under the circumstances, is admissible to establish that the said works were ordered to be done by the defendant, and that the same were done by the plaintiff C. E. Deakin Ltd., and that verbal testimony should be admitted to prove the cost or value of said works, and the objection made by the defendant to the proof is unfounded and said objection should be dismissed and is dismissed;

Considering that art. 1690 of the Civil Code has no application as between a general contractor and a sub-contractor for part of the works;

Considering that after the works, the price of which is sought to be recovered by the present action, to wit, the three items of $891.03, $453.45 and $150.57, had been completed by the plaintiff, C. E. Deakin Ltd., and an account rendered therefor to the defendant, in detail, shewing that the same were charged as extras and apart from the contract price, the said defendant company never objected to the same, but on the contrary accepted it and made payments on account without protest or objection;

Considering that the account sent to the defendant, and by it received and accepted without protest sets forth the terms upon which said works were done, to wit, actual cost plus ten per cent.;

Considering that the proprietors of the said buildings accepted the work as performed by the plaintiff C. E. Deakin Ltd., without objection, and have not since made any claim against the plaintiff C. E. Deakin Ltd., or against the defendant, the general contractor, for defective work or for the use of defective material;

Considering that with respect to the drain in connection with the said works, the defendant has expended the sum of $150, which is a work undertaken to be done by the plaintiff, C. E. Deakin Ltd., and which the defendant is entitled to charge against the plaintiffs;

Considering that the plaintiffs have not established their right to the sum of $22.47;

Considering the plaintiffs are entitled to judgment for the amount sued for, less the sum of $172.47, to wit, the sum of $1,109.42;

Doth dismiss the defendant's plea, and doth condemn the defendant to pay to the plaintiffs the sum of $1,109.42, with interest from service and costs.

Brown, Montgomery & McMichael, for plaintiff.

Murray, Perrault & Co., for defendant.

Affirmed in review

CREDIT FONCIER FRANCO CANADIEN v. REDEKOPE.

SASK.

C. A.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and MacDonald, J. ad hoc. April 19, 1919.

LAND TITLES (§ V—50)—MORTGAGE—FORECLOSURE—PURCHASER FROM MORTGAGEE—CERTIFICATE OF TITLE—OPENING FORECLOSURE—RIGHTS OF PARTIES.

A purchaser, from a mortgagee who has acquired a certificate of title under the Saskatchewan Act, is entitled to rely upon the effect given by s. 65 of the Act ((1909), R.S.S. c. 41) to the certificate of title of his vendor. Where the vendor acquired title by foreclosure, and it is sought to open up the foreclosure and permit redemption, the purchaser is entitled to be added as a party to the application, with leave to bring such evidence, and take such steps as he may be advised against opening up the foreclosure.

[*Campbell* v. *Holyland* (1877), 7 Ch.D. 166, distinguished.]

Statement.

APPEAL from an order of Haultain, C.J. Sask., dismissing an appeal from the master in chambers opening up a foreclosure action and giving the applicants time to redeem.

Appeal allowed, and the matter referred back for the purpose of having the purchaser added as a party to the application to open up the foreclosure.

P. H. Gordon, for appellant; *W. A. Beynon*, for respondents.

Lamont, J.

LAMONT, J. (dissenting):—In this case I agree with the reasoning and conclusions of the Chief Justice in the judgment now appealed from.

The plaintiffs took proceedings to foreclose their mortgage. They obtained an order *nisi* on material part of which was a G. R. certificate certifying that on July 10, 1914, there were no executions against Wilhelm Redekope, the mortgagor. As a matter of fact, Vogt Bros. had at the time, an execution for $667.54, duly registered in the Land Titles Office, against the lands of the said Redekope, but this had been overlooked by the registrar in signing the certificate. The plaintiffs obtained final foreclosure without any notice to or knowledge on the part of Vogt Bros., and a certificate of title was issued in the name of the plaintiffs, who have ever since, and now are the registered owners. Vogt Bros. made an application to open up the foreclosure and to be permitted to redeem. The master granted the application. On appeal to the Chief Justice of this court the order of the master was upheld. The plaintiffs now appeal.

As pointed out by the Chief Justice, it is in the discretion of the court whether or not the foreclosure should be opened up and redemption permitted.

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In Daniells' Chancery Practice, 7th ed., vol. 2, p. 1165, the rule is laid down as follows:

> Although the order for the absolute foreclosure appears to be a final order it is not so, and the mortgagee still remains liable to be treated as a mortgagee and to be redeemed, but whether the redemption will be permitted lies in the discretion of the court, and depends on the particular circumstances of each case; the redemption has been permitted after the mortgagee had disposed of his interest to a purchaser.

In *Campbell* v. *Holyland*, 7 Ch. D. 166, it was held that in a foreclosure action a mortgagor could redeem after the order of foreclosure absolute and notwithstanding that after the order the mortgagee may have disposed of his estate to a purchaser. In giving judgment, Jessel, M.R., at p. 172, said:—

> The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.

This rule laid down by the Master of the Rolls is, in my opinion, good law here. It was argued that the plaintiffs had since foreclosure sold the land under an agreement of sale, and that no order permitting redemption should be made unless the purchaser was made a party to the application.

For two reasons, this contention in my opinion cannot prevail. First, because it is not shewn that the land has in fact been sold, there being nothing more than a statement by one of the deponents that he has been informed and believes such to be the case, and, secondly, in any case, as the plaintiffs are still the registered owners, the purchaser is only the holder of an executory agreement of sale between himself and the plaintiffs, and the Land Titles Act gives no special privileges to the holder of an agreement of sale. The purchaser's position under such an agreement is the same under the Land Titles Act as apart from that Act. He made an agreement with the plaintiffs. If they fail to deliver title when the time to do so arrives, he has his remedy in damages, just as any party to a contract has where the other party fails to perform the contract. Had the land been transferred and a certificate of title issued to the purchaser, without doubt the purchaser would, under the Act, be protected by his title. But

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that has not been done. Furthermore, in this case what good purpose can be served by making the purchaser a party? Assume that he has been added, and that he has appeared, and proved that he has an agreement of sale from the plaintiff company for the land in question; would that be sufficient to justify the court in awarding the land to the plaintiff company free from the execution, when that company obtained its title on a false certificate—not false to their knowledge, of course, but false in fact—as against execution creditors who had their execution duly registered at the Land Titles Office at the time plaintiffs obtained title? There may be cases where equity might demand such a course, but this is not one of them. It is not one of them because here no person can suffer any loss by the order permitting redemption. Under that order, all the plaintiffs have to do is to pay off the execution, and, having done so, whatever loss they may suffer by reason of the failure of the registrar to note Vogt Bros'. execution on the title they are entitled, under the Act, to recoup themselves out of the assurance fund. On the other hand, if Vogt Bros. are not held entitled to redeem, what is their position? They may perhaps be able to recoup themselves out of the assurance fund, but the plaintiffs in that case will hold the land, and if they have sold it to a purchaser at a price over and above the amount of their mortgage, interest and costs, they would retain that excess. Are they entitled to make a profit at the expense of the assurance fund because the court was induced to make an order on a false statement of fact presented by them? I do not think they are. As everyone entitled will be paid in full by permitting redemption in this case, the Chief Justice, in my opinion, exercised proper discretion in the order he made.

I would dismiss the appeal with costs.

Elwood, J.A.

ELWOOD, J.A.:—On April 23, 1914, the appellant commenced an action against the defendant Redekope for foreclosure of a certain mortgage; the other defendants being subsequent encumbrancees. On July 29, 1914, an order *nisi* for foreclosure was issued and on February 20, 1915, final order for foreclosure was made, and under that final order, a certificate of title to the land in question issued to the appellant, on February 24, 1915. On May 12, 1914, the firm of Vogt Bros. recovered judgment against Redekope for $667.54; execution against lands was issued under said judgment on the same day and placed in the sheriff's hands,

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and duly filed in the proper Land Titles Office, to cover the land in question, on May 13, 1914. Vogt Bros. were not made parties to the action and had no notice served upon them of the action at any stage of the proceedings. On June 27, 1917, an application was made to the master in chambers on behalf of Vogt Bros. for an order opening up the final order for foreclosure, and on July 6 the master made an order opening up the foreclosure. From this order, an appeal was taken to the Chief Justice of the Supreme Court of Saskatchewan, who, on January 24, 1919, gave judgment dismissing the appeal and giving Vogt Bros. 2 months from that date to redeem. From this order this appeal has been taken.

Vogt Bros. were apparently not made parties to the proceedings for the order *nisi* because the certificate as to executions—which the appellant's solicitors procured from the registrar of land titles for use on the application for the order *nisi* for foreclosure—did not contain any information that Vogt Bros. had an execution. This was not the fault of the appellant or its solicitors.

The affidavit of Henry Vogt filed on the application before the master in chambers to open up the foreclosure, *inter alia*, contains the following:—

> That in or about the month of June, 1915, I was informed by a party at Neville aforesaid that he had been hired out to do ploughing on the said land and that the same had been purchased from the plaintiff herein by his employer.
>
> Being surprised at such information and that the said land had been sold without said Vogt Bros. being notified of any sale or foreclosure proceedings said firm of Vogt Bros. immediately took up the matter with their solicitor, namely, one William Lucas, of Neville, aforesaid, and instructed him to ascertain particulars of the proceedings.

The affidavit of Harold M. Chase, apparently used on the appeal to the Chief Justice of Saskatchewan, *inter alia*, contains the following:—

> That final order for foreclosure was granted in this action in February of 1915, and that I am informed by the plaintiff and verily believe that it sold the property a few months after obtaining final order.

So that on the application to the master in chambers there was, at least, the suggestion that some person had purchased the land in question from the appellant. There was also the information that on February 24, 1915, a certificate of title to the land in question had issued to the appellant.

It will be observed that over 2 years elapsed from the date upon which Henry Vogt was informed that the land had been

sold by the appellant and the date of the application to open up the foreclosure.

The Chief Justice in giving judgment referred to the case of *Campbell* v. *Holyland*, 7 Ch. D., p. 166, as the leading case in the subject of opening up foreclosures, and expressed the opinion that the case at bar came within the principles laid down by Jessel, M.R., in that case. At p. 172 of the above report, Jessel, M.R., is reported as follows:—

> Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it, but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.
>
> That being so, on what terms is that judicial discretion to be exercised? It has been said by the highest authority that it is impossible to say *à priori* what are the terms. They must depend upon the circumstances of each case. For instance, in *Thornhill* v. *Manning* (1851), 1 Sim. (N.S.) 451, 454, 61 E.R. 174, Lord Cranworth said you cannot lay down a general rule. There are certain things laid down which are intelligible to everybody. In the first place, the mortgagor must come, as it is said, promptly; that is, within a reasonable time. He is not to let the mortgagee deal with the estate as his own—if it is a landed estate, the mortgagee being in possession of it and using it—and then without any special reason come and say, "Now I will redeem." He cannot do that; he must come within a reasonable time. What is a reasonable time? You must have regard to the nature of the property. As has been stated in more than one of the cases, where the estate is an estate in land in possession—where the mortgagee takes it in possession and deals with it and alters the property, and so on—the mortgagor must come much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it. So that you must have regard to the nature of the estate in ascertaining what is to be considered reasonable time.

I apprehend that the statement by Jessel, M.R., above, as follows:—

> Everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order,

would probably not apply to a purchaser from a mortgagee who had acquired a certificate of title under our Land Titles Act. Jessel, M.R., *supra*, was discussing the effect of a title acquired by foreclosure under a system of land registration different from ours, and, under the system of land registration that he was referring

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to, a purchaser of land would be bound by all registrations affecting the land in the registry office. Under our system of land titles a very different condition of affairs exists.

S. 65 of ch. 41 of R.S.S. (1909), which was in force at the time of the granting of the certificate of title to the appellant, is, in part, as follows:—

> 65. The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title, absolutely free from all other incumbrances, liens, estates or interests whatsoever except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title.

I apprehend that a purchaser from a mortgagee who has acquired a certificate of title under our Act would be entitled to rely upon the effect given by our Act to the certificate of title of his vendor. But however that may be, I am of the opinion that once it was brought to the attention of the court that some third person had, or probably had some interest in the land, acquired after the issue of the certificate of title to the appellant, no order should have been made without that person being brought before the court, or, at any rate, notified of the proceedings.

I think it is also worthy of remark the very considerable length of time that elapsed between the date on which the respondents learned of the foreclosure proceedings—and of the sale—and the date upon which they launched their application for opening up the foreclosure. If the purchaser were before the court, information would be obtained as to how, if at all, the purchaser had been affected by this delay; what improvements had been placed upon the land; what payments had been made by the purchaser to the appellant. All of these matters would be matters to be considered before any order opening up foreclosure should be made.

In my opinion, therefore, the appeal should be allowed with costs, the order opening up the foreclosure and the order appealed from both set aside with costs to the appellant and the matter referred back for the purpose of having the purchaser added as a party to the application to open up the foreclosure, with leave to bring such evidence and take such steps as he may be advised against opening up of the foreclosure.

MacDonald, J.

MACDONALD, J. *ad hoc* concurred with Elwood, J.

Appeal allowed.

GREENBERG v. The GRESCA Co.

QUE.

C. R.

Quebec Court of Review, Fortin, Weir and de Lorimier, JJ. November 15, 1918.

CONTRACTS (§ IV B—333)—TRAVELLING SALESMAN—COMMISSION BASIS—AGREEMENT FOR ADVANCES—BUSINESS DEPRESSION—IMPOSSIBILITY OF GETTING GOODS FROM EUROPE—CANCELLATION OF CONTRACT.

Business depression and the impossibility of procuring goods from Europe on account of the war is sufficient to justify an employer cancelling an agreement, with a travelling salesman, selling high-class specialties (luxuries) on a commission basis. Such salesman has no claim for damages, based on an agreement to advance monthly a certain sum to be charged against commissions.

Statement.

APPEAL from the judgment of the Superior Court, Archer, J. Affirmed.

Plaintiff is a commercial traveller who, on about March, 1914, was engaged by the defendant to travel throughout Canada for the sale of high-class grocery specialties at a salary under the form of a commission of 7½%, with the right to draw $300 every month, on his commission.

The plaintiff made a first trip and returned in August, 1914, just as the war was declared. For the reason here mentioned below, the defendant refused to carry out its contract; and numerous interviews and correspondence took place between both parties which ended on the cancellation of the engagement.

The plaintiff sued the defendant and prayed that the contract should be set aside and the defendant be condemned to pay him $4,980, which was calculated on the herebefore advance of $300 monthly.

The defendant contended that the engagement had been cancelled in Augdst, 1914, by mutual consent; and that, in any event, the plaintiff has suffered no damages as it was useless for him since the outbreak of the war, to attempt to sell the defendants' goods.

The fact submitted by the defence was that the war had caused such a depression of business, especially in luxuries, as high-class grocery specialties, that the plaintiff's expenses in continuing to carry out his contract would have obviously exceeded his commission. Moreover, it was then impossible for the defendant company to get any goods from Europe to supply the plaintiff. All those facts amounting, said the defendant, to *force majeure*.

The Superior Court dismissed the action as follows:—

Considering it is proved that the plaintiff was engaged by the company defendant under the terms and conditions mentioned in the following letter,

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which letter was subsequently confirmed by the parties: "New York, March 20th, 1914.—Mr. Albert Greenberg,—We hereby confirm the conversation had with you to the effect that an arrangement is made with you, for you to travel for us from and including Winnipeg, Manitoba, to the western coast of Canada on a commission basis, which will allow you 7½% on foreign goods, and 5% on domestic goods.

On all goods sold by you direct, and on all mail orders received by us from people you have sold to, to be figured on the net amount actually received by us in payment of our bills. No allowance to be made for goods sold, but which we have found it impossible to deliver, or which have been cancelled by buyers, or claims that are allowed by us.

We will allow you to draw an advance of $300 per month on your commission account.

You are to pay all your own travelling and other expenses, but we will furnish the samples and the trunks to carry same in, these of course to remain our property, excepting the samples that are actually used for demonstrative purposes.

It is understood that you will start in our employ on May 5, 1914, if not earlier. That the territory before mentioned is to be covered twice a year at a time to be mutually agreed upon.

It is also agreed that you will have the privilege of carrying four other lines, provided that they do not conflict with ours.

This agreement shall be good for the years 1914 and 1915, but is subject to our confirmation after having made a thorough investigation in regard to your good self.

It is mutually agreed, unless you are notified by us to the contrary, you are not to solicit business from the hotels of the Grand Trunk System. Truly yours,

(Signed) GRESCA COMPANY, S. BRADY, Prest.

Considering that the plaintiff was not engaged by the defendant at a fixed salary, but on a commission basis which allowed him to draw an advance of $300 per month on his commission account;

Considering that by the terms of the agreement above mentioned, the plaintiff was to pay all his travelling and other expenses;

Considering it is proved that towards the end of May, 1914, the plaintiff left on a trip to the Western coast as far as Victoria, B.C., and returned on or about August 1, 1914, and sold goods for the defendant, amounting in all to the sum of $6,493 of foreign goods and $2,005.72 of domestic goods; that up to August 1, the plaintiff had received from the defendant the sum of $1,098.90, leaving to his debit the sum of $587.28;

Considering it is proved that the goods sold by the defendant are what are known as "high-class grocery specialties" (luxuries) for which there was very little demand in western Canada, owing to the business depression then existing;

Considering it is proved that at the declaration of the war at the commencement of August, 1914, the business depression was more and more pronounced in western Canada, and there was no market for such high-class grocery specialties as those sold by the defendant, and the evidence shews that this state of things continued during the year 1915;

Considering it is proved that the plaintiff's expenses when travelling in western Canada would amount at least to $100 a week and that even in the

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trip made at the end of May, 1914, he did not earn enough commission to pay the expense incurred;

Considering, under the circumstances proved, it is obvious that the plaintiff would not have earned sufficiently to even pay his travelling expenses, had he made his trips in western Canada during the year 1915;

Considering that the plaintiff has failed to prove any damages for which the company defendant could be held responsible;

Seeing arts. 1074 and 1075, C. C.;

Considering though the plaintiff has proved the contract between the defendant and himself, he had failed to prove the other material allegations of the declaration;

Considering the defendant has proved the material allegations of the defence;

Doth dismiss the action with costs.

Dessaulles, Garneau & Vanier, for plaintiff; *Duff & Merrill*, for defendant. *Affirmed in review.*

SMITH v. SCHON.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. May 2, 1919.

CONTRACTS (§ IV E—367)—SALE OF UNISSUED SHARES IN COMPANY—IMPOSSIBILITY OF PERFORMANCE—REMEDIES—ELECTION.

Where a contract is for certain specified stock of a company and a sufficient number of unissued shares to give the purchaser a controlling interest in the company, both parties believing at the time of entering into the contract that such unissued shares existed when in fact they did not exist. The purchaser has the right at his election to the enforcement or rescission of the part of the contract which can be carried out, and that the amount paid for the unissued shares be returned to him, and to damages in respect of these shares.

[*Mortlock* v. *Buller* (1804), 10 Ves. 292, 32 E.R. 857, applied.]

Statement.

APPEAL from the judgment of Harris, C.J., in favour of plaintiff in an action against defendants claiming (a) against the defendant Schon the specific performance of a contract for the sale by Schon to plaintiff of certain shares in the capital stock of a company known as the Tally Ho Company, belonging to the estate of one Alexander Bond, deceased, and also the capital stock of one Ernest Havill or his wife under offer or in the possession of said Schon, (b) damages for breach of contract, (c) as against the defendant Finn an order for the transfer of said shares of the estate of Bond with an indemnity as to calls and other liabilities on said shares from said Schon; (d) as against the defendant the Tally Ho Co., Ltd., an order for the transfer of said shares on the books of the company; (e) such other relief as plaintiff might be entitled to.

C. J. Burchell, K.C., and *J. McG. Stewart*, for appellants; *W. L. Hall*, K.C., for respondent.

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RUSSELL, J.:—It is not necessary for the purpose of my opinion in this case to question any of the findings of fact made by the Chief Justice. There is one "finding" towards the close of his decision which although it has the appearance of a finding of fact, seems to me to be rather an interpretation of the agreement which, as a finding of fact, would not, in my opinion, be in accordance with his other findings and as an interpretation of the contract is not, I think, warranted by the facts as found in the earlier part of the decision. I allude to the passage in which he says:—

I find that the whole agreement between Smith and Schon was that Smith and his friends were to get eight-fifteenths of the total issued stock of the Tally Ho Company by the transfer of the Bond and Havill stock and by the subscription for new stock.

As I understand the specific findings of fact, I incline to the view, not without misgiving, that there was no such agreement. From the statements of fact set out in the first eleven findings of the Chief Justice, I take the result to be one or other of two things. Either there was an agreement to transfer the stock in question to the plaintiff with a representation that such transfer would secure to him a controlling interest in the company, or there was an agreement for the transfer on condition that it would result in such a controlling interest being secured. In either case, the plaintiff has clearly the right to have his money returned, in view of the fact that it has become impossible to carry out the agreement between the parties in such a way as to secure for the plaintiffs the controlling interest which was the basis of the negotiations. There is no unissued stock which can be transferred, and if the apparent issue could be cancelled so as to leave a number of shares unissued, the defendant, Schon, would have no control over its issue and could not transfer it to the plaintiff without the assent of Finn, who refuses to concur in the transfer. So far as I have been able to learn from my perusal of the evidence, he is under no obligation to consent to such a transfer.

Probably it will not be necessary to decide whether the plaintiff would be entitled to specific performance of the contract to transfer the Bond and Havill stock, because the plaintiff, as I understand, has no use for that stock and does not wish to have it without the stock that would secure the control of the company. The specific performance of the contract with this latter term as a part of it is an impossibility for the reason already stated. Of course, I agree

with my brother Ritchie that the plaintiff if he chooses is entitled to have specific performance of the contract in so far as the defendant is able to perform it with compensation for the part that cannot be performed specifically, and I agree that the plaintiff cannot be held to have elected, by having brought this action, to take the Bond and Havill shares if he does not care for them without the others, which it is impossible to give him.

The question as to damages presents some difficulty. The Chief Justice has expressed the opinion that Schon honestly believed that there was unissued stock and that the agreement which he was in a position to carry out would give the plaintiff a controlling interest. There can be no damages, therefore, on the footing of a fraudulent representation. That is too well settled, since the decision in the leading case of *Derry* v. *Peek* (1889), 14 App. Cas. 337, to call for a moment's consideration.

Neither can there by any decree based on the notion of a liability on the part of the defendant to make good his representations.

The decision of Stephen, J., in *Maddison* v. *Alderson* (1881), 7 Q.B.D. 174, 5 Ex. D. 293, 8 App. Cas. 467, has done for that theory what *Derry* v. *Peek* has done for the notion of a liability in damages for a representation which the defendant has made, believing it to be true, but which he ought to have known was untrue and would have known to be untrue if he had taken pains to inform himself on the subject.

But it is true, nevertheless, that the plaintiff has made a contract which he is unable to perform. He has made a contract to deliver the Havill stock, the Bond stock and a block of stock which would if it could be issued and delivered have given the plaintiff a controlling interest in the company. This contract has been broken, and the measure of damages is not merely the value of the stock or the difference between that value and the price. The defendant knew the purpose for which it was being purchased. That purpose would have been accomplished if the defendant had been able to perform his agreement and had done so. He has, therefore, to be placed in the same position as if the accomplishment of that purpose had been one of the things contracted for. I think the practical result is the same as that arrived at by a slightly different route, from that followed by my brother Ritchie. I agree with him also as to the disposition of the costs.

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LONGLEY, J.:—I have read over the judgment of Ritchie, E.J., and I am entirely in favour of the judgment he has reached so far as he goes. I am, however, disposed to think that this court has the power to compel Schon to give $4,000 worth of his own shares instead of the $4,000 worth of shares which he agreed to give.

Upon what principle are we to make the distinction? Schon himself took the $4,000 and agreed to give shares representing the $4,000. He ought to have known that he had not the power to give unissued shares, and if he did not know the fact, then he is bound to make it good from his own shares of which he owns more than $4,000 worth.

The plaintiff bargained for and insisted throughout on having a majority of the stock—eight-fifteenths. He will only have four-fifteenths, if he merely accepts what is given him in the written contract, the shares of Bond and Havill. He must have $4,000 more of the stock which he bargained and paid the money for to Schon. Schon undoubtedly has more than $4,000 worth of stock and, therefore, he could be rightly decreed, it seems to me, by this court, to hand over his shares to the extent of $4,000, instead of the $4,000 which he agreed to give but which he cannot give as there are no unissued shares left.

I cannot agree with the counsel for the plaintiff that the proper remedy in this matter is to regard these shares as not issued. Nor do I think this is the action or that we have the right to bring about any such result if it could be aimed at, but I think I agree with the Chief Justice that it is fair and proper that Schon could be called upon to make good the $4,000 worth of shares out of his own shares.

In any case, I would hold that the plaintiff is not bound to take the $4,000 worth as required by the written contract, but may refuse it; and I also agree if my version of the law is incorrect that the amount of the damage which the plaintiff is put to on account of the rescission should be referred to arbitration.

My judgment is for upholding the judgment below in all points.

Drysdale, J. DRYSDALE, J., agreed with Ritchie, E.J.

Ritchie, E. J. RITCHIE, E.J.:—The plaintiff's original case as set out in his statement of claim is for specific performance and damages. The contract in respect of which the action was brought is as follows:—

William Schon hereby agrees to sell and A. M. Smith to buy, all the capital stock of the Tally Ho Co., belonging to the estate of Alexander Bond, and also the capital stock of Ernest Havill and/or, his wife, now under offer or in possession of William Schon and at actual cost to him.

Dated at Halifax this 11th day of Feb. 1919.

WILLIAM SCHON
A. M. SMITH.

The Chief Justice was the trial judge and he has made the following findings of fact:—

1. At the time of, and prior to, the making of the contract, the plaintiff was the president of, and he and his brother Howard H. Smith were largely interested as shareholders in, the Scotia Pure Milk Co.

2. That the defendants Schon and Finn and one Havill and the executor of Alexander Bond were the owners of all the stock of the Tally Ho Co., Ltd., their respective holdings being in proportion of Schon 3, Finn 3, Havill 2 and Bond estate 2.

3. That the business of the Tally Ho Co., Ltd., had not prior to the date of the agreement been profitable; that the said company had large liabilities and little or no working capital, and Schon, the president of the company, was anxious to get more capital in the business and to be relieved of the burden of financing it.

4. That Schon, in the latter part of January 1918, sent word to the plaintiff that he would like to see him about the Tally Ho matter, and this led to a meeting of the plaintiff and defendant Schon, when the latter proposed that plaintiff should become interested in the company.

5. That plaintiff and his brother Howard H. Smith, who afterwards carried on the negotiations with defendant Schon, told Schon that they would not go into the matter unless they and their friends connected with the Scotia Milk Co. got a majority of the shares of the capital stock of the Tally Ho Co. and Schon fully understood and agreed to this, and it was the basis of all the negotiations.

6. That Schon gave plaintiff, or his brother, an audited statement of the Tally Ho Co., shewing the issued capital of the company to be $10,000, and verbally represented to the plaintiff and his brother Howard H. Smith that $10,000 was the total issued capital, that there was no watered stock issued and the balance of the authorized capital, $15,000.00, was still unissued, which representations plaintiff and his brother believed and relied upon, when the plaintiff entered into the contract sued upon; and the plaintiff and his friends subscribed, and paid, for the $4,000 of new stock hereafter referred to relying upon the truth of these representations.

7. That the defendant Schon had at the time of the negotiations either actually purchased, or had an agreement with Havill to buy all the stock which Havill or his wife had in the company for $2,000 and before the agreement sued on was made, Schon shewed the transfer of the Havill stock or interim stock certificate to Howard Smith and told him he had bought Havill's whole interest in the Tally Ho Co.

8. That Schon also at this time had an oral agreement with the solicitors of the estate of Alexander Bond to acquire all the interest of the estate of Bond in the stock of the Tally Ho Co. for the sum of $2,000 on condition,

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however, that he also purchased a claim of the estate against the Tally Ho Co. for $4,440 and paid that sum to the estate.

9. That Schon represented to Smith that he had an agreement to acquire all Bond's interest in the company.

10. It was agreed between plaintiff and defendant that the Scotia Pure Milk Co., and the Smiths and their friends interested in that company, should take $4,000 of the unissued stock of the Tally Ho Co., and that Schon should take an additional $1,000 of stock, thus bringing the issued capital up to $15,000, of which plaintiff would have 8-15ths, *i.e.*, 2-15ths, the Havill stock, 2-15ths, the Bond stock and 4-15ths the new stock.

11. That plaintiff, as soon as the agreement sued on was signed by Schon, paid the Tally Ho Co. $4,000 in cash for the new stock and stock certificates were issued to his nominees therefor as follows: $2,000 or 20 shares to the Scotia Pure Milk Co.; $1,000 or 10 shares to C. N. Butcher; $500 or 5 shares to C. J. Butcher; and $500 or 5 shares to H. H. Smith.

12. That the $4,000 so paid by the plaintiff to the Tally Ho Co. was deposited to the company's credit with its bankers, but credited to Schon on the books of the company, and subsequently the company gave Schon $2,000 of it with which he purchased the Havill stock, $500 was previously advanced to Schon out of the expected payment, and the balance of $1,500 was used by the Tally Ho Co. in paying its own indebtedness.

13. That at the time of the negotiations and when the agreement was made and the new stock purchased and paid for, the directors of the Tally Ho Co., Ltd., were the defendants Schon and Finn—Schon being the president—Alexander Bond had been and was a director prior to and at the time of his death on December 6, 1917.

14. That it was no part of the agreement between plaintiff and defendant that the whole or any part of the transactions referred to were to be subject to the approval of the defendant Finn, but, on the other hand, defendant Schon represented to plaintiff that he had full control of the company—that Finn was controlled by him—and he, Schon, would guarantee to put the matter through.

15. That immediately after the agreement sued on was executed, a meeting was held at the Tally Ho Co.'s office—which was attended by Schon, the plaintiff and his friends who were taking the new stock, and the plaintiff and Mr. Butcher were elected directors, Schon resigned as president and plaintiff was elected as president in his place. Butcher was also made manager.

16. That subsequently, plaintiff tendered $4,000 to Schon, and demanded a transfer of the Bond and Havill stock which however were not transferred.

The Bond stock was transferred by the executrices of Bond to the defendant Finn, after the making of the written agreement sued on. The trial judge has made the further finding of fact that the defendant Finn knew, at the time the Bond stock was transferred to him, that the same was covered by the agreement between the plaintiff and Schon and that the transfer was made to enable Schon to evade his agreement with the plaintiff.

I accept the foregoing findings of fact.

There is a further important fact as to the existence of which

there is no dispute and that is that there was no unissued stock of the Tally Ho Co. The Chief Justice has made the further finding, namely; "that the whole agreement between Smith and Schon was that Smith and his friends were to get eight-fifteenths of the total issued stock of the Tally Ho Co. by the transfer of the Bond and Havill stock, and by the subscription for new stock."

I see no reason to disagree with this finding and accept it. It is clear that, so far as the stock for which the $4,000 was paid by the plaintiff is concerned, the contract is impossible of performance, because there is no unissued stock to be delivered.

The contract was partly written and partly oral; the part relative to the Bond and Havill stock being in writing and the part relative to the stock for which the $4,000 was paid being oral. It is contended that part of the entire contract being incapable of specific performance, the court will not decree specific performance of the other part of the contract. With this contention I am unable to agree. The rule is that where the vendor has not the whole interest he has contracted to sell, he cannot force part of the contract on the purchaser; but, on the other hand, the purchaser can insist on having all that the vendor has, with compensation for the part which he has not.

In *Mortlock* v. *Buller*, 10 Ves. 292, at 315, 32 E.R. 857, Lord Eldon said:—

> If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he had not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole.

The law as stated by Lord Eldon is the law to-day, but it may be that it is not the plaintiff's desire or to his interest to become a minority shareholder in the Tally Ho Co. When he brought this action he was under the impression that the $4,000 stock had been issued to the Nova Scotia Pure Milk Co. Part of the contract must not be thrust on him to his disadvantage.

Under ordinary circumstances the bringing of the action would be an election on the part of the plaintiff to have that part of the contract which is in writing enforced, but this, I think, is not so

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under the circumstances of this case. In order to make an election there must be knowledge of the situation and when the action was brought the plaintiff thought and had good reason to think the $4,000 of new stock had been issued to his associates, the Scotia Pure Milk Co., as set out in the 7th paragraph of the statement of claim, but this turned out not to be so, and at the trial the entire contract was sought to be enforced. This claim must fail because as to the unissued stock it was not possible of performance at the time of the contract; but as to the written part of the contract the plaintiff has his election to enforce or rescind.

Amendments were made at the trial entitling the plaintiff to claim on the whole contract as found by the Chief Justice. The trial judge in his decision says:—

> The fact being that the authorized capital stock of the company was only $25,000 all of which was previously issued, there is a practical difficulty in working out the proper remedy. Schon should, I think, be compelled to transfer 8-15ths of the $25,000, which is $13,000, of the stock to Smith and his friends, but this cannot be done unless an agreement is reached between the plaintiff and the holders of the $4,000 of new stock as to the proportion each is to receive of this stock, and, of course, the certificates for the $4,000 will have to be surrendered to the company and cancelled.

This is the only part of the decision with which I am unable to agree, but I cannot agree to a remedy which I think is not open under law. The contract was for unissued shares in the Tally Ho Co. The plaintiff, of course, thought that such shares existed and the Chief Justice has found that the defendant Schon probably honestly believed that they existed; as a matter of fact, these shares, part of the subject-matter of the contract, did not exist. The action is for specific performance; it fails in part because part of the subject-matter of the contract did not exist; the court, in my opinion, has no jurisdiction to say the contract cannot be enforced in consequence of the non-existence of part of the subject-matter, but a decree will be made that the defendant Schon deliver shares which were no part of the subject-matter of the contract. What was agreed to be sold was unissued shares in the company, of course owned by the company. The legal proposition that shares previously to the contract issued to Schon and owned by him, and which were not any part of the subject-matter of the contract, can be decreed to be delivered, is one I am wholly unable to agree to. I do not think any authority can be

found for such a proposition, and nothing but authority to which I am bound to defer would induce me to accept it as sound.

In my opinion, the decision and order made thereon should be varied and a decree should pass giving the plaintiff the right at his election to the enforcement or rescission of the written part of the contract; that the $4,000 paid for the unissued shares be returned to the plaintiff; and that the plaintiff is entitled to damages for the breach of contract in respect of these shares, the amount of such damages to be ascertained by a reference.

The plaintiff to have the costs of the appeal. Any necessary amendment of the pleadings will be made.

Chisholm, J.

CHISHOLM, J.:—The findings of the trial judge were very strenuously attacked on the argument by counsel for appellants, but effect cannot be given to their contentions. Where the evidence of the witnesses upon the disputed questions of fact in this case is contradictory, I think the court of appeal is obliged, under the circumstances, to accept in their entirety the findings of the judge. The principles which should guide an appeal court as to disputed facts is well known and they have recently been laid down with emphasis in cases of binding authority.

Anglin, J., in *Morrow Cereal Co.* v. *Ogilvie Flour Mills Co.* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, quotes from decisions of the Judicial Committee of the Privy Council, language which is worth repeating here.

In *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 38 O.L.R. 556, 21 Can. Ry. Cas. 377, Lord Buckmaster, L.C., said:—

> Upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt on the soundness of his conclusions.

And in *Wood* v. *Haines* (1917), 33 D.L.R. 166 at 169, Lord Wrenbury observed:—

> It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial judge who has seen and watched them, whereas the appellate judge has had no such advantage.

With the facts as they were found by the trial judge, we are left only with the duty of applying the proper remedy; and on that part of the case I desire to express my concurrence with Ritchie, E.J.

Judgment accordingly.

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DEWITT v. DEWITT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

ALIMONY (§ II—5)—INTERIM—NO APPLICATION FOR—COURT CANNOT GRANT PERMANENT ALIMONY PRIOR TO THE DATE OF THE DECREE.

Where no application has been made for interim alimony, the court cannot carry the permanent alimony back to a date before the decree. [*Nicholson* v. *Nicholson*, 31 L.J.P. 165, *Cooke* v. *Cooke* (1812), 2 Phillimore 40, followed.]

Statement.

APPEAL from the trial judgment in an action for alimony. Judgment varied.

H. S. Lemon, for appellant; *L. McTaggart*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Elwood, J.A.

Lamont, J.A.

LAMONT, J.A.:—In this case the trial judge found on conflicting evidence that the defendant was guilty of legal cruelty which would have justified the plaintiff in leaving him, also that he lived separate from her without sufficient cause and under circumstances which would entitle her by the law of England to a decree of restitution of conjugal rights, and he granted the plaintiff alimony and the custody of her children. There was evidence upon which to base the above finding, and in my opinion it should not be disturbed.

In addition to allowing the plaintiff alimony at $50 per month, to commence November 1, 1918, a few days after judgment was given, the judge awarded her $600 arrears of alimony. It was against this $600 award that the greatest stress was laid on the argument before us.

Alimony is the provision made by the court for a wife who is a party to a matrimonial suit, and is either temporary or permanent. Temporary alimony, or, as it is sometimes called, "interim alimony," is granted to enable the wife to live during the progress of the suit, while permanent alimony is the provision made for her after final decree has been pronounced. Brown & Powles on Divorce, 7th ed., at p. 135.

Interim alimony in the ecclesiastical courts is held to be payable from the service of the citation.

Nicholson v. *Nicholson* (1862), 31 L.J.P. 165, permanent alimony is payable generally from the date of the decree.

MacQueen on Husband and Wife, 4th ed., 218.

In *Soules* v. *Soules* (1851), 3 Gr. 113, permanent alimony of £25 a year was granted. It was argued that this sum should be

allowed to the wife from the date when she was forced by her husband's cruelty to live separate from him, or, if not from that date, from the commencement of the suit.

In giving the judgment of the court, Sprague, V.-C., at p. 116, quotes with approval the following passage from the judgment of Sir John Nicholl in *Cooke* v. *Cooke*, 2 Phillimore 40 at 46:—

I can see no ground to depart from the ordinary rule of these courts by carrying back the permanent alimony beyond the date of the sentence. It is clear, from several cases, that the true rule of the court is to decree permanent alimony from the date of the sentence.

The Vice-Chancellor then goes on to say, p. 117:—

There would, moreover, be this inconsistency in ordering permanent alimony to be allowed before decree—that interim alimony is only allowed upon such a scale as to supply the reasonable necessities of the wife during the pendency of the suit, while she is establishing her rights; whereas permanent alimony is allowed upon a more liberal footing. If, therefore, the allowance for permanent alimony could be carried back to an early period of the suit, the plaintiff could, in many cases, thus obtain more than if interim alimony had been applied for according to the ordinary rule.

In the present case no application was made for interim alimony. The permanent alimony, on the above authorities, can be given only from the decree.

The $600 awarded to the plaintiff could only be given by carrying the permanent alimony back to a date before the decree, and, as this cannot be done, the award to that extent must be disallowed.

In *Maday* v. *Maday* (1911), 4 S.L.R. 18, it would appear that I allowed arrears of alimony to the plaintiff. So far as the report and my notes on that case shew, no question was raised as to the right to do so. The above authorities, however, would seem to establish conclusively that the court should not award permanent alimony except from and after the date of the decree. The appeal should, therefore, be allowed to the extent of the $600 arrears, and the judgment below reduced by that amount.

As to costs of this appeal. Ordinarily speaking, a successful appellant is entitled to his costs. The rule, however, appears to be different in alimony actions.

In *Medway* v. *Medway*, [1900] P. 141, the wife obtained an order under the Summary Jurisdiction Act, 1895, by which she was allowed 10 shillings a week. The husband appealed, and was successful on appeal; but the wife was allowed her costs of appeal.

In giving judgment Jeune, P., at p. 144, said:—

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The rule we have before acted upon, and which we intend to lay down, is that, where a wife has obtained a decision in her favour and comes here to support it, she ought to have her costs. The appellant must, therefore, be ordered to pay the costs of the respondent upon this appeal.

ELWOOD, J.A.:—The plaintiff was married to the defendant on June 25, 1906, and this action was commenced on June 18, 1918, *inter alia*, for alimony and interim alimony, and the custody of the children of the marriage.

The action was tried before Pigelow, J., who, on October 7, 1918, ordered that there be judgment for the plaintiff for the custody of the children and for alimony, which he fixed at $50 a month, and arrears of alimony at the same rate from November 1, 1917, to the date of the judgment, amounting to $600. From this judgment the defendant has appealed.

There was considerable conflict of testimony as to the conduct of both the plaintiff and defendant, but there was evidence to justify the trial judge in coming to the conclusion that the respondent was entitled to the custody of the children and to alimony, and therefore the judgment, in so far as it ordered that the custody of the children be given to the respondent and that she be entitled to alimony, should not be disturbed.

The only question to consider is: Was the trial judge justified in ordering a payment of alimony prior to the date of the judgment? The basis of an application for interim alimony is that the wife is without means. *Noblett* v. *Noblett* (1869), L.R. 1 P. & D. 651. In the case at bar no application was ever made for interim alimony. The alimony granted was not *pendente lite*, but was permanent alimony. The question of the date from which permanent alimony is payable is discussed by Spragge, V.-C., in *Soules* v. *Soules*, 3 Gr. 113, and after reviewing the authorities the conclusion there reached is that the practice in England is to allow permanent alimony only from the date of the decree. The evidence discloses no ground for any exception in the case at bar. I would therefore vary the judgment appealed from by ordering the alimony to be payable from October 7, 1918, being the date of the order for judgment.

In actions such as the present one the rule is that the wife is entitled to her costs. See *Soules* v. *Soules*, *supra*. It is quite true that the judgment appealed from has been reduced, but she was obliged to come into court to oppose the appeal upon other

grounds upon which the appellant has failed. I would allow the respondent her costs in this appeal.

Judgment accordingly.

JACOBS v. COLT.

Quebec Court of Review, Demers, Archer and Coderre, JJ. November 8, 1918.

HUSBAND AND WIFE (§ I A—16)—NECESSARIES—LUXURIES—WHAT ARE—POSITION OF HUSBAND—HUSBAND'S PROMISE TO PAY.

Dresses at $150 and $135 for a wife whose husband earns $225 a month are not necessaries but luxuries. The fact that the husband said to send the bill over and he would see to it, is not a promise to pay if the husband at the time did not know what goods had been sold to his wife but believed them to be necessaries for which he would have paid.

Statement.

APPEAL from the judgment of the Superior Court, delivered by Guerin, J., on June 8, 1917. Reversed.

The plaintiff claims from the defendant $286.25, being for the price and value of goods supplied by the plaintiff to the defendant's wife as per account.

The defendant pleaded as follows:—The plaintiff has no *status* to recover the present alleged claim. The defendant is separate as to property from his wife; and the goods, if ordered at all, were ordered by the defendant's wife to whom the account was charged; the said orders were never authorized by himself and he was not in any way a party to the alleged transaction. Furthermore, the said goods were unnecessary under the circumstances, as they were luxuries beyond the means of the defendant who has never received any benefit or value from the said transaction.

The Superior Court gave judgment in favour of the plaintiff for the amount demanded.

Trihey, Bercovitch & Co., for plaintiff; *Elliot, David & Mailhiot*, for defendant.

Archer, J.

ARCHER, J.:—The account is composed of the following items: 1916, March 30, 2 imp. tulle and net dresses, $150; March 31, tan suit, $135; April 11, one veil, $1.25, making a total of $286.25.

It appears by the evidence that the defendant and his wife were not living together since the middle of February. The defendant left his wife and she took an action in separation from him and she got judgment in her favour ordering the separation and the defendant was condemned to pay her an alimony amounting to $125 a month.

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Up to that time the defendant, who was earning $225 a month, allowed his wife $50 a month for her clothing and sometimes he would allow her to get some extras.

We have not here to discuss the position of the parties as if separated as to property. Though they were married in England, there is no proof of the law of England and we are governed by the laws of this province where the community of property exists, unless there is a special marriage contract. Art. 175 of our Civil Code says:—

175. A wife is obliged to live with her husband and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessaries of life, and according to his means and condition.

Art. 1280 C.C. says:—

1280. The liabilities of the community consist: 2. Of the debts, whether of capital sums, arrears or interest, contracted by the husband during the community, or by the wife with the consent of the husband saving compensation in cases where it is due.

The tacit mandate which the wife may have under art. 1280 C.C. is, in my opinion, limited. Laurent, vol. 22, No. 105, *Pandectes Françaises*, No. 5, 5164, 5165.

See also the following authorities: *Brown* v. *Guy* (1881), 4 L.M. 264; *Sheridan* v. *Hunter* (1894), 6 Que. S.C. 258; *Voligny* v. *Protineau* (1842), 3 Rev. Leg. 63; *Pichette* v. *Morissette* (1904), 25 Que. S.C. 46; *Morgan* v. *Vibert* (1906), 15 Que. K.B. 407.

The dresses in question were sold to the defendant's wife and charged to her personally. It is evident that the plaintiff did not intend giving credit to the defendant, but to his wife. As there was community of property, the plaintiff took the present action against the defendant. Following the principles of law above cited, I am of opinion that the defendant is not bound to pay said bill, as the effects therein mentioned are not for necessaries of life, but are to be considered as luxuries. Dresses at $150 and $135 for a wife whose husband earns $225 are to be considered as luxuries. If the plaintiff is to lose the amount claimed, it is due to her own negligence, not ascertaining the exact position of her client.

I am to reverse the judgment and dismiss the action with costs of both courts.

NOTE.—It was claimed by the plaintiff that the defendant promised to pay the amount claimed.

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True it is that the defendant said to send the bill over and that he would see to it. But it is to be remembered that at that time he did not know what goods had been sold to his wife. Had they been necessaries of life he would have paid them. As soon as he found what the bill was for he referred the matter to his attorneys.

Judgment:—Seeing arts. 175 and 1280 C.C.;

Considering that the effects sold, price of which is asked by the present action cannot, under the circumstances proved, be considered as necessaries, but, on the contrary, should be considered as luxuries;

Considering that the defendant cannot, under the circumstances proved, be held liable for the price of said effects which were sold to his wife;

Considering the plaintiff has not proved the material allegations of her declarations and the defendant has proved the material allegations of his defence;

Considering there is error in the judgment of the first court, doth reverse said judgment and proceeding to render the judgment which should have been rendered by the first court, doth dismiss said action with costs of Superior Court and of this court.

Appeal allowed.

MARITIME MANUFACTURERS AND CONTRACTORS Ltd. v. BERRINGER.

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Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm and Mellish, JJ. April 9, 1919.

MISTAKE (§ III B—30)—SALE OF BUSINESS—FORMER OWNER AS AGENT IN CARRYING ON NEW BUSINESS—SALE TO CREDITOR OF FORMER FIRM WHO DOES NOT KNOW OF CHANGE OF OWNERSHIP—RECOVERY OF PRICE OF GOODS SOLD.

The purchaser of a business, who engages the former owner to act as his agent in carrying on the business, cannot recover the price of goods sold to a creditor of the former firm, who thinks he is still dealing with the old firm, and that the amount of the purchase will be credited on the account, before he has given such purchaser notice of the change of ownership and that the goods are being supplied by him.

[*Boulton* v. *Jones* (1857), 2 H. & N. 564, 157 E.R. 232, followed.]

Statement.

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action to recover the price of goods sold and delivered.

D. F. Matheson, K.C., for appellant; *W. L. Hall*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—The plaintiff company sues for goods sold and delivered. There is a general denial only. On the trial, it

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appeared that the defendant had lent money to the firm of C. A. Strum & Son, of which the partners were one Harris W. H. Strum and his father, C. A. Strum, and who prior to 1916 carried on a woodworking business at Mahone Bay. In 1916 the Strums got into difficulties and the defendant sued and recovered a judgment against them for the money loaned. Under an execution issued on this judgment and a number of other executions, all of the personal property of the firm of C. A. Strum & Son was sold by the sheriff and the proceeds divided among the creditors. After crediting the amount allotted to defendant's execution out of the proceeds of the sheriff's sale, defendant took a note for the balance of the claim from Strum. At the sheriff's sale the personal property was purchased by A. C. Zwicker, who continued to carry on the business—Harris W. H. Strum acting as his agent until June 10, 1918, when the plaintiff company was incorporated and took over the business which the company thereafter owned and carried on. It appears that on May 14, 1918, when Zwicker was the proprietor of the business, and before the plaintiff company was incorporated, the defendant spoke to Harris W. H. Strum, the manager, about supplying the defendant with some lumber. The defendant says he thought he was buying it from Strum and he says he had previously arranged with Strum that the goods were to be turned on his judgment. On the other hand, Strum denies the alleged arrangement and says that defendant knew that Zwicker owned and was carrying on the business.

The first goods were supplied to defendant on June 8, two days before the plaintiff company was incorporated, amounting to $23, and the account was rendered in the name of A. C. Zwicker and was marked "Strum account" and there was a memorandum on this account "kindly place above to credit of note" and this was signed C. A. Strum & Son.

Further goods were supplied by the plaintiff company to defendant on the 26th and 29th days of June, amounting to $118.47. On July 3, further goods were supplied by plaintiff company amounting to $38.75, and on July 6 still other goods amounting to $10.50. On July 5, an account was rendered by the plaintiff company of the goods supplied on the 26th and 29th June and 3rd and 6th days of July, and a draft was on July 6 drawn by the plaintiff company for the amount, $167.72, and on

the same day defendant was notified by letter that the plaintiff company had supplied all these goods. He kept the goods and refused payment of the draft and later, on July 10, got other goods amounting to $38.84.

It is left uncertain by the evidence as to just what portion of the goods furnished on June 26 and 29 had been used before July 6, or whether they had not been all used before the latter date. It is, I think, clear that the goods furnished on July 3 and 6 were still on hand on July 6, when defendant had notice that they had been supplied by the plaintiff company. Having kept and used them with knowledge that they were the goods of the plaintiff company, he must pay for them and also for the goods purchased on July 10. The total of these three items is $88.09, for which the plaintiff company is entitled to judgment.

On the authority of *Boulton* v. *Jones*, 2 H. & N. 564, 157 E.R. 232, it is, I think, clear that plaintiff company cannot recover for the goods purchased and used before July 6 and which defendant supposed were supplied on his contract with Strum.

It was suggested that defendant knew from the beginning that Strum did not own the business and was only an agent and there is evidence that he knew that Zwicker was the real proprietor, but assuming this to be so, it does not help the plaintiff company. It may be that defendant knew he was actually contracting with Zwicker, but that cannot hold plaintiff company. *Boulton* v. *Jones* would prevent plaintiff company from recovering whether the contract was made with Strum or Zwicker.

The judgment below will be reduced to $88.09, for which plaintiff company will have judgment with costs in the court below. There will be no costs to either party on the appeal.

RUSSELL, J.:—I agree. Russell, J.

CHISHOLM, J.:—I agree. Chisholm, J.

RITCHIE, E.J. (dissenting):—I agree with my brother Mellish and would dismiss the appeal with costs. I may add that it is perfectly clear that all Strum's stock-in-trade had been sold by the sheriff, and I think equally clear that this was known to the defendant, who, therefore, could not have thought he was buying Strum's lumber. The evidence which the defendant gave on cross-examination strikes me as not being straightforward. Ritchie, E. J.

MELLISH, J. (dissenting):—I agree with the trial judge that Mellish, J.

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the defendant purchased the goods the price of which is sued for from the plaintiff and not from Strum, and that the plaintiff is therefore entitled to recover the price. Strum denies that he made any bargain with Berringer, and the trial judge apparently believed him. I further think that the evidence fully justified such a finding and shews that defendant always knew when ordering the goods that he was buying, not Strum's property, but the property of somebody else on whose behalf Strum was acting.

It is, I think, immaterial whether Berringer knew who such party was or not. His attempt to escape payment is apparently the result of a desire to get the debt of an insolvent paid at the expense of somebody else. I have the misfortune to differ from my brethren in this case, but I cannot bring myself to believe that the defendant at any time thought he was buying Strum's goods. Such a finding is, I think, contrary to all the credible evidence in the case.

I would dismiss the appeal with costs.

Judgment reduced. No costs to either party on appeal.

SASK.

C. A.

A. MACDONALD Co. v. DAHL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 19, 1919.

BILLS AND NOTES (§ I D—44)—PROMISSORY NOTE—PROVISION FOR PAYMENT OF ATTORNEY FEE—BILLS OF EXCHANGE ACT—NOT FOR AMOUNT CERTAIN—VALIDITY AS NOTE.

A document purporting to be a promissory note but containing a provision for payment of "10 per cent. attorney fee," is not for a sum certain within the meaning of the Bills of Exchange Act, and is not a promissory note.

Statement.

APPEAL by defendants from the trial judgment in an action on a document purporting to be a promissory note. The trial judge held that the document was a promissory note. This finding the court reversed, but held that notwithstanding this the plaintiff was entitled to succeed and dismissed the appeal.

T. D. Brown, K.C., and *H. Thomson*, for appellants; *W. E. Knowles*, K.C., for respondent.

Haultain, C.J.S

HAULTAIN, C.J.S., concurred with Elwood, J.A.

Lamont, J.A.

LAMONT, J.A.:—The trial judge found as a fact that the document sued on was signed and delivered by each of the defendants. There was evidence to justify this finding. The document

was therefore not a forgery, and this distinguished it from the note sued on in *Sair* v. *Warren* (1917), 34 D.L.R. 268, 10 S.L.R. 120.

The defendants having signed and delivered the document as it stands, cannot be permitted to say that they did not intend to sign it. Then, was the document obtained by fraud or other unlawful means? The defendants allege that it was obtained by misrepresentation, but this the trial judge held, and rightly so, had not been proved. They also allege that the defendant Smith was during the negotiations an agent of Rygert, and obtained a secret commission on the sale. The circumstances are very suspicious. Although the plaintiffs sued all the defendants, they expressly said they did not want judgment signed against Smith. Smith was not called as a witness. The only evidence on the point was the statement of a witness that Smith had admitted it. As against the plaintiffs this is only hearsay evidence, and not sufficient to prove that Smith did in fact receive a secret commission. No one has pledged his oath that such was the case. The defendants by calling Smith might have established it, but they did not do so. There is, therefore, not sufficient evidence that the document was obtained by fraud or other unlawful means.

This being so, the plaintiffs are entitled to recover. The appeal should be dismissed with costs.

ELWOOD, J.A.:—This is an action in which the plaintiff claims, as a holder in due course of an instrument claimed to be a promissory note, which is in the words and figures following:— Elwood, J.A.

$900.00, Bengough, Sask., September 2, 1914. July 1st, 1916, after date, we or either of us jointly and severally as principals, promise to pay to the order of R. F. Dygert nine hundred dollars, at the Canadian Bank of Commerce, Bengough, Sask., value received, without any relief from valuation or appraisement laws, with interest at 8% per annum until paid and 10% attorney fees. Interest due and payable annually; and interest when due to bear the same rate of interest as the principal. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. The makers hereby represent that they are worth at least six times the amount of all indebtedness to payee over and above all indebtedness and exemptions, and this representation is made for the purpose of inducing the payee to extend credit to the makers hereof by accepting this note.

(Sgd.) MARTIN A. DAHL
ED. A. DAHL
DAN. A. MCDONALD
GEO. H. SMITH
E. R. TELFORD
CHAS. STEWARDSON

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The defendant Smith did not appear at the trial, and counsel for the plaintiff intimated that the plaintiff did not intend to proceed against Smith.

The other defendants denied having made the document in question, denied that the plaintiff was the holder in due course, and alleged that if their signatures were obtained to the document in question they were obtained through fraudulent representations as to the effect of the document that they were signing; that the defendant Smith participated in these fraudulent representations, that he received a secret commission from the payee of the note for assisting at the sale of the horse which was the subject matter of the note; that the age of the horse was misrepresented; that there was no delivery or conveyance by the defendants of the horse, and that no pedigree was delivered with the horse to enable it to be registered.

The trial judge held that the document in question was a promissory note, and found that it was signed by the defendants as such; that the plaintiff was the holder in due course; that there was no evidence that the defendant Smith had received any secret commission. He found there was no fraud, and that the horse was received by the defendants in the person of the defendant Smith, and gave judgment for the plaintiff. From this judgment the defendants, except the defendant Smith, have appealed.

I am of the opinion that the document in question is not a promissory note. The words "and 10% attorney fee" to my mind have the effect of making the amount payable under the note not a *sum certain* within the meaning of the Bills of Exchange Act.

In *Saxton* v. *Stevenson* (1872), 23 U.C.C.P. 503, it was held that an instrument purporting to be a promissory note with the words "with exchange not to exceed one-half per cent.," was not a promissory note, the amount being made uncertain by the uncertainty of exchange. A number of cases were referred to with approval in the judgment in that case, and among them *Cushman* v. *Reid* (1869), 20 U.C.C.P. 147. At p. 152 of the report of the latter case, Gwynne, J., is reported as follows:—

> An element of uncertainty was introduced which renders it impossible for us to say that the amount sued for, and for which the defendant was liable, was ever "liquidated or ascertained by the signature of the defendant." If so ascertained it must have been when defendant affixed his signature to the instrument; but it is obvious that at that time it was not only not ascer-

tained, but it was unascertainable what should be the amount payable and due under the instrument twelve months afterwards.

It seems to me that in the case at bar there is an element of uncertainty as to the amount for which the defendants would be liable. That amount was dependent upon whether or not the note were collected through the services of an attorney. If through the services of an attorney, then there is a promise to pay 10% attorney's fees; if without the services of an attorney, no such fees would be payable. The word "attorney" I assume means solicitor, and where I refer to services of an attorney, I refer to services rendered by an attorney without suit in the court. I apprehend that, if a suit were brought in the court, the only solicitor's fees that could be collected would be according to the tariff of costs fixed by our rules. This, however, in my opinion, does not dispose of the action.

Is the plaintiff entitled to recover notwithstanding the fact that it is not a promissory note?

The trial judge has found, in effect, that the defendants signed the document in question knowing what it was.

I agree with the trial judge that there is ample evidence to justify him in so finding. I also agree with the trial judge that the evidence of Whitton as to statements alleged to have been made to him by the defendant Smith were not properly received and should be disregarded, and, disregarding that evidence, there was no evidence that the defendant Smith received any secret commission.

There was not in my opinion any evidence to justify any finding of fraud, and the trial judge did not find that there was any fraud; in fact, he found, in effect, that there was no fraud. The trial judge was also in my opinion justified in finding that the horse delivered was "Mark Pointer," and that the delivery of the certificate ex. No. 2 would have enabled the defendants to procure enrollment. I agree in the finding of the trial judge that the delivery of the horse in question to the defendant Smith was a delivery to all the defendants, and was an acceptance by Smith on behalf of the plaintiffs. There was ample evidence from the defendants themselves shewing that Smith was going to take charge of and use the horse for his feed for the winter and would be the proper person to deliver it to.

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MACDONALD CO. v. DAHL.

Elwood, J.A.

In my opinion the trial judge was correct in holding, under the circumstances, that the defendants were not entitled to subsequently reject the horse, but that their only recourse was a claim for damages, if any. No evidence having been given of any damage sustained, then, in my opinion, there was no defence to the action.

No question was raised in the pleadings as to whether or not there had been a sufficient assignment to the plaintiff of the cause of action contained in the document sued upon, nor was any question in that respect raised in the notice of appeal, or the respondent's factum, or in the argument before us. In fact, the whole argument from the standpoint of the defendants was that the plaintiff held the document in question subject to any equities which the defendants would have against Dygert, were he the plaintiff.

The trial judge found, and I think correctly on the assumption that the document was a promissory note, that the plaintiff was a holder in due course. No evidence was given at the trial as to whether the plaintiff acquired title by endorsement, delivery or assignment. There was some evidence that one Rinfret obtained the note from the payee by endorsement, but it might be that, if the question of a proper assignment had been raised, evidence might have been given to shew that there had been such an assignment or assignments. The evidence shews conclusively that, while the document was made payable to Dygert, Rinfret was the real owner of the document and of the horse for which it was given. Rinfret gave evidence on behalf of the plaintiff at the trial.

Under all of these circumstances, I would not disturb the judgment, on account of there being no evidence to shew that the cause of action had been duly assigned to the plaintiff.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

DOMINION TEXTILE Co. Ltd. v. CANADA STEAMSHIP LINES, Ltd.

QUE.

S. C.

Quebec Superior Court, Maclennan, J.S.C. January 23, 1919.

CARRIERS (§ III G—457)—ABSENCE OF EXPRESS AGREEMENT—NEGLIGENCE OF CARRIER—DAMAGE TO GOODS—MEASURE OF LIABILITY.

In the absence of express terms in the agreement, a carrier's liability for goods damaged in transit, through negligence, must be computed on the market price or value of the goods at the time of shipment and at the place of consignment.

ACTION for damages for injuries to goods while in transit from Quebec to Montreal. Statement.

Perron & Co., for plaintiff; *Davidson & Wainwright*, for the defence.

MACLENNAN, J.:—The Dominion Textile Co. shipped from Quebec to the Montreal Cotton and Wool Waste Co. 50 bales of cotton waste. The Canada Steamship Lines Limited were the carriers to Montreal, where the bales were left on the dock exposed to the rain. As a consequence, 44 bales were spoiled. Maclennan, Dep. L.J.

The Cotton and Wool Waste Co. valued the damaged bales at $2,378.16, and sued the steamship lines for this amount, which was based on the market price of waste in Montreal—9½ cents a pound.

The defendants admitted liability, but urged this was limited by the terms of the bill of lading, which provided that the amount of any loss or damage for which the defendants might be liable should be computed on the basis of the value of the goods "at the place and time of shipment."

The place of shipment was Quebec, where there are no users of the waste. The material was obtainable there at 4 cents per pound for shipment where there are users, and where the market price is upwards of 8 cents a pound. The question raised in the present case, therefore, was whether the carriers' liability was limited by the bill of lading to the purchase price of the waste in Quebec or were they liable to the extent of the market price in Montreal?

The true value of the goods to plaintiff at the time and place of shipment was what they would fetch in the open market at such time and place.

In support of this ruling confer judgments in the cases of *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, and *O'Hanlan* v. *Great Western Ry. Co.* (1865), 6 B. & S. 484, 122 E.R. 1274.

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DOMINION TEXTILE CO. LTD. v. CANADA STEAMSHIP LINES LTD.

Maclennan, Dep. L.J.

The goods in question were purchased by plaintiff for resale in Montreal, where the market value was a little more than 8 cents a pound, and the only difference between their market value in Quebec and Montreal was the cost of carriage from the one place to the other. The bill of lading under which the goods were carried did not limit defendant's liability to the invoice price or cost at the place and time of shipment but to the value thereof at such time and place and the freight and other charges paid. If defendant had intended to limit their liability to the invoice price or cost of these goods, they should have so provided in express terms in the bill of lading (*The Oneida*, 128 Fed. Reporter 687). The value of the goods at Quebec might be taken to be the market value in the ordinary course of business in the open market in Montreal less the cost of carriage from Quebec to Montreal.

On this basis, and considering that plaintiff could have sold the waste in Montreal at upwards of 8 cents a pound, judgment is given for the company plaintiff, the defendants being condemned to pay $2,010.24 with costs.

Judgment accordingly.

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DAVIDSON v. SHARPE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 12, 1919.

ELECTION OF REMEDIES (§ I—7)—CONTRACT TO PURCHASE LAND—NON-PAYMENT OF INSTALMENTS—ELECTION TO RESCIND CONTRACT—DECREE OF COURT—RIGHT TO RE-ELECT.

Where a party with full knowledge of all the facts, elects to rescind a contract for the purchase of land in default of payment, and asks the court to give effect to that election and the court grants the request, he is bound by his election, and cannot by neglecting or refusing to take the necessary steps to give complete effect to the court's decree obtain the right to re-elect.

[*Standard Trust Co.* v. *Little* (1915), 24 D.L.R. 713, followed.]

Statement.

APPEAL by plaintiff from the judgment at the trial in an action on a judgment obtained in British Columbia and in the alternative on an agreement to sell certain lands. Affirmed.

H. J. Schull, for appellant; *H. C. Pope*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

Lamont, J.A.

LAMONT, J.A.:—By an agreement in writing dated February 4, 1913, the plaintiff agreed to sell and the defendant agreed to buy certain property in British Columbia for the sum of $24,500, payable by instalments. The defendant paid the cash payment

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DAVIDSON v. SHARPE.

Lamont, J.A.

of $5,500, but made default in paying the instalment falling due February 1, 1914. In October, 1914, the plaintiff commenced an action in the Supreme Court of British Columbia, and asked for an account to be taken of the amount due to her under the agreement, payment of that amount within a time to be fixed, and, in default of payment of the sum found to be due, that the contract be cancelled and the moneys paid thereunder be forfeited to the plaintiff. The British Columbia court made the order as asked, and fixed two months as the time within which the defendant should pay. The defendant did not pay, and the plaintiff entered judgment for the amount found to be due. In February, 1918, she brought the present action in this province, on the judgment obtained in British Columbia, and, in the alternative, on the agreement. The action on the judgment failed, because the defendant was not a resident of British Columbia at the time the action there was begun, nor did he appear thereto or become amenable to the jurisdiction of the British Columbia courts. To the claim based on the agreement, the defendant set up that the plaintiff had obtained an order in the court of British Columbia cancelling the agreement, therefore that agreement was now at an end and no action could be brought upon it. The trial judge gave effect to that defence. The plaintiff now appeals.

For the plaintiff it is contended that, until the final order cancelling the agreement is taken out, the plaintiff is at liberty to sue upon the agreement. This argument the court *en banc* of this province answered in *Standard Trust Co.* v. *Little* (1915), 24 D.L.R. 713 at 719, 8 S.L.R. 205, where I find the following:—

> Where a party, with full knowledge of all the facts, elects to rescind the contract in default of payment and asks the court to give effect to that election and the court grants his request, he is bound by his election and cannot, by neglecting or refusing to take the necessary steps to give complete effect to the court's decree, obtain the right to re-elect.

It, therefore, follows that when the plaintiff asked in the British Columbia court for cancellation of the agreement and the forfeiture to her of the moneys paid thereon in default of payment by the defendant within the time fixed, and the court granted her request, she made an election by which she is bound, and she cannot now by changing her mind obtain the right to re-elect. The judgment appealed from was in my opinion right, and the appeal should be dismissed with costs.

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DAVIDSON v. SHARPE.

Elwood, J.A.

ELWOOD, J.A.:—It seems to me that the question at issue in this appeal comes clearly within what was decided in *Standard Trust Co.* v. *Little*, 24 D.L.R. 713. In fact, counsel for the appellant admitted before us that in order to succeed we should be obliged to over-rule that case. I am of the opinion that this court is bound by what was held in *Standard Trust Co.* v. *Little* (*supra*), and I would therefore dismiss the appeal with costs.

Appeal dismissed.

QUE.

S. C.

BOUGIE v. CANADA BOX BOARD Co. Ltd.

Quebec Superior Court, Greenshields, J. March, 1919.

EVIDENCE (§ II A—95)—EMPLOYEE—STRICKEN AT WORK—WORKMEN'S COMPENSATION LAW—PRESUMPTION—BURDEN OF PROOF.

When an employee is stricken at his work there is no presumption in the law of workmen's compensation that the seizure resulted from the labour. The burden of proof rests upon the workman or representative who sues for damages.

Statement.

ACTION by a widow under the Workmen's Compensation Act for damages for the death of her husband, formerly an employee of the defendant company. Action dismissed.

Greenshields, J.

GREENSHIELDS, J.:—This is an action of Mrs. Bougie, widow of Treffle Bougie, who in the Superior Court sued the Canada Box Board Co., claiming, under the Workmen's Compensation Act, $2,025 to compensate her for the death of her husband, formerly an employee of the company defendant.

On the morning of January 9, 1917, Bougie went to work apparently in good health. Directly afterwards he collapsed as the result of a hemorrhage and was taken to hospital, where he died soon after admission. Plaintiff claimed that her husband's illness was brought about by his work.

The defence proved that death was due to congestion of the brain, and that deceased's seizure resulted from natural causes, and was not a consequence of any exertion made while he was at work.

When a man is stricken at his work, there is no presumption in the law of workmen's compensation that the seizure resulted from the labour. The burden of proof rests upon the workman or the representative who sues for damages.

In the absence of proof that deceased's work had anything to do with his death, and in the light of the proof made by the defence,

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the court, while sympathising with the widow, could not do other than dismiss the action.

Action dismissed.

Re ESTATE OF JOSEPH DAVISON.

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Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and MacDonald, J. April 12, 1919.

DESCENT AND DISTRIBUTION (§ I E—20)—DEVOLUTION OF ESTATES ACT (SASK.)—RIGHT OF WIDOW TO RELIEF—FROM WHAT SOURCE PAYABLE—JURISDICTION OF JUDGE.

On an application by the widow for relief under c. 13 of the stats. of Sask. 1910-11 (the Devolution of Estates Act), the judge has no jurisdiction to make an order providing from what source, as between the different persons interested in the estate of the deceased, the share of the widow should be payable. The order giving the widow a share in the estate is of the same effect as though the testator had made a codicil to his will giving his widow such share in priority to all other gifts, and such share takes priority over the residuary legatee.

Statement.

APPEAL by one of the devisees under a will from an order of Haultain, C.J., providing that the specific devises and legacies bequeathed by the will should abate, *pro rata*, to provide the share of the widow allowed under c. 13, Sask. stats. 1910-11. Reversed.

J. F. Frame, K.C., for appellant, Lesperance Davison; *H. Fisher*, for official guardian; *G. S. Kennedy*, for the executors; *H. M. Allan*, for the widow.

Lamont, J.A.

LAMONT, J.A., concurred with MacDonald, J.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the conclusion reached by MacDonald, J., that the Chief Justice on the application before him had no jurisdiction to make an order providing from what source—as between the different persons interested in the estate of the deceased—the share of the widow should be payable.

As, however, all parties interested were represented on the appeal before us, and as I think it is unnecessary under the circumstances that the estate should be put to the expense of any further application to determine the rights of the parties, I feel it desirable to express my opinion on the merits of the appeal, and particularly do I think I should do this because I am informed by the Chief Justice that no question was raised before him as to his jurisdiction in the matter.

The law seems to me to be clearly established that both specific and general legacies take priority over a residuary legatee. I cannot agree with the Chief Justice that the residuary bequest to

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RE ESTATE OF JOSEPH DAVISON.

Elwood, J.A.

Russel Davison can, under the terms of the will, be considered specific. It will be noted, too, that the concluding portion of the will directs the order in which the various bequests are to be paid. This direction is very much against the contention of counsel for the official guardian that all of the bequests should abate *pro rata*.

I am, therefore, of the opinion that the share given to the widow must be deducted from the bequest to Russel Davison.

The appeal should be allowed, and the order of January 23, 1919, set aside. The costs of the appellant and official guardian on this appeal and on the application for the order appealed from should be paid out of the estate of the deceased. There should be no costs of this appeal or said application to the executors or the widow, as it was unnecessary for them to appear and their counsel took no part in the argument before us.

MacDonald, J.

MACDONALD, J.:—By his will, the deceased, Joseph Davison, appointed executors, directed payment of his debts, funeral and testamentary expenses, and then provided as follows:—

I give, devise and bequeath unto Lesperance Davison the house and two lots which I own in the town of Craik in the Province of Saskatchewan.

I give, devise and bequeath unto the said Lesperance Davison the sum of nine thousand dollars to be paid to her as follows: five hundred dollars a year for a period of six consecutive years and six thousand dollars at the expiration of the sixth year.

I give, devise and bequeath unto each of my three daughters, Ida Davison, Lela Davison and Dora Davison the sum of five hundred dollars each.

I give, devise and bequeath unto my wife, Annie Davison, the sum of one hundred dollars.

I give, devise and bequeath unto my son, Joseph William Davison, the sum of twenty-five dollars.

All the residue and balance of my estate not hereinbefore disposed of I give, devise and bequeath unto my son, Russel Davison.

I direct my executors to pay no money to Russel Davison until he reaches the age of twenty-five years, except such sums of money as are necessary to maintain and educate him. When he reaches the age of twenty-five years, the whole residue is to be paid over to him. I direct my executors to invest the money for him in first mortgages on real estate until he reaches the said age of twenty-five years.

In the event of the decease of my son, Russel Davison, before he reaches the age of twenty-five years, I direct that his share shall be used to educate and maintain his children if he has any children at the time of his decease and in the event of his having no children I direct that the moneys herein bequeathed to him shall be divided equally among the said Ida Davison, Lela Davison, Dora Davison and Annie Davison at the time of his decease.

I direct my executors to pay the above bequests and legacies as follows: Firstly, my just funeral and testamentary expenses; secondly, the bequest and legacy to Lesperance Davison; thirdly, I direct them to pay off the

mortgage on my farm and the unpaid balance owing on my house in Craik; fourthly, the legacies and all other bequests as mentioned in this my last will in the order set out in the will.

The value of testator's estate at the time it came into the hands of the executors was placed at $21,252.45.

The widow, Annie Davison, made application to the court for relief under the Devolution of Estates Act and amendments thereto. An issue was directed as to whether she was entitled to such relief, but when the same came on for hearing, by consent of counsel for the widow and counsel for the executors—the infant Russel Davison not having been given notice of any application and not being represented—an order was made on December 1, 1915, declaring that the widow was entitled to relief, and that further consideration of the matter and particularly the determination of the nature and amount of such relief should be referred to a judge in chambers, to be brought up on two days' notice, but the widow not to move until creditors had been advertised for and the time for filing claims had elapsed.

The matter subsequently came before a judge in chambers, in the presence of counsel for the widow and executors, on May 16, 1916, when it was ordered that the executors pay or cause to be paid, in effect, one-third of the estate.

Subsequently the executors proceeded to pass their accounts, and as an infant, the beneficiary Russel Davison, was interested, they served the official guardian with notice. The official guardian then learned for the first time of the order giving the widow one-third of the estate. The official guardian then made application on notice to all concerned to vary the order giving one-third to the widow, so as to provide that the one-third given to her should not be payable solely out of the share of the infant Russel Davison, as residuary legatee, but that all legacies, devises and bequests should abate in proportion to the value thereof. On such application the appellant, Lesperance Davison, did not appear, and an order was directed varying the said original order by adding thereto the following paragraph:—

> And it is further ordered that in order to provide for the moneys directed to be paid to Annie Davison, the widow of the deceased, that the specific devises and the pecuniary legacies bequeathed by the will and the residuary devise and bequest shall all abate *pro rata* in order to provide for the allowance directed by the order of May 16, 1916, to be paid to the said Annie Davison.

From said last mentioned order the present appeal is taken.

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MacDonald, J.

The first ground urged by the appellant is, that the judge who made said order had no jurisdiction to do so.

The application of the widow for relief was made under c. 13 of the statutes of 1910-11. Ss. 11*g* and 11*h* thereof read as follows:—

11*g*. On any such application the court may make such allowance to the applicant out of the estate of her husband disposed of by will as shall in the opinion of the judge be equal to what would have gone to such widow under this Act had her deceased husband died intestate leaving a widow and children.

11*h*. Any such allowance may be by way of an amount payable annually or otherwise or of a lump sum to be paid or of certain property to be conveyed or assigned either absolutely or for life or for a term of years to the applicant or for her use and benefit as the court may see fit; and in the event of a conveyance of property being ordered the court may give all necessary and proper directions for the execution of the conveyance or conveyances either by the executors or administrators or such other person as the court may direct or may grant a vesting order.

By the consent order of December 1, 1915, the right of the widow to relief was declared, and by the order of May 16, 1916, an order was made as to what share she should receive, and how the same should be paid to her. The appellant submits that this exhausted the powers of the judge under said statute; that if the executors had any doubt as to what portion of the estate should be resorted to, to furnish these moneys for the widow, they should have applied by originating summons under Rules of Court 624 (3) (7) (9). I am of opinion that this contention is correct.

Said sections 11*g* and 11*h* are the only sections of said c. 13 giving the court jurisdiction to make an order as to relief, and it seems clear to me that they do not contemplate the court making any order respecting the rights of the beneficiaries under the will between themselves. Counsel for the official guardian argues that under section 11*h* the court had jurisdiction to order that any portion of the estate should be given to the widow, and the share of the beneficiary entitled under the will to such portion should abate accordingly.

It is true that under said section 11*h* the court may order any specified property to be given to the widow, but to my mind that does not mean that the beneficiary to whom the will gave such portion must have his devise or bequest abated to that extent. To my mind, even when the court under section 11*h* gives to the widow certain property given by the will to a beneficiary, there still remains open the question—as between such beneficiary and

the others—what devises and bequests should abate and in what proportion. That is a question to be determined by the court on an application for directions by originating summons under rule 624.

I am also of opinion that on the merits the appeal must be allowed.

In my opinion, when the court, under said c. 13, makes an order giving the widow a share in the estate, such order is of the same effect as though the testator had made a codicil to his will giving his widow such share in priority to all other gifts. In such a case the principle is abundantly established that both specific and general legacies take priority over the residuary legatee. Jarman on Wills, 2083-84.

In the judgment of the Chief Justice, he says:—

> Owing to the nature and condition of the testator's property at the date of the will and the very small amount of indebtedness, the bequest to Russel Davison though residuary in form might almost be considered specific in amount and intention.

Among the rules laid down in Jarman on Wills, 6th ed., *supra*, p. 1043, is the following:—

> The mere fact that the testator enumerates some specific things in the gift of residue (as "all my furniture, cattle, sheep and all my other personal estate") does not make the gift of those things specific,

citing *Re Green* (1888), 40 Ch. D. 610, and a number of other cases.

Plainly, here, where not even some specific things are mentioned, the gift of the residue cannot be called specific.

In my opinion, therefore, the share given to the widow by the order granting relief must all come out of the residuary gift as the same is sufficient to bear the same.

The appeal in my opinion should be allowed, and the order of January 23, 1919, set aside. The costs of the appellant and official guardian on this appeal and in the application for the order appealed from should be paid out of the estate, but I would allow no costs to the executors or widow, as it was unnecessary for them to appear, and their counsel took no part in the argument.

Appeal allowed.

N. S.

S. C.

MATHESON v. MURRAY.

Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E. J., and Mellish, J. January 14, 1919.

ADVERSE POSSESSION (§ IK—58)—TITLE BY UNREGISTERED DEED—NOT TO TAKE EFFECT AS PRESENT CONVEYANCE—ACTS OF GRANTEE NOT ASSERTIONS OF OWNERSHIP—INEQUITABLE TO GIVE EFFECT TO DEED.

The evidence shewed that certain deeds of property were executed without consideration, and were not intended to take effect as present conveyances but were only to become operative as effective conveyances to the grantee upon the death of the grantor, if at all and such deeds were held by the grantee for many years without being registered.

Ritchie E.J., and Mellish, J., held that the acts of the grantee in reference to the property could not be regarded as assertions of ownership over it, and it being clearly inequitable to give effect to such deeds under the circumstances, the title by adverse possession should be upheld and the appeal dismissed.

Harris, C.J., and Drysdale, J., following *East* v. *Clark* (1915), 23 D.L.R. 74, held that there being possession by the grantee in common with the adverse claimant the possession followed the title. The payment of taxes could be regarded as payment of rent and amounted unequivocally to an acknowledgement of the grantee's title.

Statement. APPEAL from the judgment of Longley, J., in favour of plaintiff in an action claiming damages for breaking and entering plaintiff's land and demolishing and removing one of the buildings erected thereon and threatening to seize, cut down and carry away the hay and growing crops on said lands. Affirmed by equally divided court.

J. McG. Stewart and *J. A. Mackay*, for appellant.

E. M. McDonald, K.C., and *T. R. Robertson*, K.C., for respondent.

Harris, C.J. HARRIS, C.J.:—In May, 1892, Angus Matheson executed two deeds of land to William Murray. William Murray died in 1908. The deeds were in the possession of Murray up to the time of his death and afterwards in the hands of his heirs, but were not recorded until after Matheson died in 1916. From and after the time when these deeds were executed in 1892, down to 1916, Angus Matheson continued to live in the house on one of the three lots and cultivated part of the property, and between 1892 and 1908 William Murray, every year, cut wood and hay, cultivated the land and raised and harvested the crops, and, during that period, cut down the trees and cleared up from 20 to 25 acres of the land. He also fenced 35 acres of meadow land, built a larger barn on the property, and performed other acts consistent only with possession and ownership of the property. All this is testified to by several witnesses and is not disputed. The best that can be said

from the plaintiff's standpoint is that William Murray and Angus Matheson were in joint possession of the property. Matheson's being there is accounted for by the defendant in this way: He says that after the deeds were executed his father, William Murray, told Matheson in his presence that he could live on the place and have the house (an old one) as his home provided he would pay the taxes on it, and that Matheson did pay the taxes on it and cropped what little land he could fertilise each year. This evidence is not corroborated by any other witness, but it seems to be consistent with what the parties did and to account for what subsequently happened.

After Matheson died in 1916, his brother took out administration of his estate and sold the property under license in the Probate Court to the plaintiff and the question as to the ownership arises, therefore, between the heirs of William Murray claiming under the deed from Matheson, and the plaintiff who sets up against the deeds to Murray, the possession of Matheson after the deeds were made. The claim is that Matheson's title was good under the Statute of Limitations against William Murray and his heirs.

I think the claim fails on any theory that can be set up.

If the evidence of Kenneth Murray is to be believed (and it is corroborated by the conduct and acts of the parties) Matheson was in possession as a tenant of William Murray, the rent payable being the taxes. I can see no difficulty in treating the payment of taxes as the payment of so much rent. It is the payment of so much money each year for the use of the property; and it relieves the owner from a payment which he as owner would otherwise have to make. The Court of Appeal in Ontario, in *East* v. *Clark* (1915), 23 D.L.R. 74 at p. 77, 33 O.L.R. 624, expressly decided that in such a case taxes can be regarded as rent and that their payment amounts unequivocally to an acknowledgment of the plaintiff's title. If he was a tenant he could not get any title against his landlord by possession.

On the other hand, if we disbelieve the defendant's evidence, as to the agreement to pay taxes for the privilege of living on the property, the position of the plaintiff is no better. He could get no possession while Murray was exercising acts of ownership under his deeds and his possession continued down to the death of William Murray in 1908. William Murray's possession could only be refer-

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able to his having the legal title and Matheson being in the house or cultivating part of the property could not get any title against him. The law is well settled that under such circumstances the possession is to be deemed to be that of the person having the title. I quote some authorities:—

Adverse possession for the purpose of giving title under the Statutes of Limitation, means and implies, that the true owner is out of the possession and that some third person (the adverse possessor) is in possession. Banning on Limitations, 3rd ed. 84.

In *Reading* v. *Royston*, 2 Salk. 422, 91 E.R. 368, it is laid down that:—

The Statute of Limitations never runs against a man but where he is actually ousted or disseised . . . and where two men are in possesson, the law will adjudge it in him that hath the right.

In *Orr* v. *Orr* (1871), 31 U.C.Q.B. 13, at 16, Richards, C.J., speaking for the Court of Queen's Bench, after quoting *Reading* v. *Royston*, 2 Salk. 423, said:—

It is true that case was decided long before our Real Property Act of 4 Wm. IV., c. 1 was passed, yet when both parties are in actual possession by living on the land the statute cannot run against the owner.

In *Rennie* v. *Frame* (1896), 29 O.R. 586, it was held that the defendant who was in possession as caretaker or tenant at will was not in exclusive possession so as to get a title under the Statute of Limitations where the owner put his cattle on the property to be fed and cared for by the defendant. (See judgment of Rose, J., p. 589.)

See also *Griffith* v. *Brown* (1880), 5 A.R. (Ont.) 303, per Moss, C.J.A.

In *Deputron* v. *Young* (1890), 134 U.S. Rep. 241, at p. 255, Fuller, C.J., said:—

Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he had had actual possession of a part and no one had been in possession of the remainder.

In *Winter* v. *Stevens* (1865), 9 Allen (Mass.) 526, Bigelow, C.J., said, at p. 529:—

When two persons are in possession of land at the same time, under different claims of right, he has the seisin in whom the legal title is vested. Both cannot be seised of the same estate, claiming by separate and adverse titles. Consequently the seisin in such case follows the title.

The law is thus summed up in 2 Corpus Juris:—

However much the courts may disagree in respect to exclusiveness as an element of adverse possession, there is no, nor can there be any, dissent from the proposition that a possession of the adverse claimant in common with the rightful owner is fatally wanting in exclusiveness and can never ripen into title by adverse possession In these circumstances the possession in land is deemed to follow the title.

And again:—

The law presumes that where title is shewn the true owner is in possession until adverse possession is proved to begin, and where two persons are in mixed possession of the same land one by title and the other by wrong, the law considers the one who has the title as in possession to the extent of his right so as to preclude the other from taking advantage of the statute of limitations.

See also *McConaghy* v. *Denmark* (1880), 4 Can. S.C.R. 609, *per* Gwynne, J., pp. 632-638; *Stephen* v. *Simpson* (1869), 15 Gr. Ch., *per* Draper, C.J., at p. 600, and *per* Van Koughnet, C., at pp. 601-602; *Larwell* v. *Stevens* (1880), 2 McCrary (U.S.) 311; *Barr* v. *Grat'z* (1819), 4 Wheaton (U.S.) 213.

It is clear that the burden of proving adverse possession is on the person setting it up and relying upon it, and all presumptions are in favour of the legal holder. If this were not so the legal holder would be in a worse position than the person claiming by possession. The plaintiff has absolutely failed to overcome these presumptions and has not established any title by possession against the Murrays. The legal title must prevail.

It only remains to deal with some other contentions of counsel for the plaintiff. It appears that after William Murray got his deeds, James D. Langille leased a part of the property from Matheson and occupied it for some 8 or 9 years, but the evidence of the defendant is uncontradicted that Matheson spoke to his father, William Murray, about renting the place, and his father told Matheson that Langille could have the property if he paid the taxes and left the cattle on the property, and that arrangement was carried out. Instead of being a fact in favour of the plaintiff's contention that he had such a possession of the property as eventually ripened into a title, it is a clear recognition of William Murray's title and absolutely inconsistent with the theory set up by the plaintiff. It was also pointed out that several witnesses stated that they and in fact many of the neighbours helped Matheson with his work on the place, but those acts were quite different from

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those performed by the Murrays and which are referable only to ownership of the land.

It was also urged that the deeds were voluntary. I think the evidence falls far short of establishing this, but, assuming it to be proved, I do not see how it can affect the position. Matheson had a right to give his property away if he saw fit to do so, subject, of course, to the rights of his creditors, if he had any. There is no evidence that he had any creditors in 1892.

The non-recording of the deed until after Matheson's death was also discussed, but once it is admitted that Matheson executed and delivered the deeds to Murray the fact that they were not recorded, even if unexplained, seems to be a matter of no importance.

Another matter much discussed at the argument was a statement by John A. Matheson to the effect that William Murray told him that the grantor, Matheson, had taken wood off one of the lots to repay $250 which he had previously loaned to Matheson, and which was secured by a mortgage on the property. It was said by counsel that this was after Murray got the deed of the wood lot, but I do not find that the witness fixed the date when the wood was cut. For all that appears from his evidence it may have been before Murray got the deeds; if so, it has no significance. There is a letter in the handwriting of the grantor addressed to C. E. Tanner, K.C.—but never sent—and which is dated January 21, 1893, in which it is stated that he had given Murray the wood on a lot he had, black pines, and he adds: "So I have him pretty well paid." He does not say when he gave Murray the wood, whether before or after the deeds. I do not think this writing was admissible in evidence but I do not see how it affects the case if it is admissible. Assuming, however, that Murray cut wood on this lot after he got the deed of it he would be cutting his own wood unless there was some understanding as was suggested that the grantor was to have an interest in the property during his life. And again, the mortgage would be cancelled by the deeds. I think the probabilities all are that if Murray cut the wood in payment of his mortgage he did so before the deeds were executed.

On the supposition that it was after the deeds were given, counsel built up a theory that the deeds were only executed as additional security for the mortgage.

There is no evidence of this, and the acts of ownership exercised by Murray, such as clearing 20 to 30 acres of land, building a large barn, etc., are all absolutely inconsistent with such a theory.

It was also suggested that the deeds were intended as wills, and not intended to be operative or effective until after the death of Matheson and, therefore, the property would be liable for his debts.

The delivery of the deeds to Murray shews the impossibility of accepting this theory. When delivered, they passed the legal title and vested it in Murray. Matheson could no longer control the property, and it is impossible to view the deeds as a will. One of the most elementary rules is that nothing can be construed to be a will which cannot be revoked in the lifetime of the testator and clearly these deeds could not be revoked.

The fact that the deeds were treated as passing the title (and William Murray took possession under them so far as appears without any objection whatever by Matheson) shews conclusively that they were not intended to take effect as a will.

The appeal must be allowed and the action dismissed with costs.

Drysdale, J.

DRYSDALE, J.:—The defendant claims the lands in question under deeds from one Matheson. On the face of the deeds his title seems good but he failed before the trial judge because as that judge says the deeds were worthless and bogus. I cannot understand this finding. On the argument before us, it was admitted that the deeds were properly executed and in the proper handwriting of the grantor, Matheson. The only suggestion that the title was not in all respects regular was an argument that the grantee never recorded his deeds. This is not a contest under the Registry Act and I do not appreciate the point. Whether the grantee recorded his deeds or not does not affect the validity. The real question relied upon before us was the Statute of Limitations, plaintiff claiming 20 years' possession under the grantor, Matheson. I find that this claim is not well founded. The grantee, Murray, did many acts in the way of occupation that must be referable to his title, *e.g.*, building a barn on the lands, working part of the property and clearing a considerable proportion thereof, besides letting portions of the same. Matheson remaining in possession of a part can at most be said to be a joint possession

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with Murray and inasmuch as Murray had a deed and therefore the possession is deemed to be his. I can see nothing in the case that suggests the deeds to be bogus or worthless and I would allow the appeal and dismiss the action.

RITCHIE, E.J.:—I am in entire accord with the opinion of my brother Mellish, and do not desire to add anything to what he has said except to refer to the following authorities: Challis on Real Property, 104; *Jackson* v. *Cadwell* (1824), 1 Cowen 622; *Jackson* v. *Delancey* (1825), 4 Cowen 427.

As to the letter on p. 42 of the case being properly received in evidence: Wigmore on Evidence, vol. 3, s. 1778.

Mellish, J.

MELLISH, J.:—The late Angus S. Matheson, of Scotsburn in the county of Pictou, appears to have been a somewhat eccentric bachelor—a man of reputed intelligence, with a local reputation for knowledge of the law. He was a magistrate and wrote deeds. He held three lots of land, one a lot of 7½ acres on which he resided; another lot adjoining this of about 80 acres, known as the Henderson lot; both at Scotsburn; and a third lot, 3 or 4 miles distant, at Plainfield; the latter, apparently, was a wood lot.

In 1879 he mortgaged the Henderson lot to his brother, John A. Matheson, for $250. The mortgage was released in December, 1891, when another mortgage was given to a neighbour, William Murray, apparently for the same amount.

The following May (1892) the mortgagor conveyed, or purported to convey, his whole real estate in fee simple to the said William Murray by a deed dated May 7, 1892, covering the 2 lots first mentioned, consideration $1,450; and by another deed dated May 18, 1892, covering the wood lot, consideration $600.

The grantor remained upon the premises, living there alone (except for visits to his friends and neighbours) from 1866 till the time of his death in 1916.

The deeds which he had given to Murray were not recorded until 1916, after the grantor's death. Angus S. Matheson died intestate and his brother, the said John A. Matheson, became his administrator. Finding the personal assets of the deceased insufficient to pay the debts, the administrator sold the lands in question under license of the Probate Court to the plaintiff, Annie A. Matheson. The latter claims in this action damages for trespass to said lands and an injunction. The defendant, Kenneth

Murray, as a defence to the action claims that said William Murray owned the lands and that he as one of the heirs was entitled to do the acts complained of. William Murray died intestate in 1908 leaving three sons, viz., the defendant, Kenneth Murray, of Trenton, N.S., Daniel H. Murray of Trenton, N.S., Alexander Murray of Scotsburn, N.S.

Alexander Murray seems to have been the only son living at home at the time of his father's death. The father before his death had made a deed to this son of his property not including the lands said to have been conveyed to him by Matheson. This deed was left by the father before his death with one Goodwill Clark, to be kept by him and not delivered to Alexander until after the death of Alexander's mother. This mode of dealing with the deed is not without significance when we come to consider the intention of the parties in reference to the deeds from Angus S. Matheson to William Murray.

I am not prepared to disagree with the trial judge as to what I conceive to be his findings of fact on the material points of this case. As I construe the reasons for the judgment appealed from, the trial judge has found that the deeds executed by Angus S. Matheson to David Murray were without consideration, and were not intended to take effect as present conveyances of the property therein described. I think there is sufficient evidence to justify such findings. If it was the intention of the parties that the deeds should become operative if at all only on the death of the grantor as effective conveyances to the grantee, the acts of the grantee and his sons in reference to the property cannot be regarded as assertions of dominion over it. At common law a deed in fee cannot be made to commence *in futuro* and if this was the intention acted on by the parties there is an end of the defendant's case, apart from equitable considerations arising if the deeds were not voluntary. The burden of proving such an intention is on the plaintiff, of course, and is to be inferred from what the parties did.

As to the intention of the parties; it is agreed that the deeds were not to be recorded and they were not in fact recorded during the grantor's life. No consideration was paid when the deeds were executed and the subsequent acts of the parties point clearly to the conclusion that the consideration expressed in the deed was never paid. The defendant proved by the witness, Alexander Murray,

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called on his behalf, that according to the statement of the grantor the effect of the transaction was that the grantor "had fixed it so" that the grantee would "have it" when he (the grantor) was "done with it."

The defendant, who is the chief witness, and apparently the only person who knew positively that the deeds existed outside of the immediate parties, explains the grantor's occupation of the premises by saying that his father agreed to rent the premises to the grantor on condition of the latter paying the taxes; there was no written lease. One would not expect lands that ostensibly cost so much should be let on such terms. This lease theory is met by a further difficulty. If the grantor had become lessee of the premises what justification had the Murrays for using the property during his tenancy in the way they claim to have used it? This witness offers the explanation that Matheson, the tenant, could only use what he "fertilised." The tenant in fact used much more than he fertilised. The trial judge evidently disbelieved this witness as he was entitled to. He is the only witness who offers any explanation of Matheson's continued occupancy of the premises consistent with the theory that William Murray had bought and paid for the property. This witness also claims that his father and himself and brothers "cleared" some 20 acres of this property. His evidence is entirely unsupported in this respect by the two brothers who were called as witnesses. The brother Alexander who remained at home admits working for Matheson and explains Matheson's possession of the property on the theory that Matheson was to have it till he was done with it and that then the property should go to William Murray and his children. (pp. 31-32.) The nature of the "clearing" that was done is not explained, whether it was merely cutting bushes or removing stumps and stones. I think the trial judge was justified in finding that the Murrays exercised no acts on the property in assertion of present ownership and that Matheson was not a tenant of Murray. There is, perhaps, more than a suspicion that the deeds were given to Murray for a sham consideration, and, for the purpose of defeating Matheson's creditors, they would, if necessary, be set up as pretended conveyances and registered. Even if this were a collateral, or indeed, the sole purpose of the deeds, the plaintiff has still a title by possession as the acts relied on by the defendant could not, as such

necessity never arose, be claimed to have been done even in pretended assertion of ownership of the property. As already pointed out, Matheson in December, 1891, mortgaged his property to Murray, apparently to enable him to pay off his brother, John A. Matheson, what was due him.

Was this debt still outstanding when the deeds were given in the following May? And was it considered as still outstanding by the parties after that time? I think there is justification for answering both these questions as the trial judge seems to have done in the affirmative. Counsel for the defendant told us on the hearing that this mortgage to Murray had been recorded. Matheson declares in a letter to Mr. Tanner, which was found in his effects, and apparently was never sent, that the mortgage was still unsatisfied; this in 1893, the year after the deeds were given. How could this be so if Murray held the property outright?

But it is said that this letter is not admissible in evidence. The document is marked G. 10 and merits careful consideration. The writer indicates that he is in financial difficulty and, besides, owes William Murray a balance on the mortgage, that he wants to save his property and get all his debts "in one place" by giving a mortgage for $250 or $300 to the Canadian Loan Co. I think this document is evidence of the fact that Matheson who was then admittedly in occupation of the property claimed to hold it as his own, subject to the mortgage. Such a fact is, I think, usually considered as evidence when the nature of one's occupancy is in dispute. Further, as admissions against interest, I think the letter is evidence of the fact that Matheson was in debt to certain parties not named and also to Murray for a balance of the mortgage debt. I do not think the letter is to be read as *primâ facie* disclosing a contemplated fraud on Murray. Indeed, a careful perusal of it would indicate that nothing was intended to be done behind Murray's back. The scheme was to get all his debts, including the debt to Murray, in one place secured by mortgage to the Canadian Loan Co., a transaction which obviously would not be carried out without obtaining a release from Murray of the mortgaged land. The mortgaged lot and the one intended to be mortgaged, it will be noted from the letter, are apparently the same, the Henderson lot.

Some criticism was made on the hearing of the judge's apparent

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finding that what was done by the Murrays in the way of farming this property was done for the purpose of extinguishing Matheson's debt. It was pointed out that this was impossible as, according to other evidence, this debt was extinguished in 1894.

A careful perusal of the trial judge's finding leads me to the conclusion that this criticism is not justified. In dealing with Kenneth Murray's evidence he says:—

> He claims to have been in possession of the land because he was exercising the right under his father of raising and clearing land to the extinction of his debt, but it was the most common circumstance in that part of the county to turn out and help Angus Matheson to do the things on his farm, as he was an old man and peculiar, and had no wife or family. The only real matter of any importance that Kenneth undertook to swear to as having amounted to doing something for the old gentleman was putting hinges on his gate, which had broken down.

By this I think the judge means to say in effect:—

> Kenneth Murray claims to have been acting as owner of the property and only admits having done one trifling thing not as owner but for Matheson. I do not think so, but consider what he did as having been done either to extinguish Matheson's debt or to help him out with the farm as the other neighbors were doing.

It is to be noted also that in the winter time Matheson was in the habit of staying with neighbours, particularly the Murrays, which may also account for the neighbours taking wood and crops from the property as they frequently did.

I think the statements made by the parties, oral and written, are evidence under the circumstances just as their acts are evidence for the purpose of shewing how they were dealing with the property.

Kenneth Murray claimed that a barn had been built by one Harrington for his father. That was 14 years ago. The user of the barn would, I think, be stronger evidence as shewing for whom it was built and I cannot infer that it was used by anyone else except Matheson in the absence of other evidence. Matheson, after the deeds were given, leased pasture land to one Langille. Kenneth Murray swears that he got permission to do this from Murray. Langille knew nothing of such permission, and Kenneth Murray may be swearing to a matter of inference rather than to a fact within his knowledge, a remark which is also applicable to his evidence in respect of the barn and other matters. As already pointed out the trial judge discredits him.

If the consideration was paid, one would expect the deeds to be recorded, and the agreement not to record them is some evidence

that the grantee was intended to have the power which he had, in fact, of conveying the lands to someone else for value if he saw fit who would acquire a good title by recording his deed without notice. The grantee could, it seems, not be entitled to possession of the lands until he paid the purchase money, and even if the deeds be regarded as naming a *bonâ fide* consideration, the mere fact of delivery to the grantee of the deeds must not be regarded too seriously, if the consideration was not in fact paid. It would be clearly inequitable to give effect to the deeds under such circumstances. *Griffin* v. *Clowes* (1855), 20 Beav. 61 at pp. 65-66, 52 E.R. 525.

The appeal should be dismissed with costs.

Appeal dismissed without costs on equal division of court.

THE KING v. ANDERSON.

Exchequer Court of Canada, Cassels, J. March 10, 1919.

WATERS (§ I C—53)—WRECK—OBSTRUCTION TO NAVIGATION—REMOVAL—AUTHORITY—LIABILITY OF "OWNER"—SALE.

Since the amendment of the Canada statutes in 1897, (R.S.C. 1906, c. 115, s. 13), the owner of a wrecked vessel at the time the wreck was occasioned may be deemed the "owner" for the purpose of the statutory liability to the Crown for the costs of removing the wreck as an obstruction to navigation, notwithstanding the sale of the wreck to a third party. [*The Queen* v. *Mississippi &c. Co.* (1894), 4 Can. Ex., 298, distinguished.]

2. By virtue of the Canada statutes, 1909, c. 28, amending s. 18, c. 115, R.S.C., 1906, the authority of the Governor-in-Council directing such removal is no longer necessary.

INFORMATION to recover expenditures incurred by the Crown in removing a wreck as an obstruction to navigation. The following information was filed on May 16, 1917:

Statement.

To the Honourable the Judge of the Exchequer Court of Canada:

The Information of the Honourable Charles Joseph Doherty, His Majesty's Attorney-General of Canada, on behalf of His Majesty the King, sheweth as follows:

1. That prior to November 18, 1915, the defendant was the duly registered owner of the schooner "Empress," O.N. 107761, registered at Bridgetown, Barbados.

2. That on or about November 10, 1915, the said schooner was burned to the water's edge and sunk and became a total wreck while lying at anchor at the western entrance of Barrington

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Passage, Nova Scotia, a public navigable harbour of the Dominion of Canada, and subsequently the said vessel was duly condemned, and on or about November 18, 1915, the said wrecked vessel was sold and disposed of by the defendant.

3. That the wreck of the said schooner at the place where the same was so sunk as aforesaid caused an obstruction and impediment to the navigation of the said harbour of Barrington Passage and was a source of danger to vessels plying in said harbour.

4. That the said wreck of said schooner remained in the same position in said harbour of Barrington Passage for more than 24 hours after being burned and sinking as aforesaid.

5. That His Majesty's Minister of Marine and Fisheries for Canada, being of opinion that the navigation of said harbour of Barrington Passage was obstructed, impeded and rendered more difficult and dangerous by reason of the wreck, sinking, partially sinking or grounding of said schooner or part thereof, on or about November 17, 1915, notified defendant to remove said wreck, which defendant refused to do, and upon failure of the defendant to remove said wreck in pursuance of said notice His Majesty's said Minister of Marine and Fisheries for Canada after public notice calling for tenders for the removal of said wreck accepted on or about April 6, 1916, the tender of Hugh Cann & Son, Ltd., of Yarmouth, N.S., for the removal of the said wreck and obstruction at a cost of $750.

6. That the said obstruction and impediment so caused to the navigation of the harbour of Barrington Passage by the said wrecked schooner "Empress" was duly removed by the said Hugh Cann & Son, said work being completed on or about May 9, 1916, and His Majesty's Minister of Marine and Fisheries for Canada duly paid for the work performed in removing said wreck, to Hugh Cann & Son, the sum of $750.

7. His Majesty also paid the sum of $87.80, the costs and expenses incurred for the advertising of tenders for the removal of said wreck and the further sum of $24, being the expenses incurred in making an examination of said wreck and superintending removal of same.

8. That under and by virtue of the statutes of Canada, c. 115, R.S.C. 1906, and amendments thereto, the defendant as the owner

of the said schooner "Empress" is liable for all the expenditure and costs made and incurred by His Majesty the King in removing the obstruction and impediment to the navigation of the said harbour of Barrington Passage caused by the wreck of said schooner "Empress," less any sum received on a sale of said wreck, but His Majesty's Attorney-General alleges as the fact is that no portion of the said wreck was or could be sold, and no sum has been received by His Majesty the King in respect thereof whereby and by reason whereof the defendant is liable to pay to His Majesty the sum of $861.80, being the sum so paid by His Majesty as aforesaid for and in connection with the removal of the wreck of the said schooner "Empress," and His Majesty is entitled by action to recover the said sum from the defendant.

9. The Attorney-General on behalf of His Majesty claims as follows:

(1.) The sum of $861.80.

(2.) His costs of this action.

The defence, dated April 20, 1918, was as follows:

As to the information herein the defendant Charles Anderson says as follows:

1. He denies that said vessel became a total wreck, that the said Barrington Passage or part thereof where said vessel was lying is a public or navigable harbour of the Dominion of Canada, that the said vessel was duly condemned or condemned at all or that the defendant sold or disposed of said vessel or of said wrecked vessel.

2. He denies that the said wreck caused an obstruction or impediment to the navigation of the said harbour of Barrington Passage or that it was a source of danger to vessels plying in said harbour.

3. He is not aware of and does not admit that His Majesty's Minister of Marine and Fisheries for Canada was of opinion that the navigation of said harbour of Barrington Passage was obstructed, impeded or rendered more difficult or dangerous by reason of the said wreck sinking, partially sinking or grounding of said schooner or part thereof.

4. He denies that he was notified to remove the said wreck on or about November 17, 1915, or at all.

5. He denies he refused to remove the said wreck.

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6. He is not aware of and does not admit public notice calling for tenders for the removal of said wreck referred to in par. 5 of the information.

7. He is not aware of and does not admit the acceptance of tender of Hugh Cann & Co., for the removal of said wreck and he is not aware of and does not admit any of the statements or allegations contained in par. 5 of the information with reference to the removal of said wreck or the tender or agreement with Hugh Cann & Co., with reference thereto or the terms thereof.

8. He is not aware of and does not admit any of the statements or allegations contained in par. 6 of the information.

9. He is not aware of and does not admit any of the statements or allegations contained in par. 7 of the information.

10. He denies each and every of the allegations and statements of fact contained in par. 8 of the information.

11. As to the whole information the plaintiff says that the said wreck could have been sold and that there was enough of the said vessel or wreck to be sold.

12. The plaintiff will object that the information sets forth no cause of action inasmuch as it is not therein alleged that the removal of said wreck was under the authority of the Governor-in-Council or that the wreck was so removed and sold as required by c. 115 of R.S.C. 1906, Part 2, ss. 16, 17 and 18 as amended. The said Minister did not cause the said wreck to be sold by public auction after being removed and the defendant will object that he is not liable for the cost of removal until after the sale of the wreck or obstacle so removed.

13. If the said wreck had been removed to a proper place the same would have been worth and could have been sold for a sum in excess of the amount required to remove the said wreck and by reason of the neglect or failure on the part of the said Minister or of the plaintiff to sell or attempt to sell the wreck or the part so removed the plaintiff is not entitled to recover from the defendant any part of the cost or expense of removing the said wreck.

14. As to the whole of the information the defendant will object that in point of law the same discloses no cause of action against this defendant.

15. As to the whole of the information, the defendant says that before the defendant received the notice referred to in par. 5

of the information, to wit, on November 18, 1916, the said wreck had been sold by T. W. Robertson, of Barrington Passage, N.S., Receiver of Wrecks, on behalf of the owners and underwriters for the benefit of all concerned for the sum of $5 to M. A. Nickerson, of Clarke's Harbour in the County of Shelburne and Province of Nova Scotia. By the terms of the said sale the said purchaser assumed all liability and responsibility for the removal of the said wreck.

16. The defendant repeats par. 15 hereof and says that the said M. A. Nickerson neglected and refused to remove the said wreck wherefore the defendant did cause a third party notice to be duly filed herein and to be duly served upon the said M. A. Nickerson claiming indemnity from the said M. A. Nickerson to the extent of the plaintiff's claim herein or such sum as the plaintiff might recover from the defendant with costs on the grounds herein and therein set forth.

17. The defendant repeats pars. 15 and 16 hereof and claim indemnity from the said M. A. Nickerson to the extent of the plaintiff's claim herein or such sum as the plaintiff may recover herein against the defendant with all costs.

L. A. Lovett, K.C., for plaintiff; *J. McG. Stewart*, for defendant Anderson; *V. J. Paton*, K.C., for third party Nickerson.

CASSELS, J.:—An information exhibited by The King, on the information of the Attorney-General of Canada, against the defendant Charles Anderson, claiming the payment of certain moneys expended in clearing Barrington Passage, N.S., from the wreck of the schooner "Empress" owned by the defendant Charles Anderson. Cassels, J.

A third party notice was served upon one M. A. Nickerson, the defendant Anderson claiming that the wreck in question was sold to Nickerson, and that part of the purchase price was the removal by Nickerson of the wreck in question.

The case had not been set down for trial, but by agreement between the parties, with my consent, the action was tried as between the plaintiff and the defendant Charles Anderson.

Nickerson's counsel consented to appear in order that he might have the right to cross-examine the various witnesses, it being arranged between the parties that the case between the plaintiff and the defendant Anderson should be tried, and if the plaintiff

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were held entitled to succeed then the trial as between the defendant and the third party should come on at a subsequent date to be agreed upon.

The counsel arranged to put in written arguments, and I have subsequently received papers, endorsed arguments.

I think the plaintiffs have proved their case and are entitled to judgment for the amount claimed.

The defendant Anderson's counsel alleged that the defendant Anderson was not the owner of the vessel, the vessel having been sold subsequently to Nickerson.

The date of the wreck was November 10, 1915, and the sale to Nickerson was on November 18.

The case of *The Queen* v. *Mississippi & Dominion Steamship Co.*, 4 Can. Ex. 298, was decided in the year 1894. In that case it was held that the purchaser from the owner was the owner within the meaning of the statute then in force. Subsequently the statute under which that case was decided was amended by c. 23 of 60 and 61 Vict., 1897, which statute defined the meaning of the word "owner."

The R.S.C. 1906, c. 115, s. 13, interprets the word "owner" as follows:

> "Owner" means the registered or other owner at the time any wreck, obstruction or obstacle as in this part referred to was occasioned, and also includes subsequent purchaser.

Another objection raised was that there was no authority from the Governor-in-Council directing the removal. S. 18 of c. 115 provides that whenever under the provisions of the Act the Minister "has with the authority of the Governor-in-Council caused to be removed," etc.

In 1909, c. 28, 8 & 9 Edw. VII, assented to on May 19, 1909, these words, "with the authority of the Governor-in-Council," were deleted.

These seem to be the main defences.

Judgment to issue for the amount claimed by the plaintiff, and the defendant must pay the costs of the action.

Judgment for plaintiff.

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(Annotated.)

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 3, 1919.

1. BANKS (§ VIII—160)—LINE OF CREDIT—WRITTEN PROMISE TO PAY—SPECIFIC ADVANCES ON SPECIFIC GOODS—BANK ACT, SEC. 90 (B)—SECURITY FOR INDEBTEDNESS.

The written promise required by s. 90 (*b*) of the Bank Act (1906 R.S.C., c. 29) refers to a specific loan then being negotiated for, and to specific goods proposed to be given in security for such loan.

Where a line of credit has been renewed from time to time, and after each renewal the bank takes security not only for a present advance but for the whole prior indebtedness, the security taken for the whole debt is only valid for the amount of the loan made at the time it was acquired, but the security given for each individual advance is not released and does not merge in the general security taken and so the bank is entitled to the benefit of all the securities.

2. BANKS (§ V—125)—FURTHER SECURITY TO—MORTGAGE OF ONTARIO PROPERTY—MORTGAGE OF QUEBEC PROPERTY—LAW GOVERNING—SOLVENCY OR INSOLVENCY OF DEBTOR.

A manufacturing company agreed to give the bank a mortgage on Ontario property and also a mortgage on Montreal property as further security. The court held that as to the Ontario property the Ontario law applied so that the date of the promise to give the mortgage governed and as the company was then solvent the mortgage was valid, but as to the Quebec property the Quebec law applied and only the date when the mortgage was executed could be considered, and as the company was then insolvent the mortgage was invalid.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1917), 38 D.L.R. 232, 40 O.L.R. 245, affirming the judgment at the trial, 37 O.L.R. 591, in favour of the defendant bank. Reversed in part.

Hellmuth, K.C., and *J. B. Davidson*, for appellant.

D. L. McCarthy, K.C., and *Shapley*, for respondent.

Davies, C.J.

DAVIES, C.J.:—The principal and main question raised and argued on this appeal was as to the proper construction of ss. 88 and 90 of the Dominion Act respecting banks and banking.

So far as is material for this case, s. 88 (R.S.C. c. 29) provides as follows:—

3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise . . . manufactured by him, or procured for such manufacture.

5. The security may be taken in the form set forth in schedule C to this Act, or to the like effect.

S. 90 enacts:—

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

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(a) At the time of the acquisition thereof by the bank, or

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

The bank's contention which was adopted and followed in the judgment appealed from was that the written promise referred to in sub-s. (b) was not one required to be given contemporaneously with a proposed loan or advance or having reference to any specific goods or property to be secured, but was a blanket promise sufficient to cover any future loans or advances which the bank might make the promisor up to the time when it was acted upon and security taken. That time might be as counsel boldly put it in argument 5 or 10 years after the promise given, and would enure to cover as well loans subsequently made from time to time to the promisor as property which was not even in existence when the promise was made.

The appellant, on the other hand, submitted that such a written promise as the Act referred to was one having reference to a specific loan then being negotiated for, and to specific goods proposed to be given in security for the loan, stated in the Act as an alternative to the acquisition by the bank of the security itself in those numerous cases in which the loan had necessarily to be advanced to enable the borrower to obtain possession of the goods so that he might give the bank the security.

I have had no hesitation whatever in adopting the appellant's contention on that point. In construing such a very important section as the one in question, which validates a secret and unregistered security on personal property not in possession of the grantee bank and in direct opposition to all provincial laws on the subject requiring registration of such a security, one must exercise one's common sense and common knowledge. I cannot believe it ever was the intention of parliament to pass a law having the object and purpose contended for by the bank.

The section is a prohibiting one. It declares the bank shall not acquire any warehouse receipt or bill of lading or such security (Form C) as aforesaid to secure payment of any debt or liability unless such debt or liability is contracted *at the time* of the acquisition of the security, or upon a written promise that such security would be given.

To my mind the object, intent and purpose of the section was

plain and is sufficiently well expressed, though perhaps not so clearly as to remove all doubt. Primarily the section required that the taking of the security should be contemporaneous with the negotiation or contracting of the debt or loan. If, however, for any reason that could not be done, and scores of reasons arise to one's mind of conditions in which it could not, then the alternative of a written promise is substituted for the execution of the security. But the written promise to give security had reference, and reference only, not to a future debt or loan to be subsequently made, but to the then debt or loan being negotiated and to the goods and personal property then existing which it was proposed to give security upon, and with reference to which negotiations were taking place. It was only intended in my opinion to cover cases where the actual security could not be given because of the non-possession of the goods or property at the time by the borrower. But it had no reference to future or other loans than the one for a specific amount then being negotiated or to other goods than those specific goods which were to be secured by such loan.

Take an everyday occurrence and it can be multiplied by scores and hundreds. A merchant purchases a load of produce and it arrives at its destination. The bill of lading and draft for purchase-price attached are sent to a bank. The purchaser, to get possession, must pay the draft and possibly the freight, carriage and other charges before he can get possession. He applies to a bank for an advance or loan to enable him to get possession of the goods. The bank makes the loan on his written promise to give warehouse receipt or Form C of the Act, as the case may be, as security when he gets full possession and not till then can he give the warehouse receipt or the statutory security C. So he gives the bank the alternative written promise in the words of the statute

> that such warehouse receipt or bill of lading or security would be given to the bank.

This is only one illustration of the many hundreds of cases in which the "written promise" is made by statute sufficient to take the case out of the express prohibition in the section of the Bank Act acquiring any of the securities including Form C mentioned. But the "written promise," so made by the section an alternative to the execution of the security itself where the borrower is not in a

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position to give the security, does not extend nor relate to any other loan than the specific one being negotiated or to any other goods than those to which specifically the negotiations for a loan relate. It is obvious, of course, that some time must elapse before, in the illustration I have given, the borrower is in a position to give the security, and the alternative of the written promise to give it in sub-s. (*b*) of the section is given so that the bank may not be without security for its money which it had to advance to enable the borrower to get the goods.

I am quite unable to find anything in the case of the *Imperial Paper Mills Co.* v. *Quebec Bank* (1913), 13 D.L.R. 702, 110 L.T. 91, which touches the construction of s. 90 or the true meaning to be given to the words "written promise" in sub-s. (*b*).

Assuming that I am right in my construction of s. 90, I am not sure that it can make a material difference in the ultimate result in this appeal, for the plain reason that the bank in every case where they made a loan to Thomas Bros. Ltd., and took from that firm security in Form C as provided in s. 90, included the contemporaneous advance or loan made by them in the amount for which the security was taken. To that extent, therefore, the security would stand. It is true they also included, along with the contemporaneous loan, other loans which they had made to Thomas Bros., making the security cover as well the amount they had a right to take it for, viz.:—the contemporaneous loan, as also a very large number of other loans which they had no right to include. This inclusion not being within the statute in my judgment could not, of course, have the effect of making the security effective *quoad* these outside loans, nor could it invalidate the security so far as the contemporaneous loan was concerned.

Then as regards the mortgages I am of the opinion that the findings of fact of the trial judge as to the insolvency of the Thomas Bros. Ltd., and as to the absence of knowledge on the part of the bank and its manager of the insolvency, and as to the previous promise made to give such mortgage, confirmed as those findings were by the court of appeal, should not be interfered with so far as the Ontario real estate is concerned. The trial judge, in making his finding, evidently did so by accepting the evidence of the bank manager, Anderson, as to the insolvency of the manufacturing company, and as to the promise to give the mortgage.

It was to some material extent a question of credibility. I, therefore, think his finding, with regard to the mortgage of the Ontario real estate, confirmed by the appeal court, should not be interfered with. But with respect to the Quebec real estate, different considerations arise. A mortgage of such lands cannot be upheld, as I understand the law, based upon conditions existing when the promise to give the mortgage was made, but upon the conditions existing at the time of the giving of the mortgage. No evidence was given before the trial judge or the court of appeal as to the law of Quebec on the question of the validity of mortgages taken at a time when the mortgagor was insolvent. It is clear that such a mortgage in that province cannot be sustained by virtue of a previous promise. As a federal court it is our right and duty to take judicial notice of Quebec law, and I have reached the conclusion that, so far as the mortgage of Quebec real estate is concerned, it was invalid, and should be so declared because at the time of the giving of the mortgage the Thomas Brothers were insolvent.

I would, therefore, allow the appeal as to the mortgage on the Quebec lands with one-quarter of the costs of the appeal as the point was a minor one. As to the $17,600 advanced by the bank after the filing or presentation of the petition for liquidation, no point or question was raised by the liquidator on the argument of this appeal. We, however, referred the questions arising out of these advances back to the parties for what they might have to say regarding the rights of the bank respecting them. After reading these supplementary factums or statements we are of the opinion that if the parties cannot agree as to the rights of the bank with respect to these advances, and the proceeds of the goods and chattels which these moneys were advanced to improve so as to enable them to be sold more profitably than in their unfinished state they could be, it should be referred to the proper officer of the court below to determine whether any of these advances were made under s. 20 of the Winding-up Act in which case the bank should be entitled to the benefit of the securities taken and if not so made to determine whether the advances were made by the bank in the interest of the estate generally and for the completion of the partially manufactured goods and chattels to make them marketable and salable, in which case the advances

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so made should be repaid to the bank out of the proceeds of such sales, and any balance left paid over to the liquidator as part of the assets of the insolvent estate.

IDINGTON, J.:—The most important question raised herein is whether or not the condition upon which a bank is enabled by ss. 88 and 90 of the Bank Act, c. 29 R.S.C. (1906), to lend money upon the security of goods as therein specified, was duly observed by respondent in its dealings now in question with Thomas Bros., Ltd.

The parts of said sections relative to that in question herein, being sub-ss. 3 and 5 of s. 88, are as follows:—

(3) The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

(5) The security may be taken in the form set forth in schedule C to this Act, or to the like effect.

S. 90 (1) is as follows:—

(1) The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:

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

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

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

As far back as January, 1908, we are informed, the company owed the respondent about $200,000 and so continued up to the time it was put in liquidation early in 1914.

The amount of indebtedness to the bank varied and for some time exceeded that sum. But whatever it was it is claimed by respondent securities had been taken upon goods as specified by writings conformable with Form C in the schedule to the Bank Act.

I cannot find that any of said writings in fact observed the requirements of the Act.

In the latest, dated May 12, 1914, produced in the printed case as a fair sample of many others in the record, the first, and for our present purpose the most essential, part, reads as follows:—

In consideration of an advance of two hundred and thirteen thousand, four hundred————dollars, made by the Dominion Bank to the under-

signed for which the said bank holds the following bills or notes: (1) the products of agriculture, the forest, quarry and mine, the sea, lakes and rivers, the live

(1) Those mentioned on back hereof.

and dead stock, and the products thereof and the goods, wares and merchandise mentioned below, are hereby assigned to the said bank as security for the payment of the said bills or notes, or renewals thereof of substitutions therefor and interest thereon.

This security is given under the provisions of s. 88 of the Bank Act and is subject to the provisions of the said Act.

Those mentioned on the back thereof consist of one hundred and three items headed:—

Date of Promisor Note	When payable	Amt.

Underneath the word "promisor" is written the words "Thomas Bros., Ltd.," and underneath "when payable" "demand."

The dates of these notes run from "Sept. 20" to "May 12." The year in which given is not stated.

If we try to ascertain that, and turn to the foot of the document we find the following:—

This security is given pursuant to the written promise or agreement of the undersigned and especially of agreement, dated 29th day of January, 1914.

Dated at St. Thomas the 12th day of May, 1914.

On calling the attention of respondent's counsel to this being founded on a promise dated January 29, 1914, yet running back to transactions as early as September 20, 1913, if I understand the document aright, he said there were other documents which preceded and covered those items anterior to January 29, 1914.

Assuming that to be so, how can respondent justify bringing them forward, as it were, to be incorporated with this document? How can it hope to make this document effective for the purpose of comprehending transactions of an earlier date than the promise relied upon? It certainly could not be permitted to so extend retroactively the operation of the later promise, or the still later lien contract as to include earlier advances than the dates of either the promise or the lien contract or as to include under or by virtue of either a claim upon goods over which Thomas Bros. Ltd. had neither actual nor prospective dominion by virtue of any then existent contract, either when the promise made or lien given.

Then where are we to draw the line? If we draw it at the date referred to in the instrument as the date of the promise, can we be quite sure that we cover thereby all that might rightfully have been considered as falling within the statute?

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And supposing we do assume we are right in our guess, what of the anterior promises evidently contemplated to have been had in view by the contracting parties.

Again, which of the written promises or agreements are we to adopt?

The draftsman realized as the fact is and, I submit, law also, that the statute contemplates the existence of only a single promise and that in writing which may and must be the basis of the transaction in order to validate it.

But then he presents us with the impossibility of selecting some one, out of possibly many written promises or agreements, and that especially of agreement dated January 29, 1914, to support this security which I now present as a test of what the judgment of the Appellate Division rests upon.

I am also oppressed with the language of the instrument presenting the foundation of the whole transaction as, let it be observed, an advance of $213,400.

It is not a group or series of transactions that the statute enables the bank to lend in respect of, and then provides for a security to be given therefor, but a single transaction, a single advance, and an existent single article or assortment of goods definitely specified and ascertainable by following the description thereof in the instrument, is respectively what the statute contemplates and provides for, by its express terms.

It is the certainty of identification both of the subject-matter, and of the intended specific contractual relation in respect thereof, which the statute requires. No doubt facility of identification, in order thereby to prevent fraudulent practices, was also aimed at. But, above all, a strict and complete compliance with the conditions upon which an exceptional power was given banks, is imperatively required. To go beyond those is to produce that which is *ultra vires* and hence void.

And the respondent by its systematic course of conduct clearly indicates a conception of its limitations and duty in accord with such a view of the statute by getting, or perhaps pretending to have got, on each new advance a new lien security to cover it; yet, inconsistently with such view, at each of same steps trying to cover something else.

It seems to have hoped by a metaphysical process, as it were,

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to enable the judiciary to reach the conclusion that a repetition once a year or thereabouts of a general promise could be converted by a transferable mode of thought, into a divisible or multiple promise self-adaptable to meet any such situation that possibly could arise in the course of the contractual relations between itself and the borrower.

Why did the inventor of the annual promise plan not proceed a step further and substitute as a counterpart thereof, periodical loans and acceptances of lien securities therefor, modelled after that in Form C professed to be followed? Am I right in surmising that it possibly was felt the judiciary could not be expected to accept or assent to so much at one time?

However that may be, the transaction must be as to an advance to a wholesale manufacturer upon some of such goods, wares and merchandise as manufactured by him, or procured for such manufacture.

I am unable to see how such an instrument as this resting upon a statute which seems in every line of the relevant sections to contemplate actual specific loans to be made upon the security of specific goods or such as specifically pointed to in writing, or can be manufactured out of those so indicated with such definiteness as to enable them to be effectively traced and identified can be upheld.

I was at first disposed to think that as to the item for advances made at the time when it was given it might become a security upon the goods described, and hence as these instruments were numerous the respondent's claim might be maintained for something substantial.

But the more I have considered the matter, the more absurd does such an instrument seem as a means of executing the power conferred by the statute. In substance as a result of the respective dealings embraced in each, the others are like unto this.

Then again the only promise relied upon is that contained in the request addressed to the bank for a line of credit.

That, if held effective, would reduce the legislation to something quite ridiculous.

It would be equally good as a compliance with the statute if made when a man opened an account, and signed it then, and acted in accord therewith for the life of his business, whether a year or score of years.

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I cannot think that was the sort of thing which was had in view by the conditional requirement of sub-s. (*b*) of s. 90, quoted above.

Nor can I see how the case of *Imperial Paper Mills* v. *Quebec Bank*, 13 D.L.R. 702, touches the question at all.

The object of the legislation evidently was to limit the power of the banks, when taking security of that kind at all, within the narrow limit of doing so at the time of each transaction; or at that time having a specific promise in writing relative to a specific advance.

And the evidence in this case furnishes abundant evidence of the wisdom of so restricting the power of the bank.

It would have been better for respondent and all concerned had the statute been observed in the sense in which I now hold it should be read.

In this view the amendment of sub-s. 4 of s. 88 in the Bank Act as it now stands, need not be considered.

Nor, upon the material before us, need any of the other like securities be considered.

If in the long course of dealings between the parties in question there were any isolated cases of securities given, which can possibly fall within the meaning of the statute, there should be a reference, if respondent desires it, to take an account thereof and report, subject to further directions, upon evidence distinctly proving the facts of a present advance, and specific goods being given as security, and not depending merely upon the production of some pieces of paper and evidence of an agent who does not know the facts, but only speaks to a system existent at some time.

In the mortgage securities called in question I, as the result of a perusal of the evidence, and especially the correspondence between the head office and local agent, bearing thereon, am quite convinced that the respondent well knew when the mortgage was taken on the Montreal property that the company was insolvent and that continuing in business was, for its own purposes, a better expedient than winding it up.

It had only been by careful nursing and direction on its part until that and possibly other securities were got, that the insolvency had not been exposed to the world at a much earlier date.

I think there is no difficulty in reaching and setting aside such

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a contract made in this province between the respondent and its debtor, as this was, and of necessity had to be here—though registration as result thereof had to conform with the Quebec law.

As to the other security I entertain a different view.

The condition of the concern was not so obviously hopeless at the date of the execution of the chief mortgage as of that of the later one.

Again that earlier mortgage was preceded by an agreement which may be upheld so far as restricted to antecedent debts, and within those limits may protect the mortgage without rendering it offensive against the prohibition restricting banks from making loans on real estate.

With some doubt I have in relation to that aspect of the matters involved, but not touched upon in argument, I incline to hold the mortgage may be upheld.

Yet I must say that, with the intimate knowledge the respondent had of the company's actual financial condition and mode of operating, it is difficult to understand how it could have hoped for any other ultimate result than that of its being forced into liquidation.

If called upon to pay, which is the crucial test, it must have been held insolvent by any shrewd business man acquainted with its affairs. It is more in deference to that of others than to my own judgment that I assent to the judgment below in that regard.

I think the appeal should be allowed with costs throughout in regard to the main objects of the appeal as indicated herein.

Anglin, J.

ANGLIN, J.:—The appellants, who are the liquidator and a creditor of Thomas Bros. Ltd., an insolvent manufacturing company in liquidation, brought this action to set aside two mortgages on real estate and pledges of certain goods, purporting to have been made under sub-s. 3 of s. 88 of the Bank Act (R.S.C. 1906, c. 29, and 3 & 4 Geo. V. c. 9), held by the respondent bank for an indebtedness of the company which amounted to about $213,400 on May 12, 1914, twelve days after the winding-up order was made.

The bank apparently received payments and made advances up to that date. The advances between March 25, the date of presentation of the petition for winding-up, and May 1, the date of the winding-up order, amounted to $15,400. After May 1,

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$2,200 more was advanced. The company's indebtedness to the bank, however, which on March 24 amounted to $228,827, had been reduced on May 12, when the last advance of $200 was made, to $213,400. The earliest outstanding note on March 25, 1914, bore date August 16, 1913. If those outstanding notes represented actual contemporaneous advances, as the bank maintains they did, they would all fall within sub-s. 4 of s. 88 of the Bank Act which came into force in July, 1913. The bank had put its representative in possession on March 24, 1914. By subsequently realizing on its securities (except the St. Thomas mortgage) it had reduced the company's debt to $135,000 at the date of the trial.

Except as to such of the pledged goods as were dealt in but not manufactured by the company, which are not now in question, the action was dismissed by Sutherland, J., 37 O.L.R. 591, and on appeal by the plaintiffs the appellate division sustained his judgment, 38 D.L.R. 232.

The attack on the real estate mortgages as fraudulent and void against the liquidator and as calculated to hinder and delay the creditors of the company, which was but faintly pressed at bar, in my opinion fails on the facts stated in the judgment delivered by the learned trial judge and affirmed in the appellate division. Anderson's evidence, having been believed by the judge who saw and heard him give it and by the appellate division, should not be rejected here unless under very exceptional circumstances.

The Ontario mortgage is supported by the promise of May, 1912. On the facts found by the trial judge and accepted by the appellate division, notorious insolvency within art. 2023 C.C. sufficient to invalidate the Quebec security was not established, and the insolvency of the company was not known to the bank when it was taken. Art. 1035 C.C. The plaintiffs' attack on this mortgage, however, was based entirely on the Ontario statute, R.S.O. c. 134, s. 5. They did not invoke the Quebec law. But see *Morrow* v. *Hankin* (1918), 45 D.L.R. 685, 58 Can. S.C.R. 74, and *Logan* v. *Lee* (1907), 39 Can. S.C.R. 311. Before setting aside this hypothec I should have to consider very carefully the jurisdiction of the Ontario courts to do so.

The case presented as to the securities under the Bank Act demands fuller consideration. Some facts in addition to those

which I state and extracts from the relevant documents that may serve to make more comprehensible the situation out of which the questions discussed arise appear in the judgments below.

Prior to 1908 the company's line of credit with the bank did not exceed $150,000. In that or the next year it was increased to $175,000, and later, in 1909, to $200,000, continuing at about that figure until the date of the insolvency. During the same period the company's indebtedness to the bank varied slightly. Seldom below $200,000, it would appear to have reached a maximum of $233,000 about April 16, 1914.

To quote from the judgment of Maclaren, J.A., 38 D.L.R., at p. 234:—

> The records of the transactions in question were kept by the bank in two separate accounts, called respectively the purchase account and the sales account. The former contained on the credit side a record of all the demand notes which the company gave from time to time, generally for round amounts ranging from $1,000 to $10,000. On the debit side were entered all cheques given for payment of goods, wages, expenses, interest, etc. On the credit side of the sales account were entered the cash deposited, cheques of customers, drafts for collection, etc. On the debit side the demand notes of the company paid off from time to time, customers' notes or drafts returned unpaid, etc.

As the trial judge said, however, 37 O.L.R. at 601:

> The two accounts had to be looked to to ascertain the exact standing of the customer with the bank, from time to time, and advances were made to the company in the advance account (called by Maclaren, J.A., the purchase account), as they had credits in the other account. The two accounts had, of course, relation to each other and seemed in reality to be treated as one account.

The evidence of the bank manager establishes with reasonable certainty that each of the demand notes given from time to time for the sums placed to the credit of the purchase account was not a renewal note in any sense, but represented an actual advance made at the time the note was taken—an actual increase by the amount of the note (through withdrawals of its proceeds made by the company then or within a day or two afterwards) of the company's indebtedness to the bank as shewn by its net debit balance taking the two accounts together. It should perhaps be noted that discount was not deducted from the notes. Their face amounts were credited to the purchase account and bore interest at 6%. The trial judge says:—

> It seems to me from the evidence in this case that the bank was from time to time making advances and taking security under s. 88 of the Bank Act.

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As Maclaren, J.A., says, p. 236, distinguishing this case from *Bank of Hamilton* v. *Halstead* (*Halsted*) (1897), 28 Can. S.C.R. 235, 27 O.R. 435, 24 A.R. (Ont.) 152.

> So far as the evidence goes, the company had always the privilege of drawing the full amount that had been put to its credit through the negotiation of the demand notes.

The moneys represented by each of the demand notes were actually "placed freely at the disposal of the customer," as in *Ontario Bank* v. *O'Reilly*, 12 O.L.R. 420, at 432, "were placed under the control of the company," *Toronto Cream & Butter Co.* v. *Crown Bank*, 16 O.L.R. 400, 413.

In the *Halstead* case, 27 O.R. 435, at p. 439, as pointed out by Meredith, C.J., whose judgment was approved in this court:—

> Not a farthing of the amounts which the notes represented could be touched by (the customer) or made available by him for any purpose.

The practice in the case at bar was from time to time to retire the demand notes longest outstanding by cheques of the customer drawn on its "Sales Account" or by charging up the amounts of such notes against its credit balance in that account. The advances were made quite independently of such retirements.

Concurrently with the taking of each demand note and the placing of the moneys represented by it to the credit of the "Purchase Account," from which they were subject to withdrawal by the company at its will, the bank took a pledge under s. 88 of the Bank Act on all the raw material, manufactured goods and goods in process of manufacture in the customer's premises. Down to March 7, 1914, two separate documents were obtained on each occasion, one a pledge or security for the advance then being made (demand note contract), the other an "omnibus security" (as I shall term it for lack of a better name), for that advance and such prior advances as were represented by demand notes then outstanding (*i.e.*, not yet retired as above explained), a list of which was indorsed on the back. After January 29, 1914, new forms of the omnibus security were used in which the goods are somewhat more fully described but no special allusion is made to the amount of the concurrent advance. Some ten advances, amounting in all to $17,000, appear to have been made between March 7 and the date of presentation of the petition for winding-up, March 25, 1914. No document similar to the early "Demand

Note Contracts" was taken as security for any of the advances subsequent to March 6. On the back of the omnibus security obtained when each of them was made was indorsed a list of the then outstanding notes, and the security was stated on its face to be given in consideration of their total amount, the last item in the indorsed list being uniformly the amount of the note for the actual concurrent advance. On the last of these securities taken before the winding-up—that of March 24, 1914—77 of the 103 notes in the indorsed list bear dates between August 16, 1913, and January 29, 1914, and only 26 bear subsequent dates. Yet the document purports, as do all the securities taken after that date, to be given pursuant to a written promise or agreement of January 29, 1914. I shall have occasion again to advert to this fact.

The securities taken before January 29, 1914, contain no explicit reference to an antecedent written promise, although such a promise that security would be given under s. 88 of the Bank Act had been obtained by the bank annually or oftener when the line of credit for the ensuing period of a year, or less, as the case might be, was arranged for. Whatever may be its value as security for previous advances, I know of no good reason why each of these documents taken on and after March 7, 1914, should not be a perfectly good and valid security under s. 88 (3) and clause (*a*) of sub-s. 1 of s. 90 of the Bank Act for the actual concurrent advance.

I am satisfied that all prior securities were not discharged by substitution or merger as the result of the taking of the new general security given when each fresh advance was made. This, in my view, is really the crucial question in this case, and it is perhaps regrettable that more attention was not given to it in argument. If there was no merger of earlier in later securities—if the securities taken concurrently with each advance are still alive and enforceable—the bank's position seems to me to be free from difficulty, since the requirements of clause (*a*) of sub-s. 1 of s. 90 are met. On the other hand, if there was a merger or substitution—if the last security taken absorbed and extinguished all prior securities held for the advances for which the outstanding notes indorsed upon it had been given—the stated consideration included them—it is obvious that it would be necessary to establish that as to such prior advances—past indebtedness—the absorbing

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or substituted security was given pursuant to a promise or agreement that would satisfy clause (*b*) of sub-s. 1 of s. 90. The question of merger or substitution is only of importance if the omnibus securities taken on the occasion of each advance cannot be supported in respect of the prior indebtedness included in the stated consideration; and it is on that assumption that it is now discussed.

Strong as the legal presumption of merger of an earlier security, which arises upon the taking of a new security of a higher nature for the same debt, undoubtedly is (*Price* v. *Moulton* (1851), 10 C.B. 561, 138 E.R. 222), it yields to satisfactory proof of a contrary intention (*Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, 483-4), and there is no such presumption where the new and the old securities are of equal degree. 7 Hals. 457; *Preston* v. *Perton* (1601), Cro. Eliz. 817, 78 E.R. 1043:—

> A good prior security will not be held to merge in a later inoperative one.

Chetwynd v. *Allen*, [1899] 1 Ch. 353, at 358, *per* Romer, J.

Substitution, like merger, is largely a question of intention. *Ex parte Willement*, 3 Deac. 364. Where the taking of further security is the real purpose of the new instrument there is no extinguishment of the earlier security. *Twopenny* v. *Young* (1824), 3 B. & C. 208, 107 E.R. 711. The principle underlying the equitable doctrine that merger of estates and merger in the fee of a paid-off mortgage security on real estate are questions of intention actual or presumed, and that an intention to keep a charge alive will be presumed when that is for the benefit of the person against whom it is sought to set up merger. *Re Pride*, [1891] 2 Ch. 135, 142; *Adams* v. *Angell* (1877), 5 Ch. D. 634, may well be applied where merger or substitution of securities on personal property is claimed under circumstances such as those now before us. No reason can be suggested why the bank would willingly part with or permit the extinguishment of any security held by it in a case such as this. It would be so contrary to what is commonly well understood to be the practice of bankers—so obviously contrary to the bank's interest, that I should require clear and convincing evidence that such a merger or substitution was intended before admitting that it had in fact taken place.

In the securities taken before January 29, 1914, the customer is made to represent that the goods pledged "are free from any

mortgage, lien or charge thereon." I take it that was intended to mean other than liens or charges held by the bank itself, although it would certainly have been more satisfactory had this exception been expressed as it is in the securities taken on the new forms in use after that date.

I agree with the observation made by counsel for the plaintiffs in the course of the trial that "there is nothing in the documents themselves to shew whether they are in substitution or not." Yet my inference from them, paying due regard to the surrounding circumstances, would be that no merger or substitution was intended.

The question of intention, however, is not left entirely to mere inference. The bank manager was called as a witness by the plaintiffs. In answer to questions put by their counsel on direct examination (of course without objection being taken on behalf of the defendant), he gives this evidence:—

Q. Looking again at this last receipt taken under s. 88, I see it is for $213,400? A. Yes.

Q. That amount represents the amount of notes going back to what date? A. Represents the amount of notes going back to September 20, 1913.

Q. All those notes that are represented on the back of this contract were also represented in numerous other contracts which you took after September 20? A. All the notes that were unpaid would be.

Q. You took a new contract with every note? A. With every note.

Q. So that at the time you took this contract did you hold all these other contracts? A. We held all those other contracts.

Q. You held contracts dated the date of each of those notes? A. We held contracts dated the date of each of those notes.

Later in his direct examination, in answer to a question pressed by counsel for the plaintiffs, notwithstanding objection, the witness first said positively that there was no substitution of new securities for older ones and, a moment or two later, that "it never entered into my head until now whether I took it (the later security) in substitution or not."

The plaintiffs can scarcely complain if this evidence elicited by them from their own witness is used against them. So far as it may be admissible it goes to confirm the inference that I should draw without it from the circumstances that merger of, or substitution for, earlier securities was not intended.

From the whole case I gather that the banker's idea in taking securities in this omnibus form after July, 1913, was that some-

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thing of the kind was necessary in order to obtain security on the new goods brought in to replace those sold and taken away in the ordinary course of business. That I think may fairly be said to be the purport of the bank manager's testimony. Whatever advantages it may have had before the amendment to the Bank Act of 1913, this practice has been unnecessarily, and I cannot but think unwisely, continued since. Sub-s. 4 of s. 88, first introduced at that time, provides that, in the event of goods held under a security given for money loaned under that section being removed with the consent of the bank, and similar goods brought in substitution therefor, the goods "so substituted shall be covered by such security as if originally covered thereby," *i.e.*, by the security held upon the goods so removed. A new security is neither contemplated nor required. The nature of Thomas Brothers' business leaves no room for doubt that the sale and consequent "removal" of their products was "with the consent of the bank." See, too, the last clause of sub-s. 4. Securities held upon goods so removed attached automatically under that sub-section to goods "substantially the same in character . . . substituted therefor." Yet we find in the new form of promise adopted by the bank in 1914, presumably drafted because of the amendment of 1913, this clause:—

> 6. If with the consent of the bank, the goods or any part thereof are removed, other goods, of substantially the same character and of at least the same value as those so removed, shall be thereupon forthwith substituted therefor and the customer hereby agrees, so often as every such removal and substitution shall take place, to give and shall give warehouse receipts, bills of lading or securities under the Bank Act, covering such substituted goods, all of which shall be subject to the provisions hereof.

Acting under this clause and taking the further security which it indicated as proper, if not necessary, the bank manager had no idea of relinquishing any security already in hand. To do so would never occur to him.

Elaborate (and perhaps in the respect indicated misleading) as the bank's new forms of 1914 are, the new form of pledge then adopted omits what should have been one of its prominent features, if, as was apparently the case, it was intended to continue the former practice of including in each new security all outstanding notes, namely, a clause explicitly providing that there should be no merger or absorption in it of, or substitution of it for, any

securities given for past advances. Without such a clause the taking of securities in the omnibus form adopted by the bank is unavoidably fraught with the danger of affording some colour to the contention put forward in this case that substitution for, or merger and extinguishment of, prior securities was thereby affected.

That no such merger in fact took place was the view of the trial judge. He says, p. 602:—

> It is contended on the part of the plaintiffs that there was in reality the same course of dealing between the bank and its customer in this case as was held to be invalid in the *Halstead* case. It seems to me, however, from the evidence in this case, that the bank was from time to time making advances and taking security under s. 88 of the Bank Act on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace it. A separate note and security was taken for each advance. A general security was also taken referring to all outstanding notes as to each of which a previous individual security had been taken. This it seems to me could not be called a substitution, but rather a consolidation.

There was consolidation, however, only in the sense that as a convenient method of keeping track of the total secured indebtedness and apparently as something erroneously thought to be necessary in order to secure the benefit in regard to them of sub-s. 4 of s. 88, the outstanding notes were included in the statement of the consideration for each new omnibus security and were scheduled by indorsement upon it. There was no consolidation in the sense of any merger or absorption of the earlier securities such as would extinguish them or render them unenforceable.

This question is not dealt with in the opinion delivered by Maclaren, J.A., in the appellate division probably because he held the omnibus securities good by virtue of the antecedent promises given under clause (*b*) of s. 90, in respect of the past advances which they purported to cover as well as the advances made concurrently.

I am of the opinion that the lien taken on the occasion of obtaining each of the advances represented by notes that were still outstanding at the date of the commencement of the winding-up may be regarded as a valid and subsisting security on such of the goods covered by it as remained in the hands of the company at that date (including in the case of liens taken after July 1, 1913, substituted goods), since each of such demand notes represented an actual present advance, and the security was given concurrently with the making of it as required by clause (*a*) of sub-s. 1 of s. 90

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of the Bank Act, and was not merged in or otherwise extinguished by any of the securities subsequently taken in omnibus form.

Since July 1, 1913, when sub-s. 4 of s. 88 of the Bank Act (3 & 4 Geo. V. c. 9) came into force, the advances by the bank amounted to over $300,000. The goods within sub-s. 3 of s. 88 on hand at the date when the winding-up began were valued at $83,637.92. The annual turnover of the company had been over $450,000. The earliest outstanding note when the winding-up began bore date August 13, 1913. There can be little room for doubt, therefore, having regard to the provision for substitution made by sub-s. 4, that all the goods in stock at that time were covered by valid securities in the hands of the bank.

In case there should be any difficulty in sustaining its claim under clause (*a*) of sub-s. 1 of s. 90, counsel for the bank also contended that he was entitled to support each of the omnibus liens taken for all outstanding notes by the promises for security which the bank had obtained annually or oftener from the company. Counsel for the appellants challenged this position, maintaining that a promise in order to meet the requirements of clause (*b*) of sub-s. 1 of s. 90 must be made contemporaneously with the advance in respect of which the promisor undertakes to furnish security. I am unable to read such a restriction into clause (*b*).

S. 90, so far as material reads as follows:—

> 90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:
>
> (*a*) At the time of the acquisition thereof by the bank; or
>
> (*b*) Upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

A promise to furnish security for advances to be made in the future is not within the mischief against which s. 90 was meant to provide. The mischief aimed at is the taking of security for past indebtedness. The canon embodied in the maxim *expressio unius est exclusio alterius* would seem to preclude the narrow construction which the appellants seek to place on clause (*b*). Clause (*a*) and clause (*b*) are independent alternatives. Clause (*a*) explicitly prescribes that in the case of a security to which it applies, the bill, note, debt or liability, to secure which it is given, must be negotiated or contracted at the time the bank acquires the security.

Clause (*b*) alternatively provides that, if not so taken, the security must be given pursuant to a written promise or agreement to give it, on the faith of which the bill, note, debt or liability has been negotiated or contracted. The mischief against which the section was designed to provide of course excludes from the purview of clause (*b*) a promise or agreement given or entered into after the advance has been made. But I find nothing to warrant excluding a prior promise—nothing to justify importing into clause (*b*) the restriction as to time which Parliament has placed in clause (*a*)—no reason for substituting for the introductory words of clause (*b*), "upon the," which clearly mean "on the faith of the," some such words as "at the time of obtaining a." The use in it of the preterite-subjunctive form of the verb, "would be given," tends to confirm this view of the proper construction of clause (*b*); if the construction contended for by the appellants were correct one would expect to find the verb in the future tense—"will be given."

Apart entirely from authority, my view of the proper construction of clause (*b*) is that the written promise or agreement for which it provides may be given prior to, or at, the time when the bill, note, debt or liability to be secured is negotiated or contracted. Of course it must be possible to identify the advance as one to which the promise was intended to apply, and the goods as property on which the security was promised by it.

As Maclaren, J.A., points out, however, although not explicitly referred to in the judgment of the Privy Council in *Imperial Paper Mills Co.* v. *Quebec Bank*, 13 D.L.R. 702, the question now raised as to the construction of clause (*b*) can scarcely have escaped their Lordships' attention in view of Lord Shaw's detailed statement of the course of business pursued, and of the fact that the judgment appealed from (1912), 6 D.L.R. 475, 26 O.L.R. 637, at pages 481, 488, 489, itself shewed that in one instance, although the promise for security was made in August, 1905, the demand note for $120,000 and the security therefor were given only in February, 1906, the actual advances having been made from time to time in the interval. This security was upheld.

The decision of their Lordships is chiefly valuable, however, as affording an answer to the objection taken by the present appellants to the sufficiency of the description of the goods in the securities taken by the respondent bank.

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No doubt the promise of January 29, 1914, would not suffice under clause (*b*) of sub-s. 1 of s. 90 to support the securities subsequently taken in so far as they were for advances represented by notes of earlier date. For that purpose the earlier promises should have been referred to as well. But if there was no substitution for the earlier securities, or merger of them in, or extinguishment of them by, the later securities taken, this omission is not of much moment. In any case, since the earlier written promises in fact existed, I think they might be proved and relied upon notwithstanding the fact that the promise of January 29, 1914, is alone mentioned in the liens taken after that date.

A more serious objection to supporting any of the liens as a security for any advance earlier than that actually made contemporaneously with it would seem to be that the promise to give security for such earlier advance was probably fulfilled and satisfied by the security taken at the time it was made and cannot, therefore, be relied on to support subsequent security for it. Except perhaps for the purpose of clause 6 of the "promise" of January 29, 1914, which I have quoted, there was no promise for any further security.

But if the view I hold that the security taken for each advance at the time it was made was efficacious and continued in force is sound, it is unnecessary and it would probably be unwise to dwell further upon other phases of this case. I have referred to them merely to make it clear that I do not share the views upon the construction of clause (*b*) of sub-s. 1 of s. 90 which I understand some of my learned brothers entertain.

As to the advances, amounting to $17,600, made by the bank after the presentation of the petition for winding-up (R.S.C.c. 144, s. 5) it can claim only in so far as the liquidator may have sanctioned them as necessary for a beneficial winding-up (*ibid.* s. 20), or as the court may consider it entitled under the doctrine of equitable subrogation to the benefit of securities (including under them substituted goods within sub-s. 4 of s. 88) held by it for so much of its indebtedness as was paid off during the same period.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—This is an action by the liquidator and a large creditor of the insolvent company, Thomas Bros., Ltd., to set aside certain securities held by the respondent bank on the goods

of that company, and also to set aside two mortgages given in favour of the bank.

The courts below dismissed that action, except as to a small item which is not in issue in this appeal.

It is claimed by the appellant that those securities are contrary to the provisions of ss. 88 and 90 of the Bank Act, and that the mortgages were signed when the debtor was insolvent to the knowledge of the creditor and that the effect of those mortgages gave the bank an unjust preference over the other creditors.

Dealing first with the securities. I see that from 1906 until the petition for a winding-up order was presented by the bank on March 25, 1914, the company was indebted to the bank for the sum of about $200,000. On March 24, 1914, on the eve of the presentation of the petition, the indebtedness, as appears by the security given that day, was of $228,827. As stated in the document the security was given

pursuant to a written promise or agreement of the undersigned (Thomas Brothers Limited), and especially of agreement dated 29th January, 1914,

and it was

in consideration of an advance of $228,827 made by the Dominion Bank to the undersigned for which the said bank holds the following bills or notes:

and then follows a list of 103 notes ranging in amount from $127 to $5,500 and dated from August 16, 1913, to March 24, 1914. It appears rather peculiar that the security was given in virtue of a promise made in January, 1914, when most of the notes covered by the security were dated before this last date.

The promise or agreement relied upon by the bank was in the form of a request signed by Thomas Bros. to the bank

to make advances to the undersigned (herein called the customer) from time to time and in consideration thereof the customer doth hereby promise and agree as follows: (1) To give from time to time to the bank security for every advance and interest by way of warehouse receipts, bills of lading or securities under ss. 86-87-88 and 90 of the Bank Act.

It cannot be pretended that a promise made under s. 90 of the Bank Act could cover advances made before it was signed. Besides, the terms of the promise itself in this case were not to cover past indebtedness but future advances. So the promise of March 24, 1914, could not validly cover the notes discounted or signed before the date of the promise.

Could that promise, however, validate notes negotiated after it was made? This is the main question at issue in this case.

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By s. 88 of the Bank Act, it is provided in sub-s. 3 that

the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture.

S. 90 of the Bank Act is the section which has to be construed in order to find out whether the promise above mentioned was valid or not. It provides that the bank shall not acquire any security

to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:

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

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

That provision of the Bank Act is a derogation from the prohibition in s. 76 concerning lending money upon the security of goods, wares and merchandise.

This section is also a derogation from the law concerning chattel mortgages. In some provinces, statutes relating to bills of sale, to chattel mortgages, etc., have been passed to recognize change of ownership or of legal relations respecting personal property without change of possession or change of possession without change of ownership. Those chattel mortgages have to be registered and are surrounded with provisions which, if not absolutely carried out, render the bills of sale or chattel mortgages null and void. The provincial law surrounds with extraordinary precautions the validity of chattel mortgages and where the procedure enacted by the legislature is not scrupulously followed those mortgages are held not to be valid against the assignee. *Gault* v. *Winter* (1914), 19 D.L.R. 281, 49 Can. S.C.R. 541.

The Canadian Parliament thought it advisable, however, with regard to the banks to give them the power to take security in the nature of chattel mortgages or bills of sales upon the property of the wholesale manufacturers; and those securities might be taken without any publicity being given to the existence of such chattel mortgages or such bills of sale.

Then I say, applying the principle that we have laid down in the case of *Gault* v. *Winter*, *supra*, that the procedure which is enacted by the legislature should be followed entirely to render valid the securities taken by the bank.

The object of the law is not to give to the bank an authorization to take securities or bills of lading, for money which had been previously lent, in other words, for past indebtedness, but the loan must be made contemporaneously with the taking of the security or the giving of the promise. The bill or note must be negotiated at the time the bank acquires the securities or at the time at which a written promise is made that security shall be given; otherwise the bank could for years in advance hold a promise that a security will be given and when they see that their customer is in financial difficulty take a security upon all his goods.

That was practically what was done in this case. The promise relied upon was given in the month of January, 1914, and similar promises had been made also in the previous years every time the customer was applying for a line of credit or for the continuation of his line of credit. Then on March 24, 1914, on the day previous to the presentation of the petition for winding-up the company, the bank takes a security upon all the stock of the company. That security given on March 24, constituted not only a preference given by an insolvent debtor to one of his creditors who was aware of his insolvency but also constituted a formal violation of the provisions of s. 90 of the Bank Act.

Then applying the principle that we have laid down in the case of *Gault* v. *Winter*, 19 D.L.R. 281, the procedure which is enacted by the legislature should be followed entirely to render valid the securities taken by the bank.

As I have said the object of the law is to give to the bank an authorization to take securities for contemporaneous indebtedness. It may happen that a manufacturer has to pay cash for some goods, even before their delivery; then the Bank Act authorizes the bank to advance the money to the manufacturer on the promise then made that the latter will give it security on those goods. In such a case, the security would be valid. It is the case contemplated by sub-s. (*b*) of s. 90.

It is contended, however, that if the security is not valid as a security based on a promise, it would be valid as a security based upon advances made at the time of its acquisition under the provisions of par. (*a*) of s. 90.

In that respect it becomes necessary to examine the agreements made after January 29, 1914, and those made before that date, since they were made in different ways.

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After January 29, 1914, the securities were all based on the promise of that day and they all contain this provision:—

This security is given pursuant to the written promise or agreement of the undersigned and especially of agreement dated 29th January, 1914.

Those securities profess then to have been given under par. (*b*) of s. 90. I do not see how we could now ignore that and say that they should be considered as having been given under par. (*a*) of that section.

If it were only a question of agreement between two parties, and there would be some ambiguity, we might perhaps try to find the true intention of the parties and apply with less stringency the ordinary rules of construction, but those securities affect not only the contracting parties but also all the creditors of the party who gave the security. The Bank Act enacts positively that the banks shall not lend money upon the security of any goods (art. 76, sub-s. 2), except as specifically authorized by the Act. It is then of principle that the banks should make advances to their clients without looking for any special security. There are exceptions; but those exceptions must be strictly construed.

In the case of a manufacturer the bank could, when they discount a note, take then a security on his stock for the amount of that note, or they could then take from him a promise that in a few days he would give them, to protect their claim, warehouse receipts, bills of lading, or other security; but the provisions of the law in that respect must be rigorously followed. If the customer and the bank have found it advisable to give and take a security based upon a promise, they could not substitute later on a security based upon advances.

This court has virtually laid down the above principle in the case of *Bank of Hamilton* v. *Halstead*, 28 Can. S.C.R. 235. Girouard, J., who rendered the decision for the court, stated that the Act does not authorize the substitution of one assignment for another.

As to the agreements made before January 29, 1914, Thomas Bros. were, when they had an advance made, in the habit of giving a security on their goods for that specific sum. That was unquestionably valid.

But they were, at the same time, giving a security for all the notes previously discounted, including the one discounted on that day, and the agreement contained the following provision:—

This security is given under the provisions of s. 88 of the Bank Act and is subject to the provisions of said Act. The said goods, wares and merchandise are now owned by Thomas Bros. Ltd., and are now in possession of Thomas Bros., *and are free from any mortgage, lien or charge thereon.*

The agreement with the provision that the goods of Thomas Bros. were free from any mortgage, lien or charge thereon was then handed over to and accepted by the bank. That constituted, according to my opinion, an implied renunciation, on the part of the bank, of the lien or charge which existed before on the goods of Thomas Bros. in its favour.

The bank, seeing evidently that this declaration on the part of Thomas Bros. that there was no previous lien or charge was a declaration which might affect the validity of their security, changed the provisions of the agreement and we find later on that the securities contain the following:—

The goods, wares and merchandise are now owned by and are now in the possession of the undersigned and are free from any mortgage, lien or charge thereon (excepting only previous assignments to the said bank, if any).

I am then on that point of opinion that the securities which have been given before March 24, 1914, or before the petition for winding-up, are not valid and cannot be invoked against the liquidator and creditors of Thomas Bros. and should be set aside.

Now coming to the question of mortgages, I find that the trial judge—and in that respect he is confirmed by the appellate division—was of opinion that the mortgages are valid.

In 1912, Thomas Bros. had given a promise that the securities by way of mortgages would be given on or before October 1, 1912. These mortgages were not given at the time stipulated.

In 1913, a statement was prepared which seemed to shew a considerable profit in the company's business to the end of August, 1912. But in the fall of 1913, the bank produced a note by Clarkson & Co. which seemed to shew that the previous statement was inaccurate.

This naturally made the bank more anxious and they became insistent as to the real estate securities. They then signed a first mortgage on property situate in Ontario.

In view of the findings of fact made by the trial judge, and confirmed on that point by the appellate division, I would not be ready to disturb that judgment as far as the Ontario mortgage is concerned; but on January 22, 1914, just two months before the

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petition for winding-up was presented, a mortgage was taken upon a property situate in the Province of Quebec.

I am of opinion that with respect to that mortgage, the law of the place where the property was situate and where the mortgage has been given should govern. According to arts. 2023 and 1032 *et seq.* of the Civil Code, where a creditor has knowledge of the insolvency of his debtor, he cannot take a valid mortgage on the property of his debtor.

There is no doubt that on January 22, 1914, the bank knew that Thomas Bros. were unable to meet their liabilities. Then, according to my opinion, the Quebec mortgage should be set aside.

For these reasons, the appeal should be allowed with regard to the securities and with regard to the Quebec mortgage with costs throughout.

Mignault, J.

MIGNAULT, J.:—I agree with my brother Anglin that there was no merger of previous securities given by Thomas Bros., Ltd. to the respondent by the fact that the prior advances by the latter were mentioned along with the contemporaneous advance made on the date when the new security was given to the bank. Each security was good for the contemporaneous advance and void as to the prior advances, but inasmuch as each of these prior advances was accompanied by the giving of security under s. 88 of the Bank Act, and as these prior securities were not merged in the subsequent security taken by the bank for another advance, the respondent holds securities for all its advances which meet the requirements of clause (*a*) of sub-s. 1 of s. 90 of the Bank Act.

It may, however, be remarked that the form of these securities is most misleading. Taking, for example, that of May 12, 1914, on which date an actual advance of $200 only was made, the contract or security begins by the words:—

> In consideration of an advance of two hundred and thirteen thousand four hundred dollars, made by the Dominion Bank to the undersigned, for which the said bank holds the following bills or notes:

This was almost inviting disaster in view of the imperative terms of clause (*a*), for out of this so-called advance of $213,400, the sum of $213,200 represented bills, notes, debts or liabilities which were not "negotiated or contracted at the time of the acquisition thereof by the bank." It is only because the subsequent security did not supersede the prior securities given to the

bank at the time of each advance, that the respondent can claim to have security under s. 88 of the Bank Act for more than the amount actually advanced by it at the time the last security was given by Thomas Bros. Ltd.

It was contended, however, by Mr. McCarthy that each security was covered by a prior promise given by Thomas Bros. Ltd., and that this would validate the security as to the prior advances under clause (*b*) of sub-s. 1 of s. 90. This clause, taken in connection with the first paragraph of sub-s. 1, states that:—

> The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:
>
> (*a*) .....
>
> (*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

I think the meaning of s. 90, as a whole, is that there must be, when the bill or note is discounted by the bank, either—

(a) The giving of security under s. 88 contemporaneously with the discounting of the note; or

(b) An existing written promise to give such security to the bank at some future time.

In my opinion this written promise must be a specific promise to give a specific security at a subsequent date, and not a general promise to give security for any advance which the bank may make to the customer from time to time. It does not appear necessary that the note be discounted at the time the promise is made, provided that the note be discounted by the bank upon, *i.e.*, in pursuance of, such a promise. When this written promise has been given, security may be taken by the bank to cover prior advances made by the bank upon such a specific promise.

Referring again to the security of May 12, 1914, it states:—

> This security is given pursuant to the written promise or agreement of the undersigned, and especially of agreement dated January 29, 1914.

The written promise of January 29, 1914, says:—

> The Dominion Bank (herein called the "bank") is hereby requested by the undersigned to make advances to the undersigned (herein called the "customer") from time to time, and in consideration thereof, the customer doth hereby promise and agree as follows:—
>
> 1. To give from time to time the bank security for every such advance and interest by way of warehouse receipts, bills of lading, or securities under ss. 86, 87, 88 and 90 of the Bank Act.

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In my opinion, this promise being a general promise referring to no specific security to be given in pursuance of the promise, but merely undertaking to give security for any advance which the bank may make from time to time, does not meet with the requirements of clause (*b*). I may add that if clause (*b*) were construed so as to validate securities for any prior advances which the bank might have made to the customer from time to time in pursuance of such a general promise made possibly years before the advances, the whole object of s. 90 would be defeated.

Fortunately, however, for the respondent each security taken by it is good for each contemporaneous advance, and the prior securities are not merged into the subsequent ones, so that the claim against Thomas Bros. Ltd., is secured.

I have referred to the security given to the bank on May 12, 1914, merely as an example of the course of dealing between the respondent and Thomas Bros. Ltd. I must say, however, that there is another difficulty in the way of the respondent. The petition putting Thomas Bros. into liquidation was filed on March 28, 1914. Subsequently to that date, the bank advanced to Thomas Bros. Ltd., the sum of $17,600, and took security therefor. The winding-up order bears the date of May 1, 1914. I have duly considered the supplemental factums filed by the parties with regard to these advances, and I fully concur in the opinion of His Lordship the Chief Justice as to the declaration that should be made in the judgment.

I think that the appeal should be allowed with respect to the hypothec taken by the bank on the Montreal property on January 22, 1914. I have no doubt that at the date of this mortgage Thomas Bros., Ltd., were insolvent. I am also of the opinion that this state of insolvency was known to the bank, for the latter then controlled the business of Thomas Bros., Ltd., and had received a report on their financial position up to August, 1913, shewing a considerable deficit on their operations during the preceding year. This question of the validity of the Montreal hypothec must be determined under the provisions of the Civil Code of the Province of Quebec. Reading art. 2023 C.C, with art. 1032 *et seq.*, I think that where a creditor has knowledge of the insolvency of his debtor, whether this state of insolvency be

notorious or not, he cannot take a valid hypothec on the property of his debtor.

On the whole, therefore, I think the appeal should be allowed to the extent stated in the opinion of His Lordship the Chief Justice. *Appeal allowed in part.*

ANNOTATION.

Written promises under s. 90 of the Bank Act.

BY JOHN DELATRE FALCONBRIDGE, M.A., L.L.B., AUTHOR OF BANKING AND BILLS OF EXCHANGE.

In the foregoing case of *Clarkson* v. *Dominion Bank*, the main question requiring decision related to the validity of certain securities taken by the bank under s. 88 of the Bank Act. The validity of the securities was upheld by the judgment of the Appellate Division of the Supreme Court of Ontario, and in that respect the judgment was affirmed by the Supreme Court of Canada.

The chief interest of the case lies, however, in the reasons for judgment given by the various members of the Supreme Court of Canada, with particular reference to the opinions expressed as to the meaning of clause (*b*) of s. 90 of the Bank Act. In expressing these opinions the judges have to some extent strayed beyond the ground which it was necessary for them to cover in order to decide the main question as to the validity of the securities, but it is clear, that even *obiter dicta* of members of the highest court in Canada cannot be lightly disregarded.

The relevant provisions of the Bank Act are the following:—

88. The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock, or the products thereof, upon the security of such products, or of such live stock or dead stock or the products thereof.

3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

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

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

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

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

What has, I think, been the prevailing opinion of the meaning of s. 90 is that under clause (*a*) the security must be taken at the time of the advance,

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that is when the "bill, note, debt or liability is negotiated or contracted," but that under clause (*b*) the "written promise or agreement" may precede the advance and the security pursuant to such promise or agreement may be validly taken subsequently to the advance. This view received judicial approval in the Appellate Division of the Supreme Court of Ontario in *Clarkson* v. *Dominion Bank*, 38 D.L.R. 232, 40 O.L.R. 245.

Mr. Lash, if one may judge from an article written in 1894, apparently was of opinion that the promise might precede the advance, for he says that the "promise or agreement . . . must exist at the time the bill, note or debt is negotiated or contracted" (Journal of the Canadian Bankers' Association, vol. 2, p. 64). He was careful, however, to guard himself from expressing a decided opinion as to the validity of security taken in pursuance of a general promise to give security under s. 86 or s. 88, as distinguished from security taken in pursuance of a specific promise, such as a promise to give security on specific goods, described by reference to the warehouse, the warehouseman, the quantity and description of the goods.

Mr. James Bicknell was more positive in recognizing the validity of security taken after an advance in pursuance of a promise made prior to the advance, as may be inferred from the form of application for advances and agreement to furnish security prepared by him in 1914, at the request of the executive council of the Canadian Bankers' Association, and published in the Journal of the Association (vol. 21, pp. 174-179, April, 1914).

The construction of clause (*b*) of s. 90 is very much discussed in the judgments delivered in the Supreme Court of Canada. Whether or not the written promise mentioned in clause (*b*) may precede the advance, the judgments of the majority of the court raise the more important question whether a general form of promise, such as that drawn by Mr. Bicknell—and heretofore in use by some of the banks—is valid under the statute.

As pointed out by Meredith, C.J.C.P. (now C.J.O.) in *Halstead* v. *Bank of Hamilton* (1896), 27 O.R. 435, at p. 439, s. 88 (then s. 74) is the enabling section and s. 90 (then s. 75) must be read in the light of the provisions of the earlier section. It is provided by s. 88 (and the same is true of s. 86) that the bank "may lend money . . . upon the security of," etc., and as s. 90 is in a negative form, limiting the right of the bank to take security under s. 88, s. 90 must be construed as referring only to a transaction in the nature of a loan of money upon the security in question. Clause (*a*) of s. 90 authorizes security to be taken contemporaneously with the negotiation or contracting of the bill, note, debt or liability, or to express it more shortly, at the time of the advance. Clause (*b*) obviously provides for security being given subsequently to the advance, but in that case there must be in existence at the time of the advance a written promise or agreement to give security. Apart from the question whether the promise may be general, or whether it must refer to specific security—a question to be referred to later—clause (*b*) is ambiguous. (1) The clause may mean that the promise must be taken at the time of the advance, or (2) it may mean that it is sufficient that when the advance is made there is a prior promise in existence. In the first alternative s. 90 as a whole means that the bank may lend money under s. 88 (*a*) if the security is taken at the time of the advance, or (*b*) if the promise is taken at the time of the advance, and security is subsequently taken pursuant to the promise. This construction of s. 90 is entirely consistent with s. 88 and

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attributes distinct meanings to clauses (*a*) and (*b*). Against it may be urged the fact that clause (*b*) is not expressly limited to a promise which is made at the time of the advance, whereas clause (*a*) is expressly limited to security which is taken at the time of the advance. If, on the other hand, clause (*b*) means that security may validly be taken pursuant to a promise made prior to the advance, it necessarily follows that the security may be taken subsequently to the advance pursuant to the promise, because clause (*b*) ought to be construed so as to give it a meaning distinct from that of clause (*a*), and if security is taken at the time of the advance the case falls within clause (*a*) whether or not there is a prior promise in existence.

It would appear probable that on principle Meredith, C.J.O., considered the narrower construction of clause (*b*) to be the correct one. In *Clarkson* v. *Dominion Bank*, 38 D.L.R. 232, at p. 238, he said:—

> But for the decision in *Imperial Paper Mills of Canada* v. *Quebec Bank*, 13 D.L.R. 702, I should have thought it open to serious question whether the learned counsel for the appellant is not right in his contention that, in order to validate a security under clause (*b*), the advance must be made at the time the written promise or agreement is given. In other words, that what s. 90 contemplates is, that the security shall be given at the time of the negotiation or contracting of the bill, note, debt, or liability or that the written promise or agreement to give the security shall be given at that time.

In the earlier case of *Toronto Cream and Butter Co.* v. *Crown Bank*, 16 O.L.R. 400 at p. 419, Meredith, J.A. (now C.J.C.P.), in a dissenting judgment, said:—

> I would have thought it very obvious that what was contemplated by parliament, and what is provided for by the words of the enactment under discussion, was and is a promise made at the time when the loan is made to give certain security for it at some future time.

On the other hand, none of the judges in *Toronto Cream and Butter Co.* v. *Crown Bank*, other than Meredith, J.A., seemed to see any objection to the validity of the security, merely on the ground that the promise preceded the advance, and as the majority of the court held that the security had been taken at the time of the advance, it was not necessary to pass upon the construction of clause (*b*). There was, however, a difference of opinion as to the validity of the vague form of promise there in question.

In *Clarkson* v. *Dominion Bank*, the Appellate Division considered that the question was concluded by the decision of the Privy Council in *Imperial Paper Mills* v. *Quebec Bank*, already referred to. Maclaren, J.A., with whom Magee, Hodgins and Ferguson, JJ.A., agreed, held that clause (*b*) authorized an antecedent promise, both on principle and on the authority of the Privy Council. Meredith, C.J.O., alone pointed out that the question does not appear to have been raised and was not discussed in the Privy Council, but even he felt bound by the result of the decision of the Privy Council in favour of the security, because the security there in question would have been invalid if clause (*b*) had not been construed as authorizing an antecedent promise.

In the Supreme Court of Canada, in the case of *Clarkson* v. *Dominion Bank*, Anglin, J., refers to *Imperial Paper Mills* v. *Quebec Bank* in substantially

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the same way, and takes substantially the same view of clause (*b*) of s. 90, as Maclaren, J.A., and the majority of the Appellate Division, but guards himself by adding:—

> Of course it must be possible to identify the advance as one to which the promise was intended to apply, and the goods as property on which the security was promised by it.

He also points out, and properly, that the *Imperial Paper Mills* case is of binding authority as to the nature of the description required in security taken under ss. 86 and 88. That, however, is another story. We are concerned at present only with the construction of s. 90, and particularly with clause (*b*).

On the other hand, Davies, C.J., and Idington, J., who take a different view of clause (*b*) of s. 90, dispose shortly of *Imperial Paper Mills* v. *Quebec Bank* by saying that it does not touch the construction of s. 90 at all. This is probably a correct view of the case, but the manner in which it is dismissed by the two learned judges of the Supreme Court seems somewhat casual when it is remembered that the Appellate Division considered it a binding authority.

It becomes necessary therefore to consider more carefully the case of *Imperial Paper Mills* v. *Quebec Bank*. So far as appears by the reports of the judgments in the various courts only two questions were discussed and expressly decided, namely, (1) that in certain mortgages prior to the bank's security the words "excepting logs on the way to the mill" included logs on the way to the mill *from time to time* and not merely those on the way to the mill at the dates of the mortgages, and that the mortgages operated by way of "floating securities," thus leaving the logs available as security to the bank in the ordinary course of business, and (2) that the vague description in the bank's security, namely, "40,000 cords of logs" which "are now in and on the banks of the Sturgeon River and tributaries" was a sufficient description under s. 88. It appears from the judgment of the Privy Council that there was (1) an application for advances (there was also a promise to give security, but the Privy Council does not mention it), (2) an inspection, (3) proportioning of advances so as to meet the financial requirements, (4) advances by instalments and at short intervals, (5) accumulation of these instalments into the security granted over the logs, and it is true that to a person familiar with transactions under ss. 86, 88 and 90 of the Bank Act it would be apparent that as the security was not taken at the time of the advance the validity of the security would depend upon the validity of the promise taken prior to the advance. There is, however, in the report not a word to suggest that it was argued that the transaction might be invalid on the ground that the promise preceded and the security followed the advance, or that the question whether the promise must be a promise to give specific security was brought to the attention of the members of the judicial committee. It would not seem to be an unfair inference from the fact that they mentioned the application for the advance and did not mention the promise to give security, that they were not aware that any special importance was to be attached to the promise to give security under s. 90. They had to pass on the sufficiency of the description contained in the security. The decision of that question did not necessitate their reading s. 90, and perhaps they did not know, or if they did at one time know, had forgotten, that the lending power of a bank under s. 86 or s. 88 is limited by the provisions of s. 90. It is respectfully submitted that it is not justifiable to regard the case as involving any decision by the Privy Council on the construction of s. 90.

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If the case of *Imperial Paper Mills* v. *Quebec Bank* may be disregarded as an authority on the construction of s. 90, additional interest attaches to the opinions as to the meaning of s. 90 expressed by the members of the Supreme Court of Canada in *Clarkson* v. *Dominion Bank*, because while they are to a certain extent *obiter dicta* they afford some indication of the way in which the Supreme Court would construe clause (*b*) of s. 90 in some future case in which it might be necessary to construe that clause. That the opinions expressed by the judges other than Idington, J., were not necessary to the decision of the case is clear from the fact that four members of the court held that the securities could be upheld under clause (*a*) of s. 90, that is, they held that the securities had been taken contemporaneously with the several advances. This was sufficient to dispose of the case without regard to clause (*b*). Idington, J., however, held that there was no sufficient proof that contemporaneous security was taken in connection with each advance. It was necessary, therefore, for him to decide whether the securities could be supported under clause (*b*), and he held that they could not.

Of the five judges who heard the appeal, Anglin, J. (as already mentioned), and Mignault, J., were of opinion, in agreement with the majority of the Appellate Division, that without regard to the supposed authority of *Imperial Paper Mills* v. *Quebec Bank*, the promise under clause (*b*) might be taken prior to an advance so as to support security given after the advance in pursuance of the promise. Mignault, J., however, proceeded to explain his opinion in such a way that it does not appear that there is much difference in substance between his view and that of the majority of the court.

The other three judges—Davies, C.J., Idington, J., and Brodeur, J.—were of opinion that under s. 90 the security must be taken either (*a*) at the time of the advance or (*b*) subsequently pursuant to a promise made at the time of the advance or at least at the time of the negotiation of the specific loan. Davies, C.J., adopted the appellant's contention that the written promise referred to in clause (*b*)

> was one having reference to a specific loan then being negotiated for, and to specific goods proposed to be given in security for the loan stated in the Act as an alternative to the acquisition by the bank of the security itself in those numerous cases in which the loan had necessarily to be advanced to enable the borrower to obtain possession of the goods so that he might give the bank the security.

This was the learned judge's answer to the bank's contention that the written promise referred to in clause (*b*) was not one required to be given contemporaneously with a proposed loan or advance or having reference to any specific goods or property to be secured, but was a blanket promise sufficient to cover any future loans or advances which the bank might make to the promisor up to the time when it was acted upon and security taken. "That time might be, as counsel boldly put it in argument five or ten years after the promise given, and would enure to cover as well loans subsequently made from time to time to the promisor as property which was not even in existence when the promise was made."

While Brodeur, J., stated more precisely that the loan must be made contemporaneously with the taking of the security or the giving of the promise, it may nevertheless be inferred from various passages in the judgments of Davies, C.J., and Idington, J., that they also considered that if the security is

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not taken at the time of the advance it must be taken in pursuance of a promise made at the time of the negotiations for the specific loan.

Mignault, J., said:—

> "In my opinion this written promise must be a specific promise to give a specific security at a subsequent date, and not a general promise to give security for any advance which the bank may make to the customer from time to time. It does not appear necessary that the note be discounted at the time the promise is made, provided that the note be discounted by the bank upon, *i.e.*, in pursuance of, such promise. When this written promise has been given, security may be taken by the bank to cover prior advances made by the bank upon such a specific promise."

I venture respectfully to suggest that the view of clause (*b*) of s. 90 expressed by Mignault, J., is the preferable one. It seems better to say with him that the promise may precede the advance rather than to say with Brodeur, J., that clause (*b*) requires that the promise shall be made "at the time of" the advance, because the latter construction is open to the obvious objection pointed out by Anglin, J., that it necessitates reading into clause (*b*) a limitation as to time which is expressed in clause (*a*) but is not expressed in clause (*b*).

Quite consistently with the view that the promise may precede the actual advance, Mignault, J., laid emphasis on the necessity that the promise must be a specific promise to give a specific security at a subsequent date, and in substance this is the same as the view expressed by the majority of the judges that the promise must be given in the course of the negotiations for a specific loan on specific security. Whether the promise is made on the day that the advance is made, or on an earlier day when negotiations are taking place for that advance, seems immaterial, provided the promise applies only to specific security in contemplation at the time the promise is made and mentioned in the promise. The promise must be a promise to give "such . . . security" (*cette garantie*, in the French version). What is clearly excluded by the opinions expressed by the majority of the judges is a general or blanket promise to give security under ss. 86 and 88 without reference to specific security.

In *Clarkson* v. *Dominion Bank*, prior to January 29, 1914, the form of promise given by the customer, Thomas Bros. Limited, was a very short and general one. On and after that date, the bank took a more elaborate form of application for advances and promises to give security closely following the form already mentioned, prepared by Mr. Bicknell for the Canadian Bankers' Association.

The relevant portions of the promise of January 29, 1914, are as follows:—

> "The Dominion Bank (herein called the bank) is hereby requested by the undersigned to make advances to the undersigned (herein called the customer) from time to time, and in consideration thereof the customer doth hereby promise and agree as follows:—(1) To give from time to time to the bank security for every such advance and interest by way of warehouse receipts, bills of lading, or securities under ss. 86, 87, 88 and 90 of the Bank Act . . . covering all the products of agriculture, the forest, quarry and mine, and the sea, lakes and rivers, and all the live stock or dead stock and the products thereof, and all the goods, wares and merchandise now or hereafter belonging to the customer, upon the security of which a bank may lawfully make advances, including all such products, stock, goods, wares and merchandise . . . now or here-

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after belonging to the customer of the classes or descriptions following, that is to say: (*d*) all raw material and goods manufactured or in process of manufacture, consisting principally of broom corn, brooms, handles, brushes, brush fibre, lumber, specially dimensioned lumber, screen doors, and windows, step-ladders, washboards, washing machines, baskets, matches, and general stock-in-trade, and all products thereof, and which are now stored, contained or situate or which at any time hereafter, whilst any such advances shall remain unpaid, may be stored, contained or situated in the following place or places, that is to say: (*e*) the building and the cellars and yards known as Thomas Bros. Limited, factory property in the city of St. Thomas, Ontario, and Thomas Bros. Limited warehouse, 2580 St. Lawrence Boulevard in the City of Montreal, Quebec, and in W. Strachan's warehouse, 113 Queen Street West, Ottawa, and in any other place or places or in transit thereto or therefrom."

In an editorial note in the Journal of the Canadian Bankers' Association for April, 1919 (vol. 26, p. 215), attention is drawn to the fact that in the foregoing form (1) there is no limit either as to amount or as to time in the application for advances and (2) no specific goods are mentioned. It is said that while this form is in use by some banks, other banks have used a different form in which (1) a credit for a specified amount is arranged for and limited during the season of the customer's business, and (2) the goods to be included in the security are described in such a way as to permit of their being identified. It is further suggested that if the document in question in *Clarkson* v. *Dominion Bank* had been in the latter form, the judges would have considered it sufficient under clause (*b*) of s. 90.

This editorial opinion is perhaps susceptible of being misunderstood because it emphasizes merely the form of the promise and it is submitted that, in order to guard against misunderstanding, it should be made clear that the editorial committee intended merely to say that the promise in the last mentioned form would be sufficient to support the security afterwards taken upon the goods specifically described in the promise, and not that the promise would be sufficient to support security taken up to the amount of the specified credit for the whole season of the customer's business. In other words, the validity of an arrangement for a credit for the season depends upon the extent to which the customer can definitely forecast his season's operations. To the extent to which he can specify his prospective purchases in the written promise, the arrangement for the season can be made so as to support security taken subsequently for such purchases from time to time. If, as is likely to be the case, he subsequently contemplates other purchases not specified in the promise, it would seem necessary that he should make with the bank a new arrangement for credit and give a new promise with respect to such purchases, and so on from time to time during the season. In effect, it would not ordinarily happen that the whole season's operations could be definitely forecasted at the beginning of the season, and, it is submitted, the safer practice would be to confine each arrangement for credit to the amount which, in the bank's opinion, would be justified by the specific security mentioned in the promise taken at the time of such arrangement.

(*d*) The printed form has the following footnote:

Here give general description of the class of goods to be covered by the security, *e.g.*, flour or wheat or lumber.

(*e*) The printed form has the following footnote:

Give as particular description as possible of the place or places where the goods to be covered by the securities are or are intended to be.

IMP.

P. C.

TORONTO GENERAL TRUSTS CORP. v. THE KING.

Judicial Committee of the Privy Council, Viscounts Haldane, Finlay and Cave, Lords Dunedin and Shaw. April 11, 1919.

TAXES (§ V C—190)—SUCCESSION DUTIES—MORTGAGES—SITUS.

Mortgages under the Alberta Land Titles Act, to a person resident out of Alberta, on land situated therein are property situate within Alberta, and upon the death of the mortgagee are subject to duty under the Succession Duty Act (Alberta). The administrator could not recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law, and the case is within the test laid down in *Wallace* v. *The Attorney-General* (1865), L.R. 1 Ch. 1, 9, that such duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing State.

[*Walsh* v. *The Queen*, [1894] A.C. 144; *Henly* v. *The Queen*, [1896] A.C. 567; *Payne* v. *The King*, [1902] A.C. 552, followed; *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, distinguished.]

Statement.

APPEAL from 39 D.L.R. 380, affirming 32 D.L.R. 524. Affirmed.

The judgment of the Board was delivered by

Viscount Cave.

VISCOUNT CAVE:—This is an appeal by the administrator with the will annexed of Richard Grigg, deceased, from a judgment of the Supreme Court of Canada, affirming a judgment of the Supreme Court of the Province of Alberta, Appellate Division, which in its turn affirmed a judgment of Hyndman, J., upon a special case submitted to him. The effect of the judgments under appeal was to declare that certain mortgages secured upon land in the Province of Alberta which were held by the testator, who was domiciled and died in the Province of Ontario, were subject to succession duty in the Province of Alberta, and the question raised by this appeal is whether they were in fact so subject.

By s. 92 of the B.N.A. Act, 1867, it is provided that in each province the legislature may exclusively make laws in relation (among other matters) to direct taxation within the province. By s. 7 of the Succession Duties Act of Alberta (Alberta statutes of 1914, c. 5) it is enacted that:—

> Save as otherwise provided, all property of any person situate within the province and passing on his death shall be subject to succession duties

at certain rates therein set forth. By s. 3 of the same Act the word "property" is defined as including real and personal property of every description. It was clearly within the power of the legislature of the Province of Alberta to pass the Succession Duties Act above referred to, and the only question is whether the mortgages referred to in these proceedings were at the date of the testator's death "situate within the province."

The mortgages in question were executed and registered under the Land Titles Act of Alberta (Alberta statutes of 1906, c. 24). By s. 23 of that Act it is enacted as follows:—

> Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

By s. 60 of the same Act it is enacted that mortgages shall be in a form set out in the schedule to the Act. This form does not provide for sealing, but a seal was in fact affixed to each of the mortgages in question in this case. No express provision is made in the Act for the execution of mortgages in duplicate, but the language of ss. 63 and 65 (5) appears to assume that a duplicate will be executed and retained by the mortgagee, and this appears in fact to be the general practice. In the present case each of the mortgages was executed in duplicate, one of such duplicates being delivered to and retained by the registrar in accordance with the statute, and the other being delivered to the mortgagee and retained by him. At the date of the death of the mortgagee the duplicate mortgages delivered to him were in his possession at his residence in Ottawa, in the Province of Ontario, where he died, while those deposited at the registry were, of course, in the possession of the registrar in Alberta.

A claim to succession duty having been made, the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death (Wentworth on the Office of Executor, ed. 1720, p. 46; Bacon's Abridgement, tit. Executors and Administrators (1832) (E), p. 462; *Gurney* v. *Rawlins* (1836), 2 M. & W. 87, 150 E.R. 680; *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476). This rule has been recognised in numerous decisions both here and in the Dominion of

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Canada, and the general principle must be regarded as well settled. But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages was created and evidenced by duplicate deeds, and that at the date of the testator's death one of such deeds was in the Province of Ontario and the other in the Province of Alberta. An attempt was made to shew that, having regard to the terms of the Land Titles Act, the duplicate of each mortgage held by the testator was the principal or dominant instrument, but in their Lordships' opinion no such ascendancy was made out, and the deed produced to and retained by the registrar under the provisions of the statute was not of less importance than the duplicate delivered to and retained by the mortgagee. In these circumstances any argument which goes to shew that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions; and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case.

In the present case the circumstances, other than the single fact of the presence of a duplicate deed in the Province of Ontario, are all in favour of the conclusion that the mortgages were situate in Alberta. It is established by formal admissions made in the course of the proceedings that at the date of the execution of the mortgages the mortgagors were resident in the Province of Alberta, and that the place of payment of the debt was in each case in the Province of Alberta. The debts were secured, not only by the personal obligation of the mortgagors, but also by mortgages which created interests in lands in Alberta, and this fact cannot be put out of account (see *Walsh* v. *The Queen*, [1894] A.C. 144, 148). The mortgages are executed in a form prescribed by the Land Titles Act of Alberta, and derive their force and effect from the terms of that statute, and this is not less the case because a seal has been voluntarily affixed to each mortgage. The administrator cannot

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enforce any of his securities without procuring registration of his succession in the Alberta registry and relying on documents registered in that province; and though the debtors may be prepared to pay the debts secured without putting the administrator to the trouble of suing or of realizing his securities, it is plain that they would not do so except on the terms of the mortgaged lands being released in accordance with Alberta law. In short, the administrator cannot recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law; and the case falls within the test laid down by Lord Cranworth in *Wallace* v. *The Attorney-General* (1865), L.R. 1 Ch. 1, 9, as to the limitation on the imposition of succession duty, namely, that such a duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing State.

When all these circumstances are taken into account, the only possible conclusion appears to be that the mortgages in question in this case were at the testator's death situate in Alberta. This conclusion is in accordance with the decisions of the Board in the cases of *Walsh* v. *The Queen*, [1894] A.C. 144; *Henty* v. *The Queen*, [1896] A.C. 567 and *Payne* v. *The King*, [1902] A.C. 552, and is not inconsistent with the judgment in *Commissioner of Stamps* v. *Hope*, *supra*. It is indeed suggested that, as the mortgage referred to in the last-mentioned case was registered in New South Wales, it must be assumed that it was executed in duplicate, and that one original was filed in the office of the registrar-general of New South Wales in accordance with s. 35 of the Real Property Act of New South Wales (26 Vict. No. 9), and, accordingly, that the decision governs the present case. But no reference to such an execution in duplicate is found either in the record of the case, in the arguments of counsel, or in the judgment of the Board; and the case cannot, therefore, be taken as an authority on the question of the locality of a deed of which duplicates are found in two different jurisdictions.

For the above reasons, their Lordships have come to the conclusion that this appeal should be dismissed.

Their Lordships understand that it has been agreed by the parties that they will bear their own costs of the appeal. No order therefore will be necessary respecting them.

Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

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WRIGHT v. WEEKS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and McCarthy, JJ. May 5, 1919.

CONTRACTS (§ V C—396)—RESCISSION OF—MISREPRESENTATION—LACHES—CONSEQUENCE OF.

The only legal consequences of inaction or laches on the part of the representee in rescinding a contract to purchase land on the ground of fraudulent misrepresentation is to furnish some evidence with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the *jus tertii*, or of the plea of inability to make specific restitution to the representor; but, where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has, in fact, acquired rights or interests under the contract sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "acquiescence" does not constitute a defence.

Statement.

APPEAL by the defendant from the judgment of Simmons, J.

A. A. McGillivray, K.C., and *W. J. Millican*, for respondent.

W. F. W. Lent, K.C., for appellant.

The judgment of the court was delivered by

Beck, J.

BECK, J.:—This is an appeal by the defendant from the judgment at the trial by Simmons, J.

The action was to set aside a sale of farm lands and a subsequent sale of chattels on the farm on the ground of fraudulent misrepresentation, and in the alternative for damages. Several grounds of misrepresentation were set up.

One of the grounds alleged with respect to the sale of the lands was that except for a few thistles the lands were entirely free from weeds. The trial judge in the course of his reasons for judgment said as follows:—

> Dealing first with the land contract, it is of some importance that the plaintiffs were farmers and that they made a somewhat complete examination of the farm before deciding to purchase.
>
> They allege, however, that the defendant had ingratiated himself in their confidence to such an extent that they relied absolutely upon his good faith in regard to the representations made by him. The relations between the parties immediately prior to the negotiations give colour to this. The defendant was in khaki and an employee of the registrar, engaged in work in connection with the Military Service Act, when he met the plaintiffs at the Empire Hotel in Calgary. He held himself out to them as a skilful physician, although unlicensed then as a medical practitioner in this province. He treated both of the plaintiffs for some weeks prior to the negotiations which led up to the agreement for purchase of the land. . . .
>
> I am satisfied upon the evidence that untrue representations in regard to freedom from weeds were made by the defendant. . . . the main defence is ratification of the agreement after knowledge by the plaintiffs.
>
> In regard to weeds, the defendant represented that there were no weeds excepting a few thistles on the n. e. quarter of section 10. The facts are that

this quarter section was infested with thistles, stink weeds and some mustard, to such an extent that it was not possible to crop it until the land had been summer fallowed. The s. w. quarter of 12 was seeded to timothy, so that the n. e. quarter of 10 was the only land ready for crop in 1918. The plaintiffs were assuming somewhat heavy obligations and relied upon the returns in 1918 from this quarter section and on this ground it seems to me that this representation was a very material one in inducing them to enter into the contract.

When they went into possession, however, about May 17, they admit knowledge of the existence of weeds sufficient to demonstrate the misrepresentation. It is true that they say that as the season advanced they discovered that the weeds were much worse than on May 17, but I am inclined to the view that there was ratification after knowledge, which would deprive them of the right of rescission in regard to the weeds. They purchased the chattels on May 25 and they had no intention of repudiating them.

About the last of May they elected to repudiate and came to Calgary and notified the defendant in the first week of June.

There is ample evidence to justify the trial judge's finding that there were misrepresentations as to weeds. The circumstances were such that these misrepresentations must have been made with knowledge of their untruth.

I think the judge was wrong in holding on the facts that the plaintiffs had lost their right to rescind on the ground of misrepresentation with regard to weeds by reason of ratification after knowledge.

His statement of the facts in this connection is not quite accurate. The agreement of sale of the lands is dated May 11, 1918. The two plaintiffs (husband and wife) left their home near Calgary to look at the lands which lay close to Cardston in company with the defendant and his friend, Cassidy, on May 4—arriving in an automobile late. That was a Saturday. On Sunday the men walked about the home quarter and later they all drove over one of the quarter sections—there were four in all—and saw the other quarters from the road. They returned home the next day, Monday the 6th. The agreement was signed on the 11th. They had not seen the lands in the meantime. In the interval, between this trip to the farm and May 17, the question of the plaintiffs buying also the farm stock and implements was discussed and considered. On Friday, May 17, Wright, accompanied by the defendant's son, went again to the farm for the purpose of looking at the stock. The trip and inspection and return journey occupied the 18th, 19th and 20th. On the 20th Wright and the defendant met in Calgary. The plaintiffs seem to have gone into occupation of the farm—not as the trial judge puts it on the 17th, but on the

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23rd. The bill of sale of the cattle, etc., is dated May 25. It was executed at Cardston. It was on May 29 that the plaintiffs decided that they would endeavor to get rid of the "deal" and on June 6, at Calgary, that Wright notified the defendant that he repudiated on the ground of misrepresentation. Confining one's self to the question of weeds, it appears that whatever opportunity the plaintiffs might have had, and have neglected, to investigate the condition of the lands as to weeds, instead of assuming the truth of the defendant's representations in that regard, they did not in fact begin to suspect the falsity of the representations until after the execution of the bill of sale, that is about May 27.

After investigation they came to a decision in their own minds on the 29th, and communicated that decision within what cannot be said to be an undue delay, on June 6. It is obvious that the evidence of weeds was such as would increase day by day.

I think, as I have already said, that the trial judge was in error in holding that there was any ratification or confirmation of the agreement on the part of the purchasers by reason of his actions or conduct or laches. I have given the substance of the evidence directed to the aspect of the case which seems to have been what the judge thought had prejudiced the plaintiffs' right to rescission.

As to the law applicable to such a case, I adopt the view set down in Bower's Actionable Misrepresentation (1911), pp. 282-3:—

> Delay, laches and acquiescence are constantly referred to in connection with proceedings for rescission as if, of themselves, they constituted affirmative defences thereto. This is quite a mistake. And it is a still graver error to use these expressions (as the term "laches" in particular is frequently used) with an underlying suggestion that the representee owes a duty to the representor in the matter, the failure to discharge which renders him "guilty" of conduct which, of itself, raises a personal equity against him in favour of the representor. The only legal consequence of the representee's inaction is either to furnish some evidence, with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the *jus tertii*, or of the plea of inability, to make specific restitution to the representor; but, where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has, in fact, acquired rights or interests under the contract sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "acquiescence," goes for nothing, which is tantamount to saying that, *per se*, these matters constitute no defence.

A useful recent case is *Armstrong* v. *Jackson*, [1917] 2 K.B. 822.

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There was not at the date of the repudiation of the agreement by the plaintiffs, nor at the commencement of the action, any difficulty in working out a restoration of both parties to substantially their original positions. The principles and methods applicable are pointed out in Bower, pp. 250-1.

The trial judge rescinded not only the sale of the lands but also the sale of the chattels, the latter on the ground that title had not been made by reason of a large execution against the property of the defendant being in the hands of the sheriff. I think that in addition to that ground, he might have put it on the ground that, to use an expression to be found in old cases, the two agreements—that for the lands and that for the chattels—were "complicated." It is true the agreement for the lands was concluded before the agreement for the chattels was made, but not only was the latter made in consequence of the former and made on the assumption of the former being honest and obligatory, but in the efforts made to procure the removal of the execution by payment of the amount owing upon it, it was arranged that $5,000, a portion of the moneys owing under the land agreement, should be applied upon the execution, and this was done to the extent of depositing the amount for that purpose. The purpose was not accomplished, owing to the sale of the land being declared off.

The cases dealing with this aspect of the case will be found collected and discussed in *Holliday* v. *Lockwood*, [1917] 2 Ch. 47.

On the grounds which I have discussed, and without expressing an opinion upon the other grounds dealt with by the trial judge, I think the conclusion arrived at by him that there should be rescission of both agreements is right.

The formal judgment, it seems to me, is satisfactory in form.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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BRITISH AMERICA ELEVATOR Co. v. BANK OF BRITISH NORTH AMERICA.

Judicial Committee of the Privy Council, Viscounts Haldane, Finlay and Lord Phillimore. April 3, 1919.

TRUSTS (§ III—60)—TRUSTEES—RIGHTS OF CESTUI QUE TRUST—ACCOUNTING.

If a trustee or person acting in conjunction with a trustee keep the trust money in his hands, meaning to appropriate it, or even to use it temporarily only, the actual loss ceases to be the measure of his responsibility; the beneficiary is entitled to claim the repayment of his money.

[*British America Elevator Co.* v. *Bank of B.N.A.* 26 D.L.R. 587; 32 D.L.R. 181, reversed. Judgment of Galt, J., 20 D.L.R. 944, restored.]

Statement.

APPEAL from 26 D.L.R. 587 (amended in 32 D.L.R. 181). Reversed.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—The Court of Appeal for the Province of Manitoba (26 D.L.R. 587, 32 D.L.R. 181) varied a judgment of Galt, J. (20 D.L.R. 944), delivered in this case in favour of the appellants (the plaintiffs) for $15,218. The Court of Appeal substituted for this judgment an inquiry as to what loss the appellants had sustained by reason of certain drafts set out in the statement of claim having been credited in the books of the respondent bank to the account of one Youngberg or to the account of the firm of Youngberg and Vassie. Youngberg was an agent of the appellant company who also carried on a business on his own account and another business along with Vassie, as dealers in agricultural implements and other things required by farmers. The inquiry ordered by the Court of Appeal was further directed to the amount that the appellants had received from or on behalf of Youngberg on account of the drafts set out in the statement of claim, and the respondents were declared liable for the balance, such balance not to exceed the sum of $12,028.10. The difference between this amount and that for which the trial judge gave judgment was arrived at by deducting two sums of $500 and $1,000, representing drafts for which the respondents were held by the Court of Appeal not to be liable.

The appellant company has its head office at Winnipeg and it owns a number of grain elevators in Manitoba and Saskatchewan, one among them being at Waldheim. The business carried on at these elevators was regulated by the Manitoba Grain Act, which provides, among other things, that when grain is bought by the owner of the elevator from the farmer (as distinct from being

received for storage) a cash purchase ticket in a prescribed form shall be issued to the seller. Those who receive these cash purchase tickets are entitled to payment of the amounts within twenty-four hours from the time of receiving them. The elevator owner usually appoints someone to be paymaster for these tickets, and in this case Youngberg was appointed to be the appellants' paymaster at Waldheim. There was no bank there, but the respondents had a branch at Rosthern, which, it is agreed, was some 15 miles off. As the amounts on the tickets had to be paid in currency, the appellants arranged with the respondents that the latter should furnish from Rosthern to the paymaster of the appellants at Waldheim money to meet the payments that had to be made there. These arrangements, as appears from the correspondence immediately prior to a letter of September 15, 1911, written on behalf of the appellants to the respondents' superintendent, were in existence before that date, and they were renewed in the letter referred to (in all particulars that are material for the present purpose), by which letter the appellants requested the respondents for a certain commission to furnish currency from their Rosthern branch to Waldheim, G. A. Youngberg being the agent designated. This was agreed to. The terms of the letter are important, for they settled with precision what was to be for the future the course of business between the appellants and the respondents. The money was to be furnished from the Rosthern branch of the respondents' bank to Waldheim, where Youngberg was the appellants' paymaster, against drafts by Youngberg on the appellants. The respondents' commission was to be $1.25 per $1,000.

Youngberg and Vassie had an account with the Rosthern branch of the respondent bank, of which one Rostrup was the local manager. Youngberg had also a separate private account there. These accounts were from time to time overdrawn during the period of the transactions in question in this appeal. Rostrup, the local manager of the bank, was pressing them to cover the overdrafts, and the head office was urging him to see to this.

It is obvious that, having regard to the terms of the letter of September 15, 1911, which defined what was to be the course of business, the proper procedure was that Youngberg should, as occasion required, have estimated as closely as possible the amount necessary to provide for the payments he had to make on behalf

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of the appellants in respect of grain tickets, and to have drawn on the respondents only for these amounts. On presentation of the drafts at the Rosthern branch Rostrup would have sent to him or handed to him currency for the amounts drawn for, and have forwarded the drafts to the bank's head office at Winnipeg to be collected from the appellants' head office there. Instead of doing this Rostrup allowed Youngberg to pay the amount of the drafts he presented, on behalf of the appellants and under the terms of the letter, with increasing frequency into his firm's account or his own, thereby putting these accounts, which were generally overdrawn, into credit. When this was done he drew cheques on them generally. It is not in dispute that Rostrup had full notice from the beginning that Youngberg was paying the amounts of the appellants' drafts, which could be given only in terms of the letter of September 15, into the private accounts of his firm and himself, and was then drawing cheques for his own purposes on these accounts.

Their Lordships think not only that it is plain that Rostrup knew throughout that Youngberg was directing him to act improperly in crediting to his firm's and his private accounts the amounts of the appellants' drafts, which were allowed to be drawn only for the purpose of currency being furnished to Waldheim to pay there the sums due under the grain tickets issued by the appellants, but that the directions given were in violation of the terms of the letter of September 15, 1911, a letter which prescribed the continuation of an existing practice in terms. If so, it is clear upon principle that the respondents, through Rostrup, knowingly became parties to a misapplication of what were trust funds, which they must restore to the appellants. The majority of the judges in the Court of Appeal appear to have treated the action as one which must be regarded as brought simply for damages for a breach of agreement, in which the burden lay on the plaintiffs to prove the quantum of damage suffered by them. This view is quite inadequate. Possibly the judges in the Court of Appeal were led to hold as they did by the fact that, instead of asking for a general declaration of liability on the ground of breach of trust, and for an account to be taken of all the sums so received, in which case the result of the account, after any proper deductions had been claimed and established on the initiative of the respondents,

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would have been followed by a judgment on further consideration for the balance found due, a different course was followed at the trial. The appellants claimed certain specific sums, amounting to $13,528.10, which they said had been misapplied in breach of trust, and did not persist in a further claim they made for an account of any other moneys for which the respondents might prove to be similarly accountable to them. The case was tried on this footing.

There were two sums of $500 and $1,000 respectively as to which there was special controversy in the Court of Appeal. The first of these was the subject of one of the appellants' drafts, which was credited to Youngberg and Vassie by Rostrup on September 15, 1911, just before he was notified of the letter to the headquarters of the respondent bank of that date. At this date the account of Youngberg and Vassie at Rosthern was overdrawn and the amount was applied in reducing it. This was, in their Lordships' opinion, improper, having regard to the practice which existed even before the letter of September 15, 1911, and to the duty of a banker who has notice that he is receiving a trust fund. It was improper of Rostrup to allow Youngberg to operate on his firm's account by treating the $500 as though it was money belonging to the firm and of which he could dispose as such. Similar observations apply to the draft for $1,000 dated later on, on February 13, 1912, and credited to Youngberg on the 16th of that month. It represents the amount of a cheque for part of the balance due from him to the appellants, given by Youngberg to Black, the appellants' inspector. The cheque was dishonoured, owing to the overdrawn condition of Youngberg s account, and he then drew on the appellants for the amount and sent the draft to Rostrup for payment to his own credit, and the cheque was paid. The majority in the Court of Appeal held that if the draft had not been so credited the original cheque would not have been paid, and that therefore to charge the respondents with the amounts of both the cheque and the draft would be to make them pay twice over. With this view their Lordships are unable to agree. There is not evidence before them sufficient to establish that the respondents have been charged twice with this identical amount. They think that, as the cheque was drawn to pay to the appellants their own money, being cash in hand with Youngberg,

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they were entitled to hold it, and that they were entitled to treat the payment of the draft to Youngberg's own account as a breach of duty on the part of Rostrup. They think that the trial judge and Cameron, J.A., were right in treating these items as standing on the same footing as the other items in the total claim established at the hearing, and that the majority of the Court of Appeal were wrong in deducting the $1,000. Their Lordships are unable to put this draft on a different footing from those before and after it. The respondents did not make good the contention put forward in argument, that this draft for $1,000 was given to make good the amount of a previous draft for the same amount which had been misapplied, and that this would therefore involve a payment of the same item twice over. The cash which Youngberg had in hand as the appellants' agent was not made up merely of previous drafts misappropriated, but comprised moneys received by him for his principals, his cheque was given in respect of his liability for cash in hand generally, and the application of the draft on the appellants to recoup the respondents for payment of the $1,000 cheque was a misapplication of the draft with knowledge that the agent had no right to have it so applied.

The course adopted at the trial, of treating the items making up the amount for which judgment was given as raising questions of evidence at the hearing, may not have been the most convenient one. A full inquiry and account, based on a general declaration of liability and taken subsequently with the burden of discharging themselves lying on the respondents, would probably have been the more adequate course. It would, moreover, have enabled the appellants to go into further possible items, in respect of which they did ask for cumulative relief in the shape of an account which would have extended to these items. But this course was not taken and the appellants abandoned their further claim. The respondents set up a defence challenging the principle on which they were held liable at the trial, and alternatively they alleged that the amounts of the drafts in controversy were all discharged, having been repaid by cheques drawn on them by Youngberg or his firm in payment to the farmers who had sold grain. On the first contention the respondents were, in their Lordships' opinion, wrong. The Court of Appeal should have treated the claim as one for replacement of trust funds and not for damages. The alternative

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contention the respondents did not establish by the evidence they gave at the trial. Having in view the course there taken, their Lordships are of opinion that the judgment of the majority of the Court of Appeal was erroneous in principle, and that the judgment of the trial judge must be restored. It may be that the respondents may be entitled to some relief in possible proceedings against the appellants in the name of Youngberg or his assignee. To decide this would require an inquiry into the whole of the transactions between the respondents, the appellants and Youngberg; and the presence of the assignee of the latter in his insolvency might be required. Their Lordships express no opinion on this subject. They can only deal with the case in the form in which it has been presented and on the materials which are before them, and they do not intend to prejudge any further questions. For the reasons they have given they will humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and that of Galt, J., restored. The respondents will pay the costs here and in the Court of Appeal. The petition for special leave to cross-appeal lodged by the respondents will stand dismissed, and they will have their costs of the application to postpone the hearing of the appeal, such costs to be set off against the appellants' costs of the appeal. *Appeal allowed.*

BISAILLON v. CITY OF MONTREAL.

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Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 23, 1918.

EXPROPRIATION (§ II A—80)—CITY CORPORATION—ERROR IN NOTICE OF EXPROPRIATION—POWER TO DESIST—SERIOUS MISTAKE—NULLITY AS TO OBJECT.

A city corporation in Quebec has power to desist from an expropriation proceeding already commenced because of a serious mistake or error in the notice of expropriation given by it to the owner and the plan on which the notice was based, where such error is a cause of nullity as to the substance of the object of the expropriation.

Statement.

APPEAL from the judgment of the Court of King's Bench appeal side (1916), 26 Que. K.B. 1, reversing the judgment of the Superior Court, District of Montreal, and dismissing the action with costs.

On June 30, 1913, the city respondent served a notice to the appellant that, according to 2 Geo. V. c. 56, s. 33, it was decided to expropriate lots 509 to 517 and 526 to 528 marked on a certain

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plan, being subdivisions 3, 4, 5, 6, 7, 8, 11, 12 of lot No. 168. Arbitrators were named and sworn. It was then ascertained by the respondent that, upon the part of the property not necessary for the extension of the street, there was situated an extensive building which did not appear upon the expropriation plan. Thereupon, the respondent served upon the appellant a discontinuance of the expropriation proceedings already commenced and at the same time served a new notice of expropriation for the lots 513, 515, 517 and 528 only, being part of subdivisions 3, 5, 6, 7, of lot No. 168 specially required for the widening of the street. On January 24, 1914, the appellant served a petition for an interlocutory injunction to enjoin the respondent from conducting any proceedings under the second notice of expropriation.

Proceedings, by way of mandamus, to force the respondent to proceed under the first notice of expropriation, were also instituted; but, by consent of the parties and to avoid costs, they were left in abeyance until a final decision in the present action would be rendered.

The judgment of the Superior Court, Guerin, J., maintained the injunction, upon the ground solely that the notice of expropriation and the proceedings thereunder had not been given or undertaken within the twelve months mentioned in 2 Geo. V. c. 56, s. 33.

Aime Geoffrion, K.C., and *Paul St. Germain*, K.C., for appellant.

A. W. Atwater, K.C., and *J. A. Jarry*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—The controversy in this appeal relates to expropriation proceedings taken by the City of Montreal for the extension of Palace St. (St. Joseph boulevard) in St. Denis ward from north-eastern boundary of Laurier ward to Papineau avenue.

The authority for such extension was first granted by the legislature in 1911 and was permissive only and not compulsory.

In 1912, however, the legislature amended the enactment of 1911 and made the expropriation of the lands necessary for the extension of the boulevard compulsory upon the city either by mutual agreement with the owner or by expropriation within twelve months from the sanctioning of that Act. This latter Act came into force on April 3rd, 1912. The necessary resolution for the extension of the boulevard passed the city council in March, 1913, which approved of the Barlow plan of January, 1913. The appellant was notified by the city of its intention to expropriate a

certain part of her property described in the notice as lots bearing the following numbers shewn on the plan prepared by John R. Barlow, Nos. 509, 511, 513, 514, 515, 516, 517, 526, 527 and 528.

As a fact the only lots of those specified as shewn upon the plan necessary for the extension of the boulevard were lots Nos. 513, 515, 517, and 528. The other lots were not necessary for the extension of the boulevard and the four which were so necessary were of a depth back from the boulevard of 7 feet which was all of the appellant's land required for the extension. The remaining lots in the rear of the 4 lots mentioned and which ran back 100 ft. further were not so required.

The parties not having been able to come to a mutual agreement as to compensation to be paid appellant, arbitrators were appointed when, after two or three meetings had been held, it was discovered that the plan of January, 1913, which the council had approved of, did not shew a large apartment house facing on Drolet St. which had been built by appellant on some of her lots embraced within the expropriation notice in the rear of those actually required for the proposed extension of the boulevard. The proceedings of the arbitrators were then adjourned *sine die* in consequence of the declaration of the owner's attorneys that there was an error in the plan.

The city authorities came to the conclusion that a plan should be prepared according to which the expropriation should be limited to the part of appellant's lands actually required for the widening of the boulevard. A notice to that effect was served upon the appellant and notice given to her that the city desisted from its first notice of expropriation and confined such notice to such part of her lands as laid within the street or boulevard area.

Proceedings were then instituted by the appellant in the Superior Court asking for a declaration that the resolution of the city council which directed the change in the expropriation proceedings and limited them to the strip of appellant's lands lying within the street area and the notice given by the city to her that the city desisted from its first notice of expropriation and confined itself to the four lots actually required for the street extension were one and all illegal and *ultra vires*. After a hearing, the Superior Court decided against the city and the Court of King's Bench on appeal, reversed that judgment holding that under the circumstances, and

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in view of the errors shewn to exist in the notice of expropriation the city was within its right in desisting, as it did, and in confining its expropriation proceedings to those lots of the appellant shewn upon the plan as actually necessary for the proposed extension of the street, namely, seven feet in depth and comprising lots 515, 513, 517 and 528 as shewn upon the plan.

The points argued before this court were mainly whether the city had power to desist from an expropriation proceeding already commenced because of an alleged serious mistake or error in the notice of expropriation given by it to the owner and the plan on which the notice was based.

Mr. Geoffrion contended that once the notice of expropriation is given and the sum offered as compensation is refused the right to desist from expropriation is gone and much more so when arbitrators are appointed to assess or decide the compensation to be paid. He further contended that this rule or conclusion applied as well to public municipalities as to private corporations.

In the view, however, which I take of the proper construction of the statute authorizing this expropriation, I do not think it necessary to discuss at length Mr. Geoffrion's general proposition. Suffice it to say that I agree with the judgment appealed from and with that part of my brother Brodeur's reasons in this court to the effect that grave and serious error when shewn in the notice of expropriation would be open to amendment and that to that extent at least the expropriator would have power to desist and amend.

The grounds, however, on which I base my judgment are that the statute which governs in this case being a special one imperatively requiring the city to expropriate or amicably purchase certain lands within a limited time for the special purpose of extending a particular boulevard from one specified point to another and expressly limiting the extent of the lands to be taken to those necessary for the extension, and further enacting that if recourse is had to the expropriation power it shall be taken under arts. 7581 and following of the R.S.Q. 1909, thus excluding the general charter powers, must be strictly followed; that the city had no power to go beyond the limited powers given them by this Act, and that any attempt to expropriate more or other lands than those defined as necessary in the statute to carry out its object and purpose was *ultra vires*.

The statute in question reads as follows:—

32. S. 32 of the Act 1 Geo. V. (2nd sess.), c. 60, is amended by striking out para. b.

33. The city shall acquire by mutual agreement or expropriate under arts. 7581 and following of the Revised Statutes, 1909, within 12 months from the sanctioning of this Act, for the purpose of extending Palace St. (St. Joseph boulevard) in St. Denis ward from the northeastern boundary of Laurier ward to Papineau avenue, all the immovables it may need for such purpose with the exception however of convents, schools, churches and parsonages; and sell by auction, in whole or in part, the lands thus acquired by mutual agreement or by expropriation, on either side of the said boulevard, the whole according to the plan prepared by John R. Barlow on February 25, 1911, and a copy of which shall be deposited in the office of the city clerk, or according to any other plan approved by the city.

No one shall erect any buildings on the lines comprised within the lines given on said plan within twelve months from the sanctioning of this Act, unless the City of Montreal, having become proprietor of the whole or of part of the said Palace street (St. Joseph boulevard), allows it.

The amount required to pay the cost of such improvement shall be charged to the loan fund which the city has at its disposal and the proceeds of the sales of such lots and of the materials of the demolished buildings shall be applied to the repayment of the same amount to the loan fund.

Now it does seem clear to me that in this statute compelling the city to open up and extend the street or boulevard within 12 months from the sanctioning of the Act, the legislature definitely fixed a limitation upon the powers given to the city, and that limitation was that the city should acquire

for the purpose of extending Palace St. (St. Joseph boulevard) in St. Denis ward from the northeastern boundary of Laurier ward to Papineau avenue all the immovables it may need for such purpose.

Now surely that language is plain, clear and unequivocal. It is the controlling language of the statute. It gives power to acquire such immovables as may be needed for the extension but no more. The subsequent language of the section authorizing

the sale by auction in whole or in part of the lands thus acquired on either side of the said boulevard

must be rejected as being altogether inapplicable and without any meaning. They were doubtless inserted by the draftsman under the impression that the general powers of the city under its charter when opening or extending streets or boulevards to purchase or expropriate more lands on each side of the street or boulevard than were required for the street or boulevard extended to the expropriation provided for in this special Act.

But these general powers were clearly not intended to be given and were not given in this special Act enacted for a single and

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special purpose and being compulsory on the city and not optional.

If doubt could exist on the point arising out of the city's charter, I would call attention to the fact that the powers in the special statute given were not to be exercised under the city's charter which gives these special powers of expropriating lands on each side of any street being opened or extended, but are expressly given to be exercised under arts. 7581 and following of the R.S.Q. 1909, which do not give such powers.

I am of the opinion, therefore, that the powers of the city in this case to expropriate were expressly limited to the "immovables needed for the purpose of extending Palace St. to Papineau avenue," and that the attempt under the special statute here in question and the general powers of expropriation under art. 7581 of the R.S.Q., which is read into the special statute, to expropriate more land than was required for the purpose of the street extension were so far as such an attempt was made *ultra vires* of the city. I think when this fact was discovered it became not only the right but the duty of the city to desist and to confine the proceedings of the arbitrators to those lands which the statute authorised them to expropriate.

I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—A long line of authorities beginning with *The King* v. *The Comm'rs for improving Market Street, Manchester*, reported in a note to *Rex* v. *Hungerford Market Co.* (1832), 4 B. & Ad. 327, 110 E.R. 487, and the judgment in that case, clearly establishes the right of a landowner served with a notice to treat by any legal entity upon which the legislature has conferred the right of expropriation, to apply for a mandamus to compel that party so asserting its power to proceed, by the appointed means given, to determine the amount of compensation the landowner may be entitled to.

In *Morgan* v. *Metropolitan R. Co.* (1868), L.R. 4 C.P. 97, at p. 105, Kelly, C.B., delivering the judgment of the Appellate Court (then known as that of the Exchequer Chamber), said:—

> Ever since the case of *Rex* v. *Hungerford Market Co., supra*, it has uniformly been held, that wherever a company is entitled to take land compulsorily under the powers of an Act of Parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede, and the notice operates as a contract or an undertaking by them to become the purchasers. That case was decided in the year 1832, and it has never yet been questioned.

That, of course, is only a comprehensive declaration of English law upon the subject. I am, however, unable to find that the law of Quebec differs therefrom in the slightest degree.

Counsel for the appellant told us in argument that the pursuit by her of that remedy was merely held in abeyance pending this appeal.

I am entirely at a loss to understand this circuitous way of proceeding when the direct method of asserting her right (if any) was open to her.

Indeed, I have come to the conclusion that it should not be tolerated.

I have the gravest suspicion that the judgment appealed from is founded upon reasons which are not maintainable; but I do not think a definite opinion thereupon ought to be expressed further than incidentally necessary to present the reasons for the conclusion I have reached, lest by doing so we add to the confusion of thought this peculiarly circuitous method appellant has taken by way of asserting her right has evidently produced.

Let us take the suggestion in Cross, J.'s judgment that there is to be made a distinction between the effect of expropriating powers given a railway company and the service of the like power by a municipal corporation, and see if it is well founded in light of the decisions I have referred to.

It happens that of these very decisions to which I have referred, the first named and *Steele* v. *Mayor of Liverpool* (1866), 14 W.R. 311, 7 B. & S. 261, and *Birch* v. *St. Marylebone Vestry* (1869), 20 L.T. 697, relate to the identical subject matter of expropriation for purposes of opening new streets with which the case in hand is concerned.

There is, leaving aside expropriation for the Crown, only one case that I have been able to find which has the semblance of maintaining such a distinction as sought to be made. That is the case of *Reg.* v. *Commissioners of Woods and Forests* (1850), 15 Q.B. 761, 117 E.R. 646, in which, having regard to the funds at the disposal of the commission and the limited purposes of the Act there in question, the court could easily see its way to hold the defendants entitled to withdraw the notice. To have refused to so hold would have resulted in the court forcing a public body to do that which was *ultra vires*, or at all events have been improper.

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When that case was relied upon in the two which I have cited immediately preceding my citation of it, the respective courts concerned shewed how very limited an application the decision was capable of.

Moreover, the course of legislation relative to municipalities in many jurisdictions has been to provide expressly against such like contingencies as arise in the proceedings in question herein.

I express no opinion upon the question of whether or not such like implication may be found in the legislation relevant to anything involved in the rights of the parties hereto. I am only concerned in demonstrating that the appropriate remedy, and indeed the only proper remedy, the appellant has, if any, is by way of mandamus, and that there is grave reason to suppose that there is, or may be, error in the judgment appealed from, and none the less so when the unsuitable injunction method of procedure is allowed as possibly right. Of course, if it were quite clear that she had nothing to complain of we perhaps should refrain from any interference no matter how objectionable the form of procedure as such might be.

The case presented is far from that both as to law and facts and it is important no such precedent should be made.

I think she should be given an opportunity, if so advised, to try that out and to do so freed from any prejudice founded upon anything that has transpired.

I may point out that in *Lind* v. *Isle of Wight Ferry Co.* (1862), 7 L.T. 416, and in *Adams* v. *London and Blackwall R. Co.* (1850), 2 Mac. & G. 118, 42 E.R. 46, the Court of Chancery in England refused to exercise any of its powers to aid a plaintiff situated similarly to the appellant.

These decisions were given at a time when that court had at least as ample powers to enforce by injunction the observance of a party's rights as it seems to me can fall within the provisions of the Code of Civil Procedure in Quebec providing for injunction. And they are decisions by a court of which the tradition exists that it was inclined to extend its jurisdiction when it found it necessary in order to do justice.

When we find it in such cases as these, so closely analogous in principle to that now at bar, refusing to assert its supposed power and referring the litigant to the need to seek his relief in the remedy of mandamus alone, I feel we may well follow such precedents.

The appellant may have the right to enjoin temporarily the respondent from proceeding under its new notice until she has had an opportunity of trying out the questions involved by way of an application for a mandamus.

I would therefore allow the appeal without costs and modify the judgment accordingly and substitute for the reservation by the judgment of the Superior Court of her right to proceed for damages, the right to proceed for a writ of mandamus, if so advised, without prejudice arising from the proceedings had herein.

There does not seem, considering the leisurely way things were done by those concerned, much reason to fear that the city would, in face of a proceeding for a writ or order of mandamus, which I hold to be the proper course in such a case, insist upon proceeding immediately under its new notice. But lest it might be likely to do so, an interlocutory injunction could have been had, no doubt. In allowing the appeal I would grant such interlocutory judgment until the proceedings for mandamus terminate, or such reasonable time as should enable the appellant to terminate same.

Anglin, J.

ANGLIN, J.:—I have had the advantage of reading the opinion of my brother Brodeur, in which I believe my brother Mignault concurs. While in accord with the conclusion reached, I hesitate to commit myself unreservedly to the ground on which my learned brother rests his judgment because of its very far reaching effect. As I understand it, he imports the rules of the code of procedure in matters not expressly provided for by the general law of the province governing expropriations (R.S.Q. arts. 7581, *et seq.*) into all proceedings had under it, merely because such expropriations are grouped with some other subjects in the Quebec statutes under the heading "Matters Relating to the Code of Civil Procedure." I am satisfied, however, that in the present instance on the ground of error in the substance of the object of the expropriation the respondent would be entitled to the relief which the judgment in appeal accords to it. Any amendment necessary to sustain the judgment on that ground could and should be made. Supreme Court Act, s. 54.

Brodeur, J.

BRODEUR, J.:—In 1911 the Quebec Legislature authorised the City of Montreal to expropriate, within 2 years, the land required to extend St. Joseph Boulevard from Laurier Ward to Papineau Ave., according to a plan prepared by John R. Barlow on February 25, 1911.

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In 1912 the legislature amended the Act of 1911, and declared that the city shall acquire or expropriate, not under the provisions of its charter but under arts. 7581 *et seq.* of R.S.Q., all the immovables it may need for such prolongation of the boulevard, according to the Barlow plan, or according to any other plan approved by the city. That which was, in 1911, an authorisation of expropriation, became, therefore, by the Act of 1912, a formal obligation imposed on the city to extend this boulevard as far as Papineau Ave. However, the expropriation, instead of following the Barlow plan, might follow any other plan which the city should adopt, and the expropriation, instead of being made according to the provisions of the city charter, should be made according to general expropriation law.

The appellant, Maria Bisaillon, was the owner of four lots of land fronting on the proposed boulevard. These four lots of land were respectively numbered 3, 5, 6 and 7, of No. 168 of the cadastral plan of the village of Côte St. Louis. She was also the owner of lots 8 and 11 of the said No. 168. These last-named lots were situated behind the first lots; and they fronted upon a cross street called Drolet Street. The city only required for St. Joseph Boulevard 7 ft. in depth in front of lots 3, 5, 6 and 7.

Under the general provisions of its charter (art. 425), provisions which appear to have been implicitly recognised in the Act of 1912, the City of Montreal is authorised to expropriate not only the outside limits of the land it requires for opening and widening a street, but it is authorised to expropriate more than it needs for the proposed work. In the latter case it must sell back again the land it expropriates but does not use. This method might be, in certain cases, very advantageous, because sometimes the expropriation of the frontage of a lot might occasion the destruction of a building, and so give rise to very large claims. In the present case, it would be more advantageous to acquire all the land, in order to re-sell afterwards that part which the city had no need of.

On the question of the enlargement of St. Joseph Boulevard, the engineer, Barlow, had, on February 25, 1911, prepared a plan by which the boulevard would be 100 ft. wide; and further, he shewed that 100 ft. of land on each side of the proposed boulevard should be expropriated. This is the plan which was before the legislature, and which is referred to in the legislation.

On January 27, 1913, a new plan was prepared, and there again, at any rate so far as the appellant's lots are concerned, the proposed expropriation covered not only the land necessary for the location of the boulevard itself, but also 100 ft. more. This plan was approved by the city council on March 10, 1913, and a resolution was adopted authorising the expropriation of all lands necessary to enlarge and extend the street according to the plan of January 27, 1913.

On June 13, 1913, notice of expropriation was given by the City of Montreal to the appellant, not only for the lands which fronted upon the proposed boulevard, namely, lots 3, 5, 6 and 7 of No. 168, but also lands behind these lots, which were subdivided so as to front upon Drolet St.

The notice of expropriation for the lots fronting upon Drolet St. was evidently incorrect. For example, in describing a part of No. 168-11 it gave the adjacent lands and boundaries, and declared, among other things, that this part of No. 168-11 which it desired to expropriate was bounded on the north-west by No. 168-11 of the cadastral plan. How could a part of lot No. 168-11 be bounded by the whole of lot No. 168-11? It is the same as to the location of the lands first described in the notice of expropriation, which they state forms part of the cadastral plan under the No. 168-4. Now, if we examine the plan before us, it is evident that this No. 168-4 which they described forms part, on the contrary, of No. 168-11. There was, therefore, in this notice of expropriation evident and palpable error; error in the description of the lots, and error as to the acquisition of the land which the city wanted. I quite understand that the city desired to expropriate all the lots fronting upon the proposed street; but to wish to acquire lots which were behind them, and which fronted upon another street, could not in my opinion, enter into the city's intentions.

In its notice of expropriation, the city made an offer of $17,500 for the land which it wanted to buy from the appellant.

The appellant replied that she refused this offer, and stated that the value of the property which the city wished to expropriate was $98,000; a marked difference, as may be seen, and which shews clearly that there must have been an error as to the land which the respective parties intended to buy and sell.

The arbitrators began their proceedings to determine the value of the land.

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They had already held two or three sittings when suddenly it was discovered that the plan of January 27, 1913, did not shew an apartment house which had been erected by Maria Bisaillon upon the lots fronting upon Drolet St., but which, by the proposed expropriation, would be partly taken. Then the proceedings were adjourned by the attorneys *sine die*, in view of the statement made by the owner's attorneys that there was an error in the plan. Consequently, it could not be presumed that the City of Montreal, by instituting these proceedings and seeking to expropriate 100 ft. more than was necessary for the boulevard, had any intention of taking part only of the house; and equally must it be presumed that the plaintiff-appellant was in no way compelled to see her house partially demolished when it was so easy to confine the expropriation to a small portion of the land.

I understand that if it was a question of the opening of the street, properly so called, it would have become necessary partly to demolish a house; but seeing that the city wished to expropriate not only the portion of the land necessary for the location of the street, but also all the lands of adjoining proprietors, it could not be presumed that it intended to demolish a large house, or otherwise the city would have been obliged to pay all damages resulting from this partial demolition, and it would have represented practically the value of the whole house.

This error having been discovered, it seems to me that, even if we accept the appellant's claim that the proceedings constitute a contract binding both parties, there was evidently an error which is a cause of nullity as to the substance of the thing which formed the object of the contract. I do not think, in view of the conclusion to which I have come upon another point, that it will be necessary for me to decide if the notice of expropriation, following the naming of an arbitrator by the party expropriated, constitutes a contract. I would be inclined, on the contrary, to believe that this notice of expropriation is in the nature of a judicial proceeding, as I shall shew further on.

The city authorities then considered the situation, and concluded to prepare a new plan by which they would limit their expropriation to the portion particularly required for the widening of the street, and they notified the appellant, Maria Bisaillon, to this effect, declaring that the city discontinued its first notice of

expropriation, and that it would expropriate only the land necessary for the actual street.

It is now claimed, in the present action, that the city had no right to discontinue its proceedings, and that, having produced its plan of January 27, 1913, it was bound, and that it could not produce another plan, or reduce the quantity of land which it desired to expropriate.

Could the city so discontinue? I submit that, without any doubt, it could do so, by virtue of the provisions of our law on the subject.

The expropriation of the land in question, as we have seen, ought not to be made in accordance with the ordinary provisions of the city's charter, and according to the general expropriation Act of the province, which we find in arts. 7581, *et seq.*, of R.S.Q.

It would be a mistake to think that this Expropriation Act contains the whole procedure which should be followed in the matter. We find this Act in c. 2 of Title XII. of R.S.Q., which is entitled "Matters Relating to the Civil Code." S. 9 of this chapter contains the provisions of the expropriation law properly so called.

In the course of the argument I suggested that our arts. 1431 *et seq.* of the C.C.P. might be applied to the actual expropriation, and to the expropriation made under the general law of the province. But this suggestion does not appear to have been accepted by any of the parties. However, it seems to me that there is no doubt that, where the general expropriation law does not contain a particular clause upon the subject, we must refer to the C.C.P. to determine the respective rights and obligations of the parties, and the procedure which should be followed. Thus, it is not stated, for example, in the Expropriation Act whether one party can revoke or abandon a proceeding which has been taken. So when there is no provision in the general Act we can refer to the Code of Procedure, and there we find art. 1437, which says that:—

> During the delay fixed by the submission the appointment of the arbitrators cannot be revoked, except with the consent of all the parties. If the delay is not fixed, either of the parties may revoke the submission when he pleases.

Further, it is a general rule of our procedure, as we find in art. 275 C.C.P., which says:—

> A party may, at any time before judgment, discontinue his suit or proceeding on payment of costs.

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Applying, accordingly, arts. 1437 and 275 C.C.P. to the present case, I say that the city had the right to discontinue its notice of expropriation, first, because there was no delay fixed during which the arbitrators should make their report, and next, because it could, under art. 275 C.C.P., exercise any right which a party possesses of abandoning its proceedings, provided that it pays the costs.

The appellant has cited certain decisions given in England, to the effect that municipal corporations could not discontinue a notice of expropriation. We are not bound to give judgment in this case according to the law governing expropriations in England, but according to the law governing expropriations in the Province of Quebec. Now, I find in the R.S.Q. as well as in our C.C.P., the elements necessary to declare that a party may discontinue his expropriation proceedings. For these reasons the appeal brought by Maria Bisaillon should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—I agree with the opinion of Brodeur, J.

Appeal dismissed.

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Judicial Committee of the Privy Council, Lords Sumner, Parmoor, Wrenbury and Sterndale and Sir Arthur Channell. February 27, 1919.

EVIDENCE (§ XII A—924)—PREJUDICIAL TO PARTY GIVING—ALLEGATION OF MISTAKE—COMPETENCY OF TRIAL JUDGE TO DECIDE—APPELLATE COURT SETTING ASIDE FINDING.

When a statement has been made prejudicial to the case of the person making it, and it is alleged that it was made under a mistake, no one is so competent to decide whether that allegation is correct as the judge who hears the evidence and can observe the manner of those making it. The finding of a judge under those circumstances, that the explanation is an afterthought and should not be accepted, ought not to be set aside except under very special circumstances shewing that the judge has misapprehended the evidence or the effect of the documents put before him.

Statement.

APPEAL from a judgment of the Supreme Court of Canada affirming a decision of the Judge of the Exchequer Court of Canada, N. S. Admiralty District, in three consolidated actions brought against the S.S. "Borghild" for damages arising out of a collision between that vessel and the fishing schooner "Oriole."

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The judgment of the Board was delivered by

LORD STERNDALE:—As a result of the collision the "Oriole" and her cargo were sunk and five of her crew drowned. The actions were brought by the survivors of the crew of the "Oriole" claiming for their effects, the owners and master of the "Oriole" claiming for the value of the vessel and cargo, and the personal representatives of those of the crew who were lost claiming damages for the loss occasioned to them by their death. Drysdale, J., held the "Borghild" alone to blame for the collision, and this judgment was affirmed by the Supreme Court. The defendants on the appeal to the Supreme Court and before their Lordships did not contest that part of the judgments which held the "Borghild" to blame, and only asked that they should be varied by holding that both vessels were to blame in equal degree.

The "Oriole" was an American fishing vessel of 144 tons gross and 104 tons net, about 115 ft. long, and manned by a crew of 22 hands all told, and at the time of collision was bound home to the port of Gloucester, Mass., with a full cargo of halibut. At the time she became aware of the "Borghild" she was sailing close-hauled on the port tack, carrying, except the fore topsail, all sail, including the balloon jib. The wind was about w.s.w., and she was heading about n.w. by w. ½ w. The force of the w nd was in issue, and will be discussed later. The "Borghild" is a Norwegian steamer of 3,700 tons gross and 2,200 net register, 330 ft. long, manned by a crew of 25 hands all told, and bound from Herring Cove, N.B., to France. She was on a course of s. 9° e. The collision took place in a dense fog to the s. and w. of Seal Island off Nova Scotia, near the entrance to the Bay of Fundy, the "Borghild" striking the "Oriole" on the starboard side at an angle described by both sides as a right angle, with the result that she sank in a very short time. The fog-horn of the "Oriole" was only heard twice by those on board of the "Borghild." and it was only when it was heard for the second time that it was distinguished as a double blast, shewing that she was on the port tack. When the fog-horn of the "Oriole" was first heard the engines of the "Borghild" were put to slow, and afterwards, just before the "Oriole" came in sight, were put full speed astern and her helm was put hard a port, but it is said that the helm had no material

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effect on her heading. She has been held to blame for excessive speed, for not stopping her engines when she heard the whistle of the "Oriole" forward of her beam, and for a bad lookout.

The distance at which the vessels came in sight of one another was very short: it was stated by the plaintiffs as about 50 or 60 feet, and by the defendants' master at 60 to 90 feet. Those on board the "Oriole" heard the whistle of the "Borghild" three times, though they did not, when first heard, distinguish it to be a steamer's whistle, and when the "Borghild" came in sight the helm of the "Oriole" was ordered hard a starboard, but the wheel had not been got over when the collision occurred.

If the courses given by the two vessels and the angle of the blow are quite accurate, the "Borghild" must have altered substantially under her port helm; but their Lordships are of opinion that these data are not ascertained with sufficient accuracy to enable any satisfactory conclusion to be drawn as to this alteration, except that the vessels were at first approaching one another at less than a right angle, and, therefore, their joint speed would bring them together rapidly. The important question in the case is whether the speed of the "Oriole" was immoderate considering the state of the weather.

Drysdale, J., found that her speed was 6 knots, but that such speed was not immoderate. The judges in the Supreme Court who gave detailed reasons for their judgments did not entirely agree in their view of the facts. The Chief Justice did not find what the speed of the "Oriole" was in fact, but considered that it was not more than sufficient to give her steerage way. The judge seems to have been under a little misapprehension as to the evidence, for he states that all the witnesses on both sides admitted that the wind was light, and speaks of the effect of the current on the "Oriole." As will be seen later, most of the witnesses from the "Borghild" described the wind as of greater force than a light wind, and the current was proved to be so slight as to be negligible. Davies, J., was not satisfied that the speed of the "Oriole" was 6 knots as found by Drysdale, J., but expressed the opinion that whether it was 4½ or 6½ knots or between those rates it did not exceed what was necessary for her to keep good steerage way. He also came to the conclusion that the wind was light or very light.

Anglin, J., was not satisfied that the speed of the "Oriole" was more than 3½ or 4 knots through the water, and accepted the explanation of the master as to the contradictory statement made by him to which reference will be made later. Idington and Duff, JJ., concurred without giving detailed reasons.

At the opening of his argument the learned counsel for the respondents—a counsel of great ability and experience in Admiralty matters—admitted that if the finding that the speed of the "Oriole" was 6 knots through the water were upheld, the decision that such speed was not immoderate could not stand. The question of whether that finding should be upheld is therefore vital.

Before the trial of the action an enquiry was held before a wreck commissioner, and at that enquiry the master of the "Oriole" stated more than once that the speed of his vessel was 6 to 6½ knots through the water, and that the wind was a moderate breeze. No evidence inconsistent with that statement was given at that enquiry, except that two witnesses from the "Borghild" described the wind as light. One of them, however, also said that the "Oriole" was going fast, as he judged from the wave at her bow. Some evidence was taken before the registrar, and one of the witnesses from the "Oriole" then described the wind as a moderate breeze. At the trial of the action the master of the "Oriole" gave evidence that his statements before the wreck commissioner were made under a mistake: that he had meant 6 to 6½ knots over the ground, and that he had been under the impression that there was a current running in his favour of about 2 knots. He also stated that the wind was light. This account was corroborated by several members of his crew. Drysdale, J., who heard and saw these witnesses, came to these conclusions on this point:—

> The officers of said "Oriole" were examined before a wreck commissioner shortly after the accident, and whilst conditions were all fresh made deliberate statements respecting the speed of the schooner, statements I have no doubt detailing their then honest convictions. When these suits came on a deliberate attempt was made to vary or change the first statements so made respecting speed, and to have it understood that the speed of the "Oriole" was much less than at first stated. The preliminary acts in these actions were put in, stating the speed of the "Oriole" at 3 or 4 miles an hour, whereas the officers before the commissioner had pledged their oath to 6 to 6½ knots on the occasion in question. I am of opinion that the effort to change position on this question was an after-thought, and, further, not a success. The schooner was

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sailing close hauled by the wind with practically all her sail set, and hauled by the wind with practically all her sail set and hauled flat, and I think making 6 knots an hour. Was this excessive speed under the circumstances, and further did such speed contribute to the accident?

When a statement has been made prejudicial to the case of the person making it and it is alleged that it was made under a mistake, no one is so competent to decide whether that allegation is correct as the judge who hears the evidence and can observe the manner of those making it. Their Lordships are of opinion that the finding of a judge under those circumstances, that the explanation is an after-thought and should not be accepted, ought not to be set aside except under very special circumstances, shewing that the judge has misapprehended the evidence or the effect of documents put before him. In this case their Lordships are of opinion that no such circumstances exist.

The master's statement that the wind was a moderate breeze was in accordance with the bulk of evidence called from the "Borghild" before the wreck commissioner. This evidence was put in at the trial as the defendants' evidence, and it described the wind as a breeze, a fresh breeze, a topsail breeze, or words to that effect, and was not then seriously challenged by any of the evidence called from the "Oriole."

Their Lordships are of opinion that the master of the "Oriole" was right when he called the wind a moderate breeze. This is not a very precise term, but it does not mean a breeze so light that a vessel like the "Oriole" must carry all sail including her balloon jib in order to keep steerage way. The "Oriole" was making for her home port and was carrying her balloon jib, a sail that would be very useful in helping her to get to her destination as soon as possible, but would not in a moderate breeze be serviceable if her object were to keep a moderate speed and manœuvre easily for other vessels in the fog. The main explanation given for the master's statement was that he had erroneously supposed he had a current with him, and added the force of that current to his speed through the water. It is, however, to be noticed that the plaintiffs' preliminary act, founded no doubt on information obtained from the master and filed on the second day of the enquiry before the wreck commissioner, stated that there was no force in the tide, and this was confirmed by the evidence of an expert called by the plaintiffs, who said that there

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was not more than three-quarters of a knot of current. The master had been navigating in this neighbourhood for a long time, and was no doubt well acquainted with the tides and currents. Some suggestions were put to him on the second day of his examination before the wreck commissioner as to a current, but his answers shew that the question of current was not really present to his mind at that time as important. For what it is worth, too, he answered distinctly that his speed was 6 knots through the water. It is evident also that he did not consider the current a sufficient explanation, because at the trial he also altered his evidence as to the wind, describing it as light, and not as a moderate breeze. He had been navigating this vessel for 18 months; he described her as the fastest fishing vessel afloat, and he knew quite well what speed she could make under given conditions, and as Drysdale, J., said, he made these statements when the matters were fresh in his recollection.

Their Lordships are, therefore, of opinion that there were no circumstances to shew that the judge in any way misapprehended the evidence, and that his finding as to the actual speed of the "Oriole" after hearing and seeing the witnesses should not be disturbed. It is admitted that in that case his finding that the speed was not immoderate, which is not entirely a question of fact but partly of nautical opinion, cannot stand.

The evidence of the witnesses from the "Oriole" also proved that 6 knots was not necessary to keep steerage way.

It was, however, contended that the speed of the "Oriole" if immoderate did not contribute to the collision, and it was pointed out that if the "Borghild" had stopped sooner and not ported, the collision might not have happened, as she might have gone under the stern of the "Oriole." That may be so, but it is also possible that given the wrong manœuvres of the "Borghild" the collision might not have happened if the "Oriole" had been going slower, as then the "Borghild" might have crossed ahead of her. One important object in going slow in a fog is to give each vessel time to hear the signals made by the other as often as possible before they are close to one another, and thus afford an opportunity to judge their relative positions. In this case the signals were not heard until the vessels were so close that a collision was imminent. In their Lordships' opinion this collision was brought about by wrong navigation of both vessels, which

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prevented them from hearing the sound signals as often as they should, continuing up to the time of and contributing to the collision. Both vessels should therefore be held to blame.

There still remains to be considered the division of the loss under the Maritime Conventions Act of 1911.

The judgment in the case of the claim by the representatives of the deceased seamen is not affected by the decision of their Lordships, as in that case the liability of the vessels is joint and several, and therefore that judgment must stand.

In the other two cases their Lordships are of opinion that upon the materials before them it is not possible to apportion the degree of fault of the two vessels, and both must be held equally liable.

The appellants have succeeded on the main point in the appeal, and the respondents, other than the representatives of the deceased seamen, must, therefore, pay the costs of the consolidated appeals here and before the Supreme Court of Canada. All parties must bear their own costs of the trial before Drysdale, J.

Their Lordships will humbly advise His Majesty accordingly.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Britton, Riddell and Latchford, JJ. February 21, 1919.

HIGHWAYS (§ IV A—151)—DITCH ALONG—MUNICIPAL DRAINAGE ACT—MUNICIPAL WORK—INJURY TO AUTOMOBILE—LIABILITY.

Where a ditch or drain has been constructed under the authority of the Municipal Drainage Act (1914 R.S.O., c. 198), along a highway, the boundary between two townships, for the purpose of draining the lands of an adjoining township, it is not a municipal work undertaken by the two townships; such townships are not bound to erect a rail or guard along the course of such drain. If the road is a good clay road for the locality having regard to the means at the townships' disposal for keeping it in repair, they are not guilty of negligence in the maintenance of the road, although in wet weather the surface of the road is slippery and there is danger of automobiles skidding into the ditch.

[See annotations on Automobiles, 39 D.L.R. 4, also on Highways, 46 D.L.R. 133.]

Statement.

APPEAL from the judgment of Middleton, J., in an action for damages for the death of the plaintiff's wife in an automobile accident, caused, as the plaintiff alleged, by the negligence of the defendants in regard to the condition of a highway forming the boundary between the two townships.

The judgment appealed from is as follows;—

MIDDLETON, J.:—This is an action arising out of an accident by reason of an automobile upon a highway, in which the wife of the plaintiff was killed. He now sues the Corporations of the Townships of Mersea and Rochester for damages for her death.

The plaintiff was driving a heavy car along the road, with his wife, her brother and sister, and some children, on the 30th June, 1918, about midday, when it started to rain and soon rained very heavily. He was about to turn into the premises of Mr. Desmarais for shelter, when his car skidded and slid on the clay to the side of the road (as travelled) and the wheels going into the ditch the car overturned and the wife was instantly killed.

The road was the boundary between the two townships now sued. A drain had been constructed along the road, at the instance of the residents in the adjoining township of Gosfield, for the purpose of draining lands in that township, and its sole function was to afford the waters from Gosfield an outlet in Silver creek, a stream crossing Mersea and Rochester. This drain was constructed under the sanction of the law and under the supervision of a competent engineer, over whom the townships had no jurisdiction, and the use thus made of the highway was an abnormal use, permitted and approved by the Legislature having jurisdiction in the premises.

The ditch was necessarily wide and deep to carry the water to the outlet, and manifestly any one who left the travelled way and fell into the ditch might sustain injury.

The road ran beside the ditch, and was formed of the natural clay, graded and kept in fair condition. The crown of the road was 11 inches—somewhat less than the height necessary under the requirements of the regulations made under the Ontario statute for "Good Roads."*

So far as the road itself is concerned, it is admitted that there was no negligence. What is contended is that the absence of an adequate guard or fence along the course of the ditch was such negligence as to create liability in the circumstances, and that the accident was caused by this negligence. The defendants not only deny their liability but also contend that the accident was the fault of the plaintiff.

*See the Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 6.

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Much might be said as to the provision of the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 23, casting the onus upon the operator of a motor vehicle whenever an accident occurs upon a highway, but I propose to deal with this case quite apart from that statute.

The situation here was in no sense a concealed trap; the drain was quite obvious and known to the plaintiff. Miss Desmarais saw the car coming down the road and went out to call to the driver to turn in at her father's barn, because she recognised his peril, as the car was slipping about on the road. A heavy car on a clay road when it is wet is most dangerous, owing to the fact that the wet clay affords no grip for the rubber tires. Chains are a great aid in preventing skidding of the car—not so much from the prevention of the sideward motion as by giving a forward motion, which permits a driver of skill and experience to counteract an incipient skid.

This heavy car without chains on the wheels required most cautious and skilful handling to make the turn into Desmarais' lane. The approach to the lane was wide enough to permit an easy entrance. What the plaintiff did was to depart from the crest of the road so as to make the turn a wider curve, and it was at this moment the fatal skid occurred. Had he slackened his speed earlier and remained on the crown the accident would not have occurred. He probably was going at a greater speed than he knew, or did not realise how nearly he should have brought the car to a standstill before turning upon a road with a surface so slippery that it might be said there was no aid from friction. Had he reduced his speed sufficiently to make the turn safely, he would not have turned toward the ditch before entering the lane. In any case, having regard to the condition of the road and the car, it was most imprudent to have left the crown of the road. Another factor of some importance was the loose steering gear. The effect of this was that when the car swung from side to side there could not be immediate action to counteract the swing, and the car upon a bad road would swing and would not at any moment be in perfect control. The plaintiff had not much experience, and, while he could run a car well enough upon a good road and under favourable circumstances, on this road and under the circumstances which existed and which undoubtedly called for care and experience in handling a car, he proved inadequate.

The proximate cause of the accident was, in my view, the plaintiff's omission to do the things which, under the circumstances, he ought to have done, and his doing the things he ought not to have done; this in law being negligence.

I do not think I ought to omit stating my views as to the alleged negligence of the defendants. The ditch along the road, it is said, ought to have been fenced. A fence that would prevent a heavy automobile which was skidding from coming to grief would have to be a very substantial structure; and, as there are about 50 miles of drainage ditches upon highways, the financial burden would be enormous. A fence, if strong enough, would prevent cars going into the ditch; it would probably wreck many cars which now escape by reason of having greater sea-way. A ditch which is 7 feet deep looks dangerous, but a ditch 2 or 3 feet deep will wreck a car just as thoroughly, particularly when the driver has the necessary lack of experience. So, if the obligation exists, a heavy burden will be placed on municipalities.

The drainage system is not a municipal work undertaken by these townships. The works are constructed upon the highways under the authority of the Drainage Act, and if fencing is necessary the cost of fencing ought to be part of the cost of the drains and should be borne by those for whose benefit the drain is constructed. It may be that the Legislature intended to impose an obligation to fence upon the municipality which is compelled to submit to a drain passing along its highways, but it is most unlikely that it was so intended where the result would be obviously unjust. The truth is that there is no such danger in a travelled road running along a drain or along the course of a natural stream as to call for the construction of a fence. In almost every conceivable situation there is ever-present danger, but the person called upon to face the situation must face the danger and avoid disaster. There is danger of automobiles skidding on any paved street, and if the automobile strikes the kerb it is almost certain to be smashed, but so far no one has argued that therefore a kerb is a dangerous obstruction. A kerb on the road in question would not be practicable, and would have been most dangerous, and almost certainly would have overturned the car.

On the other hand, it can well be argued that where there is a dangerous situation upon a highway which might reasonably be

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protected by a fence or guard, then the municipality is negligent when it neglects to fence or guard.

This drainage ditch was not one which, in my view, imposed any such obligation upon the municipality. In the first place, the situation was not such as reasonably to call for this protection.

In the second place, this, to my mind, is not at all like the case of a hole in a sidewalk or the permanent pavement of a travelled road. Nor is it a peril arising from work done by the municipality on its own road. It is the case of part of a road allowance having been taken by legislative authority for the construction of a work of a public or quasi-public character. The peril, if any, arises from the nature of that work, and the law which permits its construction does not require it to be fenced or guarded. As soon as that part of the highway was taken for the public use, the municipality was, *quoad* that work, relieved from responsibility.

The situation is not essentially different from that arising from a railway crossing a highway upon the level, or a telephone company placing poles upon the highway. The railway or the telephone company creates under legislative sanction that which would be an obstruction or a danger: this does not impose a duty upon the municipality to guard the crossing or to place lights upon the poles: see *Holden* v. *Township of Yarmouth* (1903), 5 O.L.R. 579.

I do not assess damages, as, if an appellate court thinks I am wrong, it will have all the material before it, and there is no conflict as to the material facts.

While the action fails, I hope the defendants may be generous enough to forego costs.

Morton, for appellant.
Rodd, for defendants, respondents.

At the conclusion of the argument for the appellant, the judgment of the court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Mr. Morton has not convinced any of us that the judgment appealed against is wrong. We have all, during the argument, stated our reasons for thinking that it should be affirmed. I shall now, therefore, merely restate them, or most of them, briefly.

It was not proved at the trial that the accident, out of which

the plaintiff's claim in this action arose, was caused by neglect of the defendants' duty to repair the highway upon which it happened. The evidence, including the photographs, shews that, in performance of their duty to keep this highway, among other highways, in repair, the defendants made of it a good clay road, a very fair road, in all respects, for the locality, having regard to the means at their command for that purpose; wide enough for the traffic, and rather below than above the usual height at the crown: but, being a clay road, it was slippery in wet weather, and so, especially, a place for much caution on the part of drivers of rapid-moving self-propelled cars when in that condition. Circumstances prevent the use of gravel generally in the county of Essex; there is little to be had there; and circumstances make clay roads, to a great extent, necessary, clay soil preponderating so much. It is impossible for such a county to have roads at all comparable to those of England or France, though in the course of time that may be worked up towards; or even equal to those of other Ontario municipalities in which gravel abounds. Nor was there anything very exceptional in the ditch, at the side of the road, at the place where the car was overturned into it. Open ditches at the sides of such roads exist everywhere: they are needed to take the water from the roads and keep them dry enough for traffic: and I am unable to discover anything in the evidence, including the photographs, shewing that the work done under the drainage laws created at this particular spot any especial danger. There was a green sward, or a growth of some like character, several feet in width apparently, between the travelled part of the road and the road-side ditch, but unfortunately just at the place where the car went into the ditch there was a bare spot of several feet in length in this otherwise continuous sward, which sward ought to afford some protection even to a "skidding car on a greasy road."

Mr. Morton's main contention was that there should have been a guard-rail along the side of the road sufficient in height and strength to have stopped the "skidding" car from going into the ditch. It may be doubtful whether such a guard could be provided, practically, anywhere, without creating other possibly greater danger; but as, according to the evidence, it would need to be some 50 miles in length so to protect all such places as that

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in question, it seems to me to be out of the question in this case Growth of grass, such as I have referred to, is practical, and there is nothing in the evidence to shew that it is not preferable. It must be borne in mind that we are not dealing with a case of a deep ditch filled with water, an obvious source of unusual danger, or of an accident happening in the dark; but are dealing with the case of a dry spot only, not very different in character from those commonly existing at country road-sides everywhere; and an accident in full daylight; and so the question as to obligation to guard against danger from drains constructed under the drainage laws does not require consideration.

On this ground, want of proof that the plaintiff's injury was caused by negligence of the defendants—want of proof of such negligence—the plaintiff's action failed at the trial, as this appeal does also here.

Nor am I inclined to differ from the learned trial Judge on the question of contributory negligence, though, speaking for myself, I should preferably put my judgment upon the other ground.

On such a road, perhaps upon almost any road, in wet weather, in the midst of a heavy downpour of rain, many might say that it would be a want of a very apparent and necessary precaution to have proceeded without having chains on the tires, when the chains were in the car, and there was nothing, but anxiety to get under shelter, to have prevented them being put on.

The circumstances were such as to demand great caution to prevent "skidding;" caution as to speed, caution in turning, and caution as to all appliances available to prevent the dreaded, in such circumstances, uncontrollable slipping action of the car, commonly called a "skid:" if all such precautions had been taken, there ought not to have been an accident; and I am quite unprepared to say that the hurry to get his passengers and himself out of the heavy rain would ordinarily be considered enough, in all the circumstances of the case, to excuse a neglect of them. If he were guilty of contributory negligence he cannot recover damages even if the defendants had been guilty of negligence causing the accident, however it might be as to the other occupants of the car if they were seeking damages.

The appeal is dismissed. *Appeal dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and McCarthy, JJ. May 20, 1919.

ARBITRATION ACT (§ IV—46)—RAILWAY ACT—COSTS—AWARD.

The costs under s. 199 of the Railway Act (1906, R.S.C., c. 37) of an arbitration, if they are to be borne by the party whose land is expropriated, cannot exceed the amount of the award.

[*Calgary & Edmonton R. Co.* v. *Sask. Land & Homestead Co.* (1918), 44 D.L.R. 133, reversed.]

Statement.

APPEAL from the judgment of Ives, J., 44 D.L.R. 133. Reversed.

G. A. Walker, K. C., for plaintiff; *Frank Ford*, K. C., for defendant.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck that the appeal should be allowed and the action dismissed both with costs. I would have no hesitation in agreeing with the trial judge that when the statute says the costs shall be borne by a party if it said nothing more, they must be borne by him and it is the duty of the court to enforce the liability, but as respects the costs to be borne by an owner of land taken by the railway company, the statute provides how the costs shall be borne by him, viz:—by being deducted from the compensation moneys which are either in the hands of the railway company or in court. But it is said this is a case in which they cannot be fully borne in that way because they exceed the amount of the compensation. My answer to that is that in so far as they exceed that amount the statute does not direct that they shall be borne by the owner and, therefore, does not authorize their recovery. As the statute says they shall or may "be deducted from the compensation" it follows that they must be capable of being so deducted, in other words, they must not exceed the amount of the compensation. It may be that there was not, in the minds of the legislators, the thought of a case of taxed costs exceeding the amount of the compensation, but I feel little doubt that they would have held up their hands in horror at the suggestion that a railway company should be allowed to take a person's land and while paying him nothing for it, have a claim against him for nearly six times its value for costs arising out of their compulsory taking. But, be that as it may, the terms of the statute appear to me to be clear and the effect is to make an absolute limitation of the costs recoverable by the railway company to the amount of the compensation.

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I do not desire to express any opinion on any of the other grounds argued in the appeal.

STUART, J.:—I agree with the Chief Justice. I would add, however, that the words of Lord Selborne in *Metropolitan District R. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, at 433, seem to me to be applicable in general to the matter before us. He said:—

> In construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force.

Of course we have nothing to do here with reconciling general and special Acts, but I cannot avoid recalling that in many statutes dealing with costs, the legislatures have limited the amount of costs recoverable to a certain percentage of the claim. By analogy to these statutes and by the rule of reason and justice, I think we should interpret the statute in question here as limiting the cost recoverable to the amount decided upon as the value of the property taken particularly when the words are clearly capable of being interpreted in that sense.

Beck, J.

BECK, J.:—This is an appeal by the defendant company from the judgment of Ives, J., at the trial.

The action arose out of the arbitration between the parties under the Dominion Railway Act in question in the reported case of *Sask. L. & H. Co.* v. *Calgary & Edmonton R. Co.* (1915), 14 D.L.R. 193, 6 Alta. L.R. 471, 21 D.L.R. 172, 51 Can. S.C.R. 1. In that arbitration proceeding, the railway company had offered the land company $733.05 as compensation for the lands taken and any damages caused by the exercise of the railway company's powers in respect thereof. That was early in the year 1908. On July 24, 1908, Ex-Chief Justice Sifton made an order for immediate possession of the lands upon payment into court of $1,150. On January 8, 1912, Stuart, J., made an order appointing three arbitrators—Lott, nominee of the railway company, King, nominee of the land company and Carpenter.

On August 22, 1912, Walsh, J., made an order appointing as arbitrators, in lieu of the three persons above named, Clarke, nominee of the railway company, Edwards, nominee of the land company, and Carpenter.

On October 18, 1912, Carpenter and Clarke joined in an award

finding the compensation to which the land company at $733.05—the exact amount offered in the first instance by the railway company. Edwards expressly dissented from the finding in a written statement.

There was an appeal from the award to the Supreme Court of the Province and a further appeal to the Supreme Court of Canada, with the result that the award of the majority of the arbitrators was sustained. It is these appeals which are reported as above stated. Nothing in relation to these appeals is in question here. The costs of the appeals were paid by the land company.

What is in question here is the costs of the arbitration proceedings.

On October 16, 1916, Simmons, J., made an order for the taxation of these costs by the clerk at Calgary and a report by him to be adopted or varied by a judge.

On October 24, 1916, the clerk reported that he had taxed the costs at $1,726.95.

The railway company thereupon made an application "to hear the report" and "to hear the objections of the parties to the report and for an order thereon as may be requisite or necessary."

This application came before Walsh, J., who gave a direction to the clerk to tax the costs of the arbitration on the basis of column 5 (doubled) of the tariff of costs fixed by the rules of court for proceedings in court. The clerk proceeded with a taxation accordingly and made a report which came before Simmons, J., who allowed (on October 27, 1917) the costs of the arbitration at $5,116.20. The amount awarded to the land company by the arbitrators $733.05, with interest at 5% from July 24, 1908, amounting to $346.65, making together $1,079.70, being deducted from the $5,116.20, left on April 1, 1918, the date of the commencement of the action, a balance of $4,036.50 for which the railway company sued the land company in this action, Ives, J., giving the plaintiff company judgment for the whole amount claimed, with costs. The defendant company appeals.

Obviously the questions for our consideration depend for their solution in a large part upon s. 199 of the Railway Act, c. 37 R.S.C. (1906).

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If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

The trial judge thought he was bound by the taxation of the costs made by Simmons, J., and regulated as to the basis by the order of Walsh, J., and, therefore, did not enquire into the propriety of the quantum.

S. 191 (2) says that in case of disagreement between the parties, or any o˙ them (as to the compensation or damages) all questions which arise between them shall be settled as hereinafter provided. then follows the caption:—Compensation and Damages.

S. 195, dealing with the service of the "notice to treat" says that if the opposite party is absent or unknown an application for service by advertisement may be made "to a judge of a superior court of the province or district or to the judge of the county court of the county where the lands lie;" sub-s. 3 says "the judge shall order, etc."

S. 196 says that if within a certain time the sum offered by the notice to treat is not accepted—

the judge shall, on the application of the company, appoint a person to be sole arbitrator for determining the compensation to be paid as aforesaid; provided that the judge shall, at the request of either party on such application, appoint three arbitrators to determine such compensation, one of whom may be named by each party on such application.

These several references to "the judge" seem to be an indication that the same expression in s. 199 means the judge who has appointed the one or the three arbitrators. It is true that looking at s. 217, which provides for a case in which no judge has necessarily, as yet, intervened, and where the expression "the judge" is again used, it seems that "the judge" must be taken to mean the judge provided by the Act namely, a judge of a superior court, or of the county court of the county in which the lands lie; yet it seems to me that when a particular judge has on application intervened it is he who is to continue to act, to the exclusion of any other judge, in relation to the same proceeding, and that, therefore, he is the only judge who can under s. 199 (2) tax the costs of any proceeding under the Act. It is to be noted, too, that taxation is not made a condition precedent to recover, whatever the method of recovery may be.

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Such English decisions as are available, the most recent of which seems to be *Re Cannings and Middlesex County Council*, [1907] 1 K.B. 51, lay it down that where the taxation of costs is to be by a *persona designata*, there is no right of review in the ordinary sense of an appeal from the taxation.

Opinions have been expressed by several members of this court that a judge acting under these provisions of the railway Act is not acting as a *persona designata*, but as a judge of the court. *Marsan* v. *G.T.P. R. Co.* (1909), 2 Alta. L.R. 43; *Sanders* v. *E. D. & B. C. R. Co.* (1913), 14 D.L.R. 88, 6 Alta. L.R. 459, and this on the ground that the decision in *C.P.R. Co.* v. *Little Seminary of Ste. Thérèse* (1889), 16 Can. S.C.R. 606, is no longer a binding authority in view of s. 220 introduced into the Act subsequently to that decision (3 Edw. VII (1903) c. 58, s. 156).

I share this opinion notwithstanding the opinions of some of the judges of the Supreme Court of Canada, expressed in the recent case of *C.N.R. Co.* v. *Smith* (1914), 22 D.L.R. 265, 50 Can. S.C.R. 476, in which no reference is made to the introduction of the additional section.

Even the English decisions already referred to, expressly for the most part leave undecided the question whether where there is, for instance, a clear failure of duty, as distinguished from a mere error of judgment, there is not an inherent right of review by way of certiorari, mandamus or otherwise which would result in a direction to the designated person to retax the costs having regard to a certain principle or basis. See Morgan & Wurtzburg on Costs, p. 479. I think this court has such inherent jurisdiction, and that as counsel for the appellant contends, a right of review in this sense extends to a case where the designated person has acted upon a wrong principle; and I think such a case is made out in the present case. See *Sparrow* v. *Hill* (1881), 7 Q.B.D. 362, 8 Q.B.D. 479; *Re Castle* (1887), 36 Ch. D. 194; and Hudson on Compensation, vol. 1, p. 229, where it is said:—

> The court will not grant a mandamus or writ of *certiorari* to the taxing master to review his taxation nor will the court issue directions to the taxing master, but *when the master states the principles of his taxation, the court will in a proper case review it.*

See, further, Hudson pp. 224, 225, 229, 274, 275, 279; Cripps 187; Browne & Allan 606-7.

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So that in my opinion the judges who had a hand in the taxation of these costs were acting not as designated persons but as judges of the Supreme Court, and, therefore, their acts are subject to review by the ordinary methods, that is the direction of Walsh, J., and the certificate of taxation of Simmons, J., can be set aside and a new taxation ordered with proper directions as to the principle of taxation; and even if they were acting as designated persons a similar method of review is open.

In this province we have a tariff of costs applicable to proceedings in court which consists of five columns of charges, one or other of these columns being applicable according, speaking generally, to the amount involved, with a provision for increasing the amounts set forth in the fifth or last columns by certain proportions if the amount involved exceeds $50,000. A judge has also a large discretion over costs. Then there is a limitation upon the amount of costs recoverable, having regard to the amount claimed, limiting the costs recoverable to a certain proportion of the amount involved; and the amount claimed must be stated.

Obviously this system for the allowance of costs provided expressly for the ordinary proceedings in court and based primarily on the principle of the amount involved, so that for the same service in different actions immensely different amounts are allowed in disregard, for the most part, of the real value of the service, cannot with justice be applied to a proceeding outside the court where the whole test is fair remuneration for the service performed, though no doubt a master or a judge in forming an opinion as to what in a particular case would be a fair remuneration might well have some regard to what in an analogous case the party would be entitled to.

Walsh, J., in fixing double the 5th column as the basis on which the costs of the railway company shall be taxed, said:—

> The position, by analogy to an action at law, was this, I think: The Saskatchewan company's land had been taken from it, and it was seeking to recover from the railway company compensation therefor. But for the provisions of the Railway Act, its remedy would have been by action at law in which it would have sued for the very large claim which it put forward in the arbitration proceedings.

It seems to me there is a defect here. But for the Railway Act the railway company could not lawfully take the land or

interfere with it in any way. If it did the owner could, without possibility of doubt, recover possession, damages and costs, and the costs would be taxed under our system, on the basis of having regard to the real value of the land. When parliament has provided for the compulsory taking of the lands of private persons it seems that it could not have intended to throw upon the owner any such risk as the adoption of the principle suggested by Walsh, J., would throw upon him, and it is to be remembered that our system of the grading of costs in actions is to a very large extent a new one, which has been adopted only recently and long after the passing of the provisions of the Railway Act under consideration.

The difference between the two cases is suggested by Lord Selborne in *Metropolitan Dist. R. Co.* v. *Sharpe*, 5 App. Cas. 425, at 432, where he refers to—

> the universal principle founded not upon any arbitrary policy, but upon natural reason and justice, according to which the legislature has been accustomed in Acts belonging to the class of which this is one, to provide that if compulsory powers are exercised against the owners of property for some object considered to be of sufficient importance to justify it, the costs either shall necessarily be or at least in the judgment and discretion of some authority trusted by the legislature may be paid, so as to indemnify the person against whom those compulsory powers are exercised.

Parliament having authorized a railway company to take private property compulsorily, natural reason and justice would seem to require that the cost of ascertaining what compensation should be paid to the owner should be borne by the company. Our parliament has recognized this principle but, having made it obligatory upon the railway company to make an offer to the owner of a definite sum by way of compensation, it has, while still recognizing the principle, said that, if the arbitrators find the sum offered to be sufficient, the costs of the arbitration shall be borne by the owner; but has even in such a case thought that the principle above stated should still have a prevailing influence and so has used the words: "Shall be borne by the opposite party and (*shall*) *be deducted from the compensation.*"

I think this is a clear indication of intention that the owner should in no case have thrown upon him by way of costs of ascertaining the value of what the company has compulsorily taken

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from him more than the total amount of compensation awarded him.

On this ground alone, I think the action should have been dismissed, but I have thought it well to discuss a number of other points raised and have already partially done so.

But assuming that there is a right of action for any surplus I revert to a consideration of the principle of taxation adopted by Walsh, J. What in my opinion is the question for the arbitrators to determine is—and is nothing more than—the amount of the real value of the land taken and any incidental damage, and, so far as it is to affect the question of costs, whether the sum offered by the railway company is or is not sufficient, and in no case the righteousness of any value suggested by the owner in the course of the enquiry. The analogy put by Walsh, J., is, as I have said, in my opinion, false. I have endeavoured to indicate why I think so. If I am right then, inasmuch as he directed the taxation upon a wrong principle and that wrong principle was acted upon by Simmons, J., in the taxation of costs, I am of opinion that the taxation is open to review in this sense, that it can be set aside, and a new taxation directed. In view of our simplified procedure and the unity of all judicial jurisdiction under our system of jurisprudence, I see no reason why,—whether the judges intervening in the taxation were acting as designated persons or as judges of the court—the trial judge having as he had, both parties to the taxation before him should not have set aside or disregarded the taxation, which in any case, is unnecessary, and if within the jurisdiction only of the judge seized of the particular matter was invalid, and have allowed the plaintiff company what he thought right on the basis of a *quantum meruit*, invoking if he wished, the assistance of the taxing master after giving him proper directions as to the principles of taxation. If this is the right view it is beyond question that the amount recoverable by the plaintiff ought to be very largely reduced.

In the costs taxed $1,717.85 was allowed for expenses of experts, engineers, etc. This amount for such costs is unusually large in view of the real value of the property involved. Having regard to what one might expect would, in the ordinary case, be the amount of disbursements upon an arbitration and a reasonable

sum for remuneration of solicitor and counsel, I think it might well have been supposed by the framers of the section of the Railway Act under consideration that the entire costs of the arbitration would almost without exception be less than the amount of the compensation awarded and that the right of deduction of the costs therefrom would, as a rule, which it would be wise to make universal, afford a sufficient protection and remedy to the company. A consideration of a number of questions which, having regard to the view I adopt, it was unnecessary that I should discuss, has I think been of some use in making that view clearer. If that view is held to be wrong, I think the judgment should be set aside, and also that the taxation should be set aside, and a new taxation directed—if this cannot be done here and now, a substantive motion can be made and judgment should go for the amount shewn on the new taxation.

I adopt the view, as I have already said, that there is no right of action for any costs in excess of the amount awarded for compensation. I would, therefore, allow the appeal with costs and dismiss the action with costs.

McCarthy, J.

McCARTHY, J. (dissenting):—This is an appeal from the judgment of Ives, J., 44 D.L.R. 133, in favor of the plaintiffs. The action was brought by them against the defendants to recover the amount of the taxed costs of an arbitration under the Railway Act in which they were successful—*i.e.*, to determine the plaintiffs' right to recover such costs. The steps which led up to the action and to this appeal are set out by my brother Beck and it is unnecessary for me to repeat them here.

The land in question and with respect to which the arbitration was held, was parts of legal sub-divisions 7 and 8 in the south-west quarter of s. 21, township 34, range 27, west of the fourth meridian, near Blackfalds, in the Province of Alberta. This land was taken by the plaintiffs in the year 1908 for the purposes of its railway. The plaintiffs offered the defendants (owner) $733.05 as compensation for the taking. The matter came on for hearing before the arbitrators on the 9-10-11-12-13th days of Sept., 1912.

The defendants endeavored to establish that the strip of land had a special and peculiar value and placed the value at approxi-

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mately $339,000. The amount awarded was exactly that which the company had offered to pay.

In this award the arbitrators were sustained by the Appellate Division of the Supreme Court of Alberta (14 D.L.R. 193) and by the Supreme Court of Canada (21 D.L.R. 172, 51 Can. S.C.R. 1).

The costs of the arbitration were on October 27, 1917, taxed by Simmons, J., as I view it, as *persona designata* under the Railway Act at $5,116.20 or less than one-sixtieth of the amount that the defendants alleged they were entitled to as compensation for the compulsory taking. The amount awarded by the arbitrators with interest being deducted from the amount of the bill as taxed left a balance of $4,036.50 and for this amount the plaintiffs obtained judgment at the trial from which judgment the defendants appealed.

Dealing with the question as to whether or not the judge taxing the costs was or was not a *persona designata* under the Railway Act the result of the authorities seemed to me to determine that he was.

Re Toronto, Hamilton & Buffalo R. Co. and *Hendrie, et al* (1896), 17 P.R. (Ont.) 199.

Per Meredith, C.J., at p. 200:—

> It is objected that there is no jurisdiction to hear this appeal, as the order complained of (an order for payment out of compensation) was made by my brother Falconbridge as a *persona designata* under s. 165 of the Railway Act, 51 Vict. c. 29 (D.) and not by him sitting for the court. The case of *Canadian Pacific R. Co.* v. *Little Seminary of St. Thérèse*, 16 Can. S.C.R. 606, is a conclusive authority in favour of the objection, and the appeal must therefore be dismissed.

A judge making an order under the Dominion Railway Act, now s. 219, for payment out of compensation moneys, acts not for the court but as a *persona designata*, and no appeal lies from his order. *Canadian Northern R. Co.* v. *Smith*, 22 D.L.R. 265, 50 Can. S.C.R. 476, citing amongst other cases *T.H. and B. and Hendrie.*

Per Duff, J. (head note).

"The judge under s. 196 of the Railway Act acts as a *persona designata* and no appeal lies from his order under that section."

At p. 480, *per* Duff, J.:—

The jurisdiction created by s. 196 of the Railway Act is not, I think, a jurisdiction given to the superior court or county court as the case may be, but to the judge or judges of those courts. In other words, when acting under that section, the judge does not exercise the powers of the court as such, but the special powers given by the Act. From the refusal of the judge on an application under s. 196 to appoint arbitrators no appeal would lie to the Court of King's Bench or to this court.

If it be assumed that the judge is acting *persona designata* it seems clear there is no jurisdiction in the court to review his taxation, because there are no proceedings in the court out of which the taxation arises. *Per* Lusk, J., in *Owen* v. *London and N.W. R. Co.* (1867), L.R. 3 Q.B. 54 at 63; *Sandbach Charity Trustees* v. *North Staffordshire R. Co.* (1877), 3 Q.B.D. 1.

In Hudson on Compensation, p. 229, the rule is stated to be that while the court will not grant a mandamus or writ of *certiorari* to the taxing master to review his taxation yet, when the master states the principle of his taxation, the court will, in a proper case, review it. The only case cited as authority for the latter part of the proposition is *Eccles* v. *Blackburn Corporation* (1861), 30 L.J. Ex. 358. That was a case in which the proceedings were *in court* from the commencement, the arbitration having taken place pursuant to a consent order made at the trial of an action for an injunction and damages. I do not think the case, or the author's note, could be taken to be in conflict with the authorities I have cited.

It did not seem to me, however, that counsel for the defendants in his very able argument contested but rather admitted in his view that it was clear on the cases that there is no right of appeal from the taxation, but he contended that if the judge, even though *persona designata*, acts upon a wrong principle, that the defendants could, by way of defence to the action or otherwise, establ sh that a wrong principle had been acted upon and that there is no debt, or no debt over and above the amount of the compensation.

It was argued by counsel for the defendants on this appeal, in effect (a), there was no cause of action in the plaintiffs as against the defendants; (b), the wrong principle of taxation was applied; (c), a large number of irrelevant witnesses were called.

As regards the first of these contentions it is urged that under the wording of s. 199 of the Railway Act:—

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> If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall *be borne by* the company; but if otherwise they shall *be borne by the opposite party and be deducted from the compensation;*

that costs cannot, in any event, exceed the compensation upon the assumption that the section creates a new remedy and that that is the only remedy. Counsel for the defendants even goes further and contends that even if the words "*and be deducted from the compensation*" were not in the section that still there would be no right of action for costs.

This would be in direct conflict with the decision in *Metropolitan District R. Co.* v. *Sharpe*, 5 App. Cas. 425, on the construction of the Land Clauses Act 1845 (Imp.) s. 34, where almost identical language was used and it was then held there was a right of action to recover costs though not so stated in the statute in express terms.

If, as was argued for the defendants, the intention of the framers of the Railway Act had been to limit the remedy of the railway company in respect to the costs of an arbitration, to the amount of the compensation, I would have expected to find much more apt words used. Such a case as this might possibly not have been in contemplation when the statute was passed. Nevertheless, we must give the section its ordinary grammatical interpretation, and I cannot think that the words "and be deducted from the compensation" should be read to mean "but shall be limited to the amount of the compensation," nor that the latter phrase should be super-added to the former. While the amount of costs taxed is undoubtedly large, having regard to the amount awarded, it would not be so regarded if the situation were reversed and the present defendants were suing for the recovery of a similar bill, after the award for an amount based upon their estimate of the compensation. That, surely, must be the test of the reasonableness of the bill as taxed, more especially because it was the course taken by the defendants before the arbitrators which so greatly increased the costs of the arbitration. Moreover, if the principle of the case of *Canada Northern R. Co.* v. *Robinson* (1908), 8 Can. Ry. Cas. 244, be followed, "and I see no reason to doubt its correctness," the costs are to be taxed on a solicitor and client basis and "all the reasonable cost which a prudent man would

incur" allowed. On this footing I do not consider the bill under all the circumstances unreasonable having regard to the fact that approximately two-thirds of the bill represents disbursements.

If the contention of the defendants is correct that the costs are limited to the amount of the compensation peculiar situations would arise and circumstances under which it could never have been the intention of the legislature to deprive the successful party of their costs.

Assuming the plaintiffs find it necessary in the interests of the public to carry their line of railway over the corner of an owner's land, *e.g.*, covered by a slough or otherwise rendered valueless, the plaintiffs offer $25, the owner endeavours to hold the plaintiffs up, and days are spent upon the arbitrations whilst the owner was endeavouring to establish that the land had a special and peculiar value necessitating the attendance of the arbitrators, witnesses, counsel and experts, the railway company occupies an hour in the presentation of their case. Could it be contended that the legislature intended, if the award were for the amount offered only, that the railway company's right to costs was limited to the amount of this award?

In *Re Shibley and Napanee, Tamworth and Quebec R. Co.* (1889), 13 P.R. (Ont.) 237, Street, J., held that the land-owner was liable for the costs of an application under s. 163 of the Railway Act (now s. 219 of the present Act, although that section did not, in terms, impose any liability upon the landowner for costs).

I would dismiss the appeal with costs.

Appeal allowed.

PESANT v. ROBIN.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. December 9, 1918.

HUSBAND AND WIFE (§ II C—68)—DONATION TO WIFE—ACCEPTANCE—COMMUNITY AS TO PROPERTY—NO AUTHORIZATION BY HUSBAND—FAILURE OF INTENDED GIFT—ARTS. 177, 183, 776 C.C. QUE.

The appellant, by deed of cession for good and valuable consideration, gave a sum of money to his daughter, the respondent's wife, common as to property, and she accepted without the authorization of her husband. Some years later the appellant brought an action to set aside the deed as null and void. The court held that the donation required acceptance by the wife on her own behalf in the form prescribed by art. 776 C.C. Que. given with the authorization of her husband, evidenced either by

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his execution of the deed itself or otherwise in writing (art. 177 C.C.), and that for lack of such authorization the intended gift failed under art. 183 C.C.

[*Robin* v. *Pesant*, 27 Que. K.B. 88, reversed; review of authorities.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1917), 27 Que. K.B. 88, reversing the judgment of the Superior Court, District of Montreal, 23 Rev. de Jur. 211, and dismissing the plaintiff's action.

The appellant sold his lands to one Caron for $90,000, of which $21,000 was paid in cash, $11,000 was payable to the Crédit Foncier Franco-Canadien, and the balance was payable to himself. Later on, by a deed of transfer, "pour bonnes et valables considérations," he allotted to his daughter, the respondent's wife, a sum of $5,000.11 out of the balance of the price of sale. In the deed, the wife was erroneously described as separate as to property. The wife accepted alone, the husband not appearing in the deed to authorize her. She died a few years later, after having made her will by which she instituted the respondent her universal legatee. Two years after, the respondent signed a notarial deed of acceptance of the transfer which had been made to his wife and had that deed registered in the lands which were mortgaged for the payment of the sum so transferred. The appellant, later on, took the present action to have declared null the gift made to her daughter and claimed the radiation of the registration of the deed of acceptance by the respondent. The Superior Court maintained the action; but, on appeal, it was held that a gift made to a wife common as to property falls into the community and that the acceptance by the wife alone was legal, as made on behalf of her husband and as his mandatary acting under special mandate proved by parol evidence of the husband given at the trial without objection.

Paul St. Germain, K.C., for appellant; *Thibaudeau Rinfret*, K.C., and *R. Genest*, for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—I concur with Brodeur, J.

Idington, J.

IDINGTON, J.:—I concur with Mignault, J.

Anglin, J.

ANGLIN, J.:—The facts of this case sufficiently appear in the opinions delivered in the provincial courts. I am not disposed to differ from the view taken by the trial judge and the judges of the Court of King's Bench that, looking at the substance of the trans-

action in question, the donation by the appellant to his daughter should be deemed gratuitous.

Notwithstanding that, as a result of their marriage contract not providing otherwise (art. 1271 C.C.), legal community of property existed between the defendant and his wife, in the deed of cession, which the wife's father seeks in this action to have declared void, his daughter is described as "séparée de biens." The plaintiff, however, does not claim that the deed should be set aside on the ground of error (arts. 991 and 992 C.C.). Indeed, he does not even allege mistake. Neither does he aver that he intended to make the money donated to his daughter her separate property (*propre*), as he might have done by a distinct stipulation (art. 1272 C.C.). Nor does he pretend that he made the donation under the belief that she would enjoy the money as her separate property. He was a party to his daughter's marriage contract, which bears date November 14, 1907, and contains a provision that a certain donation of money thereby made by him to her should be *propre* to her. All he says in his evidence on this aspect of the case is that he does not know whether his daughter was or was not married under the system of community of property—he does not recollect her marriage contract, *i.e.*, at the time of his examination in October, 1916. He does not pretend that he had forgotten it when he made the deed of cession in December, 1911. Under these circumstances the plaintiff should, in my opinion, be taken to have known when he executed that deed that community of property existed between his daughter and the plaintiff and, since, under that regime, in the absence of a contrary provision, any movable property acquired by either of the spouses during coverture falls into the community (art. 1272 C.C.), he must be taken to have intended in giving $5,000 to his daughter to augment the community property. From the fact that if the wife were separate as to property the donation of this money to her would admittedly be void (art. 183 C.C.) for lack of marital authorization to accept it, which must be in writing or evidenced by the husband's execution of the deed (arts. 177 and 763 C.C.)—there is no question here of judicial authorization—there arises a presumption that it was not intended to go to her in this character —*ut res magis valeat*. Speaking generally, every one is presumed to know the law; I made an effort to review the authorities on

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this latter presumption in *Montreal Investment Co.* v. *Sarault* (1918), 44 D.L.R. 530, 57 Can. S.C.R. 464, and refer to my judgment in that case—of course, merely for convenience—and no one should be presumed to intend his deed to be a nullity. It must, therefore, I think, be assumed that the plaintiff knew and intended that the $5,000 in question should fall into the community. If these presumptions be rebuttable, there is no evidence of any contrary intention in the record to rebut them.

The invalidity under art. 183 C.C. is absolute and may be taken advantage of by any person interested, whereas under the corresponding article of the Code Napoleon (No. 225) it is relative and can be set up only by the wife, the husband or their heirs. D.P. 97, 1, 449 and note.

On this state of facts there arises an interesting question, viz., whether a gift of movable property made to a married woman subject to the regime of community can be validly accepted by her husband alone acting either personally or by an agent (who may be his wife, art. 1708 C.C.), or whether the acceptance must be by the married woman, either in person, or by agent, on her own behalf.

The theory put forward by the respondent, which has found favour in the Court of King's Bench, is that the acceptance by Emma Robin (Pesant) was on behalf of her husband and as his mandatary acting under special mandate proved by parol testimony of the husband given at the trial without objection. He also relies on a general mandate arising from the existence of the community and the wife's proven habit of controlling the *menage*. Inasmuch as the acceptance of property cannot be regarded as a matter of administration (art. 177 C.C. so indicates) a general mandate, express or implied, would seem insufficient (art. 1703 C.C.). I incline to think that the finding that a special mandate was proved should not be disturbed. The efficacy of parol evidence on such a question received without objection is not open to question in this court. *Schwersenski* v. *Vineberg* (1891), 19 Can. S.C.R. 243; *Gervais* v. *McCarthy* (1904), 35 Can. S.C.R. 14.

I am also inclined to agree with the respondent in upholding the view of the Court of King's Bench that, although the acceptance itself must be in authentic form (art. 776 C.C.), when it is executed by procuration the mandate therefor need not be so.

Art. 933 C.N. is not reproduced in the Civil Code of Quebec. Under English law an agent who executes an instrument required to be under seal must be appointed by deed; *Steiglitz* v. *Egginton* (1815), Holt (N.P.) 141; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355, 108 E.R. 132; although the authority of an agent who signs a writing exacted by the Statute of Frauds may be oral. *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22. Compare *Carruthers* v. *Schmidt* (1916), 32 D.L.R. 616, 54 Can. S.C.R. 131. The contention of the appellant as to the necessity for appointment by notarial instrument of a mandatary who is to execute a document required to be in notarial form assimilates the latter to the English deed under seal. But the Court of King's Bench, upwards of twenty years ago, decided that the appointment of an agent to execute a conventional hypothec, required by art. 2040 C.C. to be in notarial form, need not be made by notarial instrument. *La Société de Prêts, etc.* v. *Lachance* (1896), 5 Que. Q.B. 11. An appeal to this court was quashed for lack of jurisdiction, 26 Can. S.C.R. 200. The principle of this decision of the Court of King's Bench is directly in point. It determines that a requirement of the law that an instrument should be in authentic form does not import that the authority of an agent to execute it must be evidenced in the same manner. As Lacoste, C.J., points out, the French authors are divided in their opinions on this question and the French courts have now definitely adopted a contrary view. See too Langelier, Cours de Droit Civil, vol. 6, p. 277. But the late Chief Justice of the King's Bench tells us that in Quebec the authentic form of mandate has never been required. This decision of the highest court in the province has stood unquestioned for 22 years. Many authentic acts have doubtless been executed on the faith of it by procuration not so evidenced. Confusion would be introduced and many titles possibly upset were we now to overrule it. In my opinion we should not do so. *Dunlop & Sons* v. *Balfour, Williamson & Co.*, [1892] 1 Q.B. 507, at 518.

Inasmuch as the acceptance by the wife, if regarded as given on her own behalf, would be inefficacious for lack of marital authority in writing (arts. 177 and 183 C.C.), if her acceptance as mandatary of her husband would render the gift valid I would incline on the evidence in the record to give it that construction. Upon the testimony given by him it is not open to the respondent

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to contend for any other. We are thus squarely confronted with the question whether acceptance by the husband alone suffices to maintain the gift.

A passage in Laurent (vol. XII., No. 244, which he bases on Pothier, Coutume d'Orleans, Introd. au titre XV., No. 35) would seem to indicate that it would. See, too, Furgole, Question IV., "Donations," t. VI., p. 27. But, in my opinion, this view cannot be supported:—

> Mais cette doctrine qui pouvait se justifier sous le régime de l'ordonnance, qui admettait l'acceptation de la donation en vertu d'un pouvoir général (Furgole sur l'art. 5 de l'ordon. de 1731; Ronssilhe, Jurisp. de Donations No. 284) serait inadmissible aujourd'hui . . . Dans tous les cas le mari seul ne peut pas accepter pour sa femme. . . . Le mari en effet n'est pas donataire et n'a point, par conséquent, qualité pour accepter. Pan. Fr. "Donations." No. 3838.

Compare arts. 177 and 763 of the Quebec Civil Code with arts. 217 and 934 of the C.N.

To permit the husband alone to accept a donation made to his wife would involve the mistaken idea that the law prescribes marital authorization solely for his benefit and protection, and consequently that he alone can set up its absence (art. 183 C.C. in terms precludes this view); that he might give the required authorization subsequently (which is contrary to the spirit, if not to the letter of art. 177: Langelier, Cours de Droit Civil, vol. 1, p. 316); and that *he may compel an acceptance by the wife which the Code merely empowers him to authorize*—Merlin Rep. vbo. "Authorization Maritale," sec. 6, par. 3, No. 2; De Lorimier, Bibl. du Code Civil, vol. 2, pp. 182-3.

> Le mari ne peut accepter la donation seul, sous quelque régime que les époux soient mariés . . . soit même qu'il s'agisse d'une donation mobilière," 18 Fuzier-Herman, vbo. "Donation Entre Vifs," 362-365; 20 Demolombe 159; Beltjens, Code Civil Belge, art. 934, No. 3; 3 Troplong "Des Donations entre Vifs," No. 1122; 2 Arntz, Droit Civil No. 1862.

It may be urged that Demolombe, Troplong and Arntz rest their opinions, that the view of Pothier and Furgole, based on the *Coutume d'Orleans* and the *Ordonnance* of 1731, that a husband living in community, by virtue of his general marital authority, may, without his wife's concurrence, accept for her a donation made to her, cannot prevail under the Code Napoleon, on the presence in that Code of art. 933, which, as already stated, is without counterpart in the Quebec Civil Code. The argument

deduced by these writers from art. 933, however, is that its requirements shew that the general mandate of the husband arising from his marital control under the community system cannot be invoked to uphold the acceptance by him of a donation made to his wife; a special mandate is necessary. But since, as has already been indicated, acceptance of property is not an act of administration and the Quebec Civil Code expressly provides that the authority conferred by a general mandate is restricted to acts of administration (art. 1703 C.C.), the absence from the Quebec Code of an article couched in terms similar to those of art. 933 C.N. does not seem to me to detract materially from the weight that should be given in Quebec to the opinions of the writers I have cited as to the necessity for acceptance by the wife or her specially authorized mandatary.

The Court of King's Bench appears to have proceeded on the assumption that the husband, in accepting, would do so as head of the community. This necessarily implies that the community exists as a juridical person apart from the persons of the two spouses. That, I think with deference, is a fundamental error. Laurent himself, with what seems to me unaccountable inconsistency, recognizes that the community (the only regime to which he would extend the doctrine enunciated in No. 244 of his vol. 12, Supp. 1902, vol. 4, No. 123) is neither a civil nor a moral juridical person. Vol. 21, Nos. 189, 210, 250. He concludes the latter number in these words:—

> La loi considère donc la communauté, non comme une personne, mais comme une masse de biens, un fonds social.

Huc, in his vol. 9, at p. 85, says:—

> Cette société, en l'absence d'un texte formel, ne constitue pas une personne juridique distincte de la personne des conjoints. Si la loi emploie l'expression en apparence abstraite, de communauté, c'est simplement pour désigner les époux eux-mêmes, considérés comme associés, par opposition aux époux envisagés individuellement.

Baudry-Lacantinerie, "Mariage," vol. 1, Nos. 249-250, writes to the same effect. The authorities are collected by this author in Note 1, p. 259, 3rd ed. He concludes (No. 250) in these words

> En somme, la véritable notion de la communauté nous parait être qu'elle constitue une copropriété entre époux, soumise à des règles particulières.

See, too, III. Dalloz Codes Ann. 1905, art. 1339, Nos. 4 and 5. One cannot act as agent for or representative of a non-existent

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person. If, therefore, the husband has authority to accept a gift to his wife, it must be not as head of and on behalf of the community which has no existence as a person, and, therefore, cannot have an agent or representative, but as the mandatary of his wife and on her behalf. Citing Colmet de Santerre, vol. 6, No. 65, Huc, in his vol 9 (No. 157), says:—

> Ce qui est vrai, c'est que le régime en communauté est combiné de telle manière que le mari chargé par la femme de faire prospérer les affaires communes, est censé, dans ce but, recevoir de celle ci des pouvoirs presque illimités.

But, since acceptance is not an act of administration, the general mandate would not cover it; a special mandate would be necessary. Art. 1703 C.C. Compare art. 181 C.C.

It is not pretended, however, that there was in fact any such acceptance by the wife through the agency of her husband or that she was deputed to act as sub-mandatary of her husband and as such to accept for herself—if, indeed, such a situation as that of a donee *ex facie* accepting in her own name and on her own behalf, but in reality as sub-mandatary of her own agent, would be possible or conceivable, or if the requirement by art. 177 of an authorization in writing could be thus circumvented.

But what are the limits of the husband's rights as agent of his wife in respect to the community property? They are impliedly defined by art. 1292 C.C. They are rights of administration, alienation (onerous), hypothecation and donation *inter vivos*. These rights all appertain to property already in the community. They do not extend to the acquisition of property by the wife which, when acquired, will fall into the community by operation of law. Acceptance is not administration (art. 177 C.C.). Since without acceptance a donation is not complete (arts. 755 and 776 C.C.), until there has been a valid acceptance of it the property which is its subject cannot be vested in the wife. Upon being so vested *eo instanti* it, no doubt, falls into the community. But until so vested it cannot be subject to community control. The fallacy therefore—if I may say so with respect—underlying the judgment of the Court of King's Bench is double. It consists (1) in ascribing to the husband the power as head of the community to contract with regard to property not yet in the community, and (2) in assuming the existence of the community as a distinct juridical person for which the husband may act as mandatary.

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I am, for these reasons, of the opinion that the donation required acceptance by the wife on her own behalf in the form prescribed by art. 776 given with the authorization of her husband evidenced either by his execution of the deed itself, or otherwise in writing (art. 177 C.C.), and that for lack of such authorization the intended gift fails under art. 183 C.C.

I would, therefore, allow the appeal with costs in this court and in the Court of King's Bench, and would restore the judgment of the learned trial judge.

Brodeur, J.

BRODEUR, J. (dissenting):—The question in this case is as to the validity of a donation of movable property made by the appellant, on December 4, 1911, to his married daughter, under the system of community of property.

The father, who is the plaintiff-appellant, claims that the donation was void, because his daughter was not authorized by her husband to accept it. The husband, who is the defendant-respondent, claims, on the contrary, that the donation is valid, and that his wife, by accepting the donation, acted as his mandatary.

The deed of donation, in describing Emma Pesant, the wife of the defendant-respondent, as a "wife separate as to property," was incorrect, for she was married under the system of community of property, and in her contract of marriage, which was made November 14, 1907, her father, the plaintiff-appellant, had acknowledged the deed; and he, too, knew that she was common as to property, seeing that he had made her a donation of movable property which he had declared to belong to the community.

Emma Pesant died July 23, 1913, leaving a will, by which she made her husband her universal legatee. Difficulties then arose between the appellant and the respondent, on the subject of the ownership of certain burial debts which had been incurred at the death of Mme. Emma Pesant; and on December 4, 1913, the appellant gave notice to the debtors that this donation was void.

On June 2, 1915, the defendant, Robin, in view of the attitude of the appellant, served him with a declaration saying that his wife had accepted the donation with the consent, the authorization, the mandate, and according to the instructions of her husband, the head of the community; that this was recognized by the

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father; that, moreover, so far as was necessary, he confirmed and ratified the acts of his wife.

Joseph Pesant, the father, now brings the present action to have this donation declared void, alleging that it is illegal, seeing that his wife had not been authorized by her husband to accept it, and he also asks to set aside the declaration made by the husband in his protest of June 2, 1915.

The defendant pleads, in substance, that the acceptance made by his wife was valid, and sets up the defences indicated in his deed of confirmation and acceptance.

The defendant has also claimed that the deed in question was a deed with an onerous title, but the Superior Court decided that this deed constituted a donation, and upon this point the Court of Appeal is of the same opinion; I believe that upon this question the judgments are well founded.

Upon the validity of the donation the Superior Court, 23 Rev. de Jur. 211, held that the donation, not having been accepted by the wife, authorized by her husband, was void. The Court of Appeal, 27 Que. K.B. 88, on the contrary, came to the conclusion that she acted, in the matter of the contract, as mandatary of her husband, and that the acceptance so given made the donation valid. By art. 177, C.C. (Que.), a wife cannot accept a donation unless her husband becomes a party to the deed, or gives his consent in writing.

This provision of the law applies as well to a wife common as to property, as to one who is married under the system of separation as to property. The question which presents itself in this case is, whether a donation made to a wife common as to property can be accepted by the husband alone, or accepted by the wife as mandatary of the husband.

The question which I have just put must be settled in the present case, because the donation is apparently void, seeing that it is made nominally to the wife, that it was accepted by the latter, and that the husband has not acknowledged the deed, and does not appear to have given his consent in writing; and then if we take the deed of donation itself it would appear at first sight to be void because the acceptance was not made by the wife, authorized by her husband.

But the husband says:—

We were in community of property, my wife and I. I gave her a mandate to accept the donation for me, head of the community; and then the acceptance which my wife gave as my mandatary makes the donation valid.

The authorization required by art. 177, C.C. (Que.), should be made in writing.

The mandate, on the contrary, may exist without writing. Proof of the mandate may be sometimes difficult to make. However, if there is commencement of proof by writing on the part of the adverse party, or if there is an admission on his part, or, again, if the proof by testimony was made without any objection, the mandate ought to be held to have been legally proved.

In the present case, the mandate which the husband claims to have given his wife has not been proved by writing. But the husband has given proof of it by testimony, to which no objection has been taken, and by reason of the decisions given by this Court in the cases of *Schwersenski* v. *Vineberg*, 19 Can. S.C.R. 243, and *Gervais* v. *McCarthy*, 35 Can. S.C.R. 14, the mandate is proved.

We have, therefore, in the present case, proof of the mandate.

There is still, however, to be decided a very important question, that of whether the donation, having been made to the wife, the husband, as head of the community, could accept for his wife.

Pothier, in his introduction to the title "Donations," No. 35, says: "The husband having the responsibility, government and administration of the property and person of his wife, it follows that he can accept, on behalf of his wife, a donation made to his wife." This opinion of Pothier was under the old law, also supported by Furgole, "Donations," 2nd ed., p. 29. Furgole, in his commentary upon the ordinance of 1731, tells us that there were in the jurisprudence differences of opinion upon the question of whether the husband could accept a donation made to his wife. The parliaments of Toulouse and Dijon declared for the negative: the parliament of Bordeaux was of opinion that such acceptances were valid.

Furgole considers that the jurisprudence of the parliament of Bordeaux appeared very just, and conformed to the maxims of the Roman law, and he added:—

To that must be added this rule, that under the Loi Maritus, 21, Cod. de Procurator, the husband is the natural and legal attorney of his wife, without having the need of any mandate; from which we may infer that the acceptance made by the husband of a donation made to his absent wife is

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sufficient to make the donation good, even for her paraphernalia; for if it is a question of dowry there would be no doubt, by reason of the personal interest of the husband; neither does it seem to us that there is any when the wife is under the authority of her husband, because such authority should not have less effect than that of a tutor or curator.

And he adds: That appears still better founded, and more reasonable, in countries where the community of property is the custom, because the husband, before profiting by the half of the generosity, as, being property which goes into the community, by accepting the donation for his wife, he is considered to do so as a partner, not only for the portion which should go to him, but also for the whole, because the capacity of partner gives him the right to contract and to accept all agreements favourable to the partnership; for it is a maxim established by the law and the authorities that each partner has a tacit mandate, by the nature of the contract and by the will of the other partners, to act for the benefit of the partnership: this is still more undoubted in a conjugal partnership, of which the husband is the head.

Laurent, vol. 3, p. 145, is likewise of the opinion of Pothier and Furgole. After having declared that the authorization must not be confounded with the mandate, he adds:—

It is very necessary, then, to ascertain when there is authorization, and when there is mandate. It is not the expressions which decide the question. It is possible that the husband may make use of the word *authorization* when he really gives his wife a mandate. It is necessary to ascertain if the juridical deed relates to the rights of the wife or those of the husband. In the first case the wife must be authorized; in the second, she could only act under a mandate. The question, whether it concerns the rights of the wife or the rights of the husband, depends upon the matrimonial agreements. Suppose the husband and wife are married under the system of legal community. It goes without saying that if the husband gives the wife power to act with regard to his own property or for the property of the community, it is a mandate, and not an authorization. Consequently, if the power relates to the administration of the wife's goods, there is mandate; for under the community system the husband administers the property of the wife.

Laurent is still more explicit in his vol. 12, Traité des Donations, No 244, p. 309, where, in discussing the question of whether the husband can accept in his wife's name, he says:—

As a question of principle, it is certain that the husband has no capacity to acquire, in his wife's name, nor to bind her. But cannot the matrimonial agreements give him this power? Pothier infers that the husband and wife are married under the community system. Under this system, moveable donations, even an inheritance of personal property, fall into the assets of the community; the husband, as head of the partnership, is grantee of the rights of the wife; it is granted that in this capacity he can accept the inheri-

tance of personal property falling to his wife, although he cannot inherit it; for the same reason we must recognize his right to accept donations of movable property, although he cannot be the donee.

I recognize that there is a difference of opinion among the authorities who have written upon the Code Napoleon. Thus, for example: Demolombe, vol. 20, No. 159; Troplong, vol. 3, des Donations entre vifs, No. 1122; Fuzier-Herman, vol. 18, vbo. Donations entre vifs, pp. 362 and 363; Beltjens, Code Civil Belge, art. 934, No. 3; Arntz, vol. 2, Droit Civil, No. 1862; Pandectes Françaises, vbo. Donations, No. 3838, are of opinion that the husband cannot accept for his wife a donation of movable property made to the latter.

It is well to remark, however, on this point, that the last work which we have on this subject is that of Dalloz—Répertoire Pratique, where, at No. 189, vbo. Donations entre vifs, after having declared that the husband alone cannot accept for his wife, it is stated:—

> However, if the husband and wife were married under the legal community system, the husband would have the capacity to accept, without his wife's concurrence, donations of personal property made to her.

I see that Demolombe and some other authors, who do not accept the opinion of Pothier, rely upon art. 933 of the Code Napoleon to declare that the husband cannot accept a donation made to his wife. This art. 933 declares that if the donee is of age the acceptance should be made by him, or in his name, by a person having a proxy giving him power to accept the donation made, or a general power to accept donations which might have been, or could have been, made. These authors find in this provision of the law relating to power to accept donations, a provision contrary to the Ordonnance des Donations of 1731, and to the old French law: and then they come to the conclusion that on account of this difference between the C.N. and the old law, the right of the husband to accept a donation made to his wife no longer existed under the C.N.

I shall not undertake to discuss this question from the point of view of the C.N., for it is not the provisions of this code which we have to apply in our law. The works of the commentators on this code are very useful, so far as they can explain some ambiguous or doubtful portions of the Civil Code of Quebec; but they certainly are not sure guides in the interpretation of our code when their arguments are based upon formal provisions of the C.N.,

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which are not found in our law. It is much more important in this respect to follow the old authorities when the law on the subject does not appear to have been changed.

Herse v. *Dufax* (1872), 9 Moo. P.C.C. (N.S.) 281, 17 E.R. 520.

Now, art. 933, upon which Demolombe and other authorities rely, has no corresponding section in our code. See Beauchamp, Civil Code Annotated, vol. 3, p. 1549; Sharpe, C.C., vol. 2, p. 823.

Moreover, the two codes differ on a very important point. Thus, the C.N. says, in art. 932, that the donation should be accepted "in express terms." Art. 788 of our code says, on the contrary, "the acceptance of a gift need not be in express terms; it may be inferred from the deed or from circumstances."

These two texts of the law are absolutely different, as we see. Then, can we follow with certainty the commentator of the C.N. upon this question of acceptance, since, while the C.N. requires that the acceptance be made in express terms, our code declares, on the contrary, the principle that the acceptance can be inferred from circumstances?

It is much better, then, in this respect to follow the opinion of the authors who have written under the old law, and it is proved that under the old law a donation could be accepted by the husband alone.

No one should contest the opinion of Pothier. The codifiers, far from discarding this opinion of Pothier, seem to have accepted it, while art. 177 of our Civil Code is based on Pothier himself. Rapportes des Codificateurs, vol. 1, p. 298. Therefore, under the circumstances, I am of opinion that we should follow Pothier in preference to modern authors who have had to commentate on sections of the C.N. which are not found in our law, or which differ from them.

Can it be claimed, moreover, that the principle of marital authority has been violated in the present case? A wife cannot even accept a donation without the authorization of her husband, because the incapacity of the wife arises, manifestly, from the married state, and she is incapable of making a contract or even of receiving a donation without the express wish of her husband. If a married woman cannot receive a donation *inter vivos*, without the authorization of her husband, the husband has a moral interest

in examining the source and the motive of the generosity towards his wife.

Now, in the present case we have a father who wishes to set aside a donation, by claiming that his married daughter was not authorized; and on the other hand we have the husband seeking to maintain that donation, saying that his wife had acted with his consent and authorization; that, in effect, under the circumstances, she was his mandatary.

The position might be different if the husband claimed that he had not given any authorization; but, on the contrary, he claims that his wife has not acted in violation of the marital authority which he has over her, but that she has, on the contrary, in every way respected that authority.

I have, therefore, come to the conclusion that the donation was validly accepted by the wife, as mandatary of her husband, and that the judgment of the Court of Appeal should be confirmed with costs.

MIGNAULT, J.:—With all possible deference, I cannot convince myself that the judgment of the Court of Appeal has made an exact application of the principles of the law which govern the capacity of the wife under the authority of her husband. On the contrary, I am of opinion that this judgment confounds two things, which, however, are quite distinct; the condition of the validity of a contract, and the effects of this contract when it is valid. So it is beyond doubt that under the system of community of goods, donations of movable property made to a wife fall into the community (C.C. Que., art. 1272); that is the effect of the contract of donation made for the benefit of a wife common as to property. But in order that this may be effected, the donation itself must be valid; if it is void it would produce no effect, and the community would derive no benefit, for, according to the legal axiom, *quod nullum est nullum producit effectum*.

Mignault, J.

The confusion of ideas of which I have just spoken seems to me very apparent when we read the reasons for the judgment appealed from. I quote them literally:—

Considering that the deed of cession or transfer from the plaintiff respondent, to Napoleon Pesant and others made on December 4, 1911, before Mtre. Leclerc, notary, though purporting to transfer the sum of $5,000 to the said late Dame Emma Pesant would, by law, upon the same being duly executed, have had the effect of vesting the said sum in the said matrimonial com-

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munity of property and in the said defendant, appellant, as head of the said community, and not in the said Emma Pesant;

Considering that the said cession or transfer was consequently not a gift of the said sum to the said Emma Pesant; and that she was not a contracting or accepting party to the said deed of cession or transfer, but merely the mandatary of her husband, the appellant, and did not need to be assisted by the latter or authorized by him otherwise than as a mandatary.

In other words, it is said that the donation of a sum of money to a wife common as to property has the effect of causing this sum to fall into the community; then the donation is not one to the wife, and the latter is not a contracting party to the deed of donation, and only appears as mandatary of her husband, head of the community.

I cannot prevent myself from setting up in absolute *non sequitur* to this reasoning. The first reason for judgment should, it seems to me, have led to an altogether different conclusion, for, by saying that the donation of a sum of money to a wife, common as to property, has the effect of making such sum fall into the community, the judgment adds the qualification, "upon the same being duly executed." There, in effect, is the whole question. In order that the donation should produce this effect it must be "duly executed." If the donation was void by reason of defect in form, no one would pretend that the sum given should fall into the community, for the donation would not even exist. Now, if the donation is not validly accepted by the donee—and the wife, common as to property or separate as to property, it matters little, can only accept a donation when her husband becomes a party to the deed or gives his consent in writing (C.C. Que., arts. 177, 763)—the donation is null, or rather, it never existed, and it goes without saying that it can produce no effect, and that the sum intended to be given will not fall into the community.

Under these circumstances, to invoke the principles which govern the mandate, when it is a question, on the contrary, of the rules of the validity of a donation *inter vivos*, is to increase the confusion of ideas. Whether, indeed, it is a question of a donation made to a married woman, and in such case this donation only existed on condition that the wife had accepted it with the concurrence of her husband in the deed, or with his written consent, except cases where the judicial authorization can sup-

plement that of the husband; or else it is a question of a donation to a husband; and then, it goes without saying that the latter can accept personally or by attorney. The effect which the donation will produce in either case has nothing to do with this question of the validity of the contract.

Ha the donation in question been made to the wife or to the husband, for one cannot conceive a donation made to a community, this community not being a moral or juridical person but simply an estate or patrimony? See Baudry-Lacantinerie, Contract de Mariage, vol. 1, Nos. 249 and 250.

I am of opinion that this donation—and like Mercier, J., in the Superior Court, 23 Rev. de Jur. 211, and Cross, J., in the Court of Appeal, 27 Que. K.B. 88, I think that the deed of assignment and transfer constitutes an actual donation—is a donation made to the wife. The appellant had agreed, with his son Napoleon, to a deed by which, in view of a promise of sale that he had given, he bound himself, if the sale should realize it, to assign part of the price to Napoleon Pesant, Eva Pesant, and to Mrs. Emma Pesant (the wife of the defendant), his children. The sale being made, the appellant, by a deed whose partial validity is in question, has "granted, quit claimed, and transferred to his children"—Napoleon, Eva and Emma—"the sums following stipulated to be payable to the said grantor," and the deed enumerates these sums and, so far as it concerns Emma, it says: "to the said Mrs. Emma Pesant dit Sanscartier the sum of $5,000.11."

The said Emma Pesant is described in the deed as "wife separated as to goods of Charles Robin," but I do not attach more importance than is necessary to this erroneous designation, for I cannot doubt that the assignment or transfer, or the donation, for it is a donation, was made to Emma Pesant, and the latter has only appeared and pretended to accept as donee.

If, then, Emma Pesant is donee, she could only validly accept with the concurrence of her husband in the deed, or with his written consent, and as she accepted without this concurrence or consent the donation is invalid as regards her, and invalid with an invalidity that nothing can hide (see C.C. Que., art. 183); and, consequently, the deed has no effect either as to her or as to the community of goods between her and her husband.

The defendant claimed to accept this donation after his wife's

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death. It is enough to say that, even if he could accept a donation made to his wife, this acceptance could not be made after the death of his wife, the donee. (C.C. Que., art. 794.) Since the above opinion was written, I have had the advantage of reading the argument of my colleague, Brodeur, J., but I regret that I am not able to bring myself to see it from his point of view. The question as to whether the husband can accept a donation for his wife, necessarily supposes that the donation was made to the wife, but that the husband accepted the donation as attorney for his wife. Under this hypothesis, the wife is a contracting party to the deed, but she is represented by her husband, and my honourable colleague invokes the authority of Pothier and Furgole to maintain that the husband "having the responsibility, government and administration of the property and person of his wife, it follows that he can accept on behalf of his wife a donation made to his wife." (Pothier, Introd. au titre des Donations de la Coutume d'Orléans, No. 35). Such, however, is not the point which presents itself to this court for decision.

It is not claimed that the husband accepted the donation made to his wife as mandatary of the latter, but that the wife would have been the mandatary of her husband to accept the donation in his name, and, consequently, the husband, and not the wife, would have been the donee. The judgment of the Court of Appeal, 27 Que. K.B. 88, says plainly: that the said cession or transfer was consequently not a gift of the said sum to the said Emma Pesant; and that she was not a contracting or accepting party to the said deed of cession or transfer, but merely the mandatary of her husband." It is, therefore, not necessary to decide whether the husband can accept a donation made to his wife, as attorney of the latter.

Under the present circumstances I do not have to express an opinion upon the purely theoretical question, in my opinion, of whether the wife can accept, as mandatary, a donation made to her husband. Pothier, in the passage cited, seems to think not, for he says: "A wife could not accept on behalf of her husband a donation made to her husband." This opinion should probably be admitted with reserve, but, again, it does not require a solution in this case, for I am of opinion that the donation was made to the wife, and not to the husband, and it is not claimed that the latter accepted it as mandatary of his wife.

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I can only add that in every respect it is preferable to give effect to the articles of the Civil Code, which govern the capacity of the married woman to give or to accept, to alienate or dispose of, *inter vivos*, or otherwise contract (Que. C.C. art. 177; see also Que. C.C. art. 763). These provisions are of public order, and the lack of marital authorization imports an invalidity which nothing can cover (C.C. Que. 187). The will of the legislator is formal, and it is the duty of courts to bow before it.

For these reasons, I would maintain the appeal, with the costs of this court, and of the Court of Appeal, and restore the judgment of the Superior Court. *Appeal allowed.*

Re WATERLOO LOCAL BOARD OF HEALTH; CAMPBELL'S Case.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 18, 1918.

NUISANCES (§ II C—44)—ABATEMENT OF—PROVINCIAL BOARD OF HEALTH ACT (ONT.)—JURISDICTION OF JUDGE—EVIDENCE—PROCEDURE.

The Provincial Board of Health having determined as authorized under s. 6 of the Public Health Act (1914 R.S.O., c. 218) that a nuisance exists, and recommended the removal or abatement of the nuisance the local board may apply to a judge under s. 81, sub-s. 2, for an order for the removal or abatement of the nuisance. On the application the judge may admit further evidence for the purpose of determining whether under all the circumstances an order for abatement should issue and if so on what terms; but this provision does not mean that he may, on further evidence, set aside the finding of the Provincial Board. Affidavits in support of the finding of the Board are not admissible, and the judge is not justified in attaching any weight to affidavits challenging the correctness of the finding of the Board of the nuisance.

Statement.

AN application by the Local Board of Health of the Township of Waterloo for an order that the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do forthwith remove and abate a nuisance caused and maintained by them upon that portion of lot 58 of the German Company Tract of the Township of Waterloo owned by the said A. B. Campbell, by the deposit of garbage thereupon.

The application was made under sec. 81 of the Public Health Act, R.S.O. 1914, ch. 218.*

*81.—(1) If, on investigation by the Local Board, any nuisance is found to exist, and if after the Board has required the removal or abatement of the same within a specified time, the Board finds that default in removal or abatement has been made, and the case appears to the Local Board to involve the expenditure or loss of a considerable sum of money, or serious interference with

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Hodgins, J.A.

HODGINS, J.A.:—The respondents to this application applied at the opening of the case for an enlargement in order to answer the affidavits filed on behalf of the applicants. They produce nothing except letters from their principals, the excuse being the absence of the solicitor. The examinations of the Mayor and Clerk of the City of Kitchener were taken on the 19th November and that of Campbell on the same day. They were taken in the court-house in Kitchener and in the presence of the solicitor, Mr. Sims, who appeared for the City of Kitchener, so that the absence of affidavits in answer is not important.

In a matter affecting public health in which the conditions appear to be as dangerous as they do in this case, I think I should not grant an enlargement unless some very serious question arose as to whether the nuisance did exist or some question as to its abatement since the motion was made. The question upon this motion is not really whether a nuisance does or does not exist in fact, and that forms part of my reason for refusing an enlargement and considering it necessary to deal with the motion to-day.

Under the Public Health Act, R.S.O. 1914, ch. 218, sec. 73, a nuisance is defined as any condition existing which is or may become dangerous to health or prevent or hinder in any manner the suppression of disease. By sec. 74 (*e*), the particular nuisance in this case is defined and stated to be a nuisance. I think that under the section upon which application is made, 81, the Court is practically relieved from saying whether or not this is a nuisance in fact, by reason of the report of the Provincial Board of Health. As I read the section, the Local Board of Health, on discovering a nuisance, is enabled to cause an inspection to be made and can deal with the nuisance, and if, under sec. 81, in certain cases, of

any trade or industry, or other considerations of difficulty, the Provincial Board at the request of the Local Board may investigate and report upon the case.

(2) If the report of the Provincial Board recommends the removal or abatement of the nuisance, the Local Board or any ratepayer residing in the municipality, or within a mile thereof, may apply to a Judge of the Supreme Court for an order for the removal or abatement of the nuisance, and to restrain the proprietors of any such industry from carrying on the same until the nuisance has been abated to the satisfaction of the Provincial Board; and the Judge may make such order upon the report of the Provincial Board or upon such further evidence as he may deem meet.

(3) The Judges' Orders Enforcement Act shall apply to every order made by a Judge under this section.

which this appears to be one, the Local Board desires it, the Provincial Board may also investigate, and it then becomes the province of a Judge of the Supreme Court to make an order on the basis of the report. If the report of the Provincial Board recommends the abatement of the nuisance, the Judge is entitled to deal with the matter by making an order for abatement if the conditions of the statute are fulfilled. I do not think that the Judge is necessarily bound by the report of the Provincial Board; but if, on reading that report, he comes to the conclusion either that the nuisance is not distinctly brought within the statute or that some further explanation is desirable, he has the right to ask for further evidence. But in this case I do not feel that it is necessary to take that course, partly because the report is clear, and partly because counsel before me who represent the respondents express their willingness on behalf of their clients to undertake that nothing further shall be done in the direction of what has occurred; and this, to my mind, involves practically the conclusion that what has been done heretofore is something that ought not to have been done, and that it was a nuisance.

That being the case, the only point left, it seems to me, is whether Mr. Smith is right in saying that the city corporation is not affected and should not have been a party to this application. I think that is covered by the case cited of *Robinson* v. *Beaconsfield Rural District Council*, [1911] 2 Ch. 188. The contract here with the Riverside Garbage Company does not provide for the disposal of the sewage but merely for its removal out of the city. Therefore, the city corporation having decided to remove it, through a contractor, outside of the limits of the city, is itself responsible in law for its disposal, and is bound, if the disposal constitutes a nuisance, to abate it.

As to the respondent Campbell, his premises are being used for the disposal of this garbage, which is left open on the ground, and this makes the whole situation, in the words of the Provincial Board's report, "most insanitary and a serious nuisance and dangerous to the public."

The contracting company which brought the garbage out and deposited it is, in like manner, responsible for the nuisance. On the whole case, I think that I should make the order now that is asked, for the abatement of the nuisance. This, as I understand

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the present condition, will be an order for the removal or destruction of the garbage and so forth deposited upon this farm and at present lying exposed thereon, and will be against the three respondents

I do not think that on the present motion I can grant an injunction except as to Campbell; all that I can do is to deal with the report as it is before me and order the abatement of the particular nuisance complained of.

It seems to me that this is a pressing matter; that, at this time of the year, the depositing having continued down to the 12th November, Mr. Haight is right and that it may be frozen in, or, if the weather continues mild, it may partly drain away into the creek and thence into the Grand River. The order should therefore be an order for immediate abatement.

Campbell will be restrained from receiving the garbage for the purpose of allowing hogs to be fed upon it or from feeding hogs from it.

Costs will go against all the respondents.

Since I delivered judgment, Mr. Smith has referred me to the Municipal Act, R.S.O. 1914, ch. 192, sec. 406(5). I am unable to see how the power to provide by by-law for the disposal of garbage affects this case, in which the power was not exercised.

The order of Hodgins, J.A., as settled and issued, was as follows:—

(1) That the said the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do forthwith wholly remove and abate the nuisance existing on the said lands due to the deposit and presence thereon of garbage from the City of Kitchener and do forthwith remove from the said lands, or wholly destroy, all such garbage so deposited on the said lands and now lying thereon.

(2) That the said A. B. Campbell be and he is perpetually restrained from receiving upon the said lands garbage for the purpose of allowing hogs to be fed thereupon and from feeding hogs on the said lands upon garbage so received.

(3) That the said the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do pay to the applicants their costs of and incidental to this application and order forthwith after taxation thereof.

The city corporation, Campbell, and the company moved, under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79,* for an order for leave to appeal from the order of Hodgins, J.A.

The motion for leave was heard by Ferguson, J.A.

FERGUSON, J.A.:—The applicants contend that they were not permitted to present properly to the Court their answers or contentions, in that the learned Judge refused an adjournment asked for by counsel, for the purpose of filing material and receiving further instructions. They also contend that the part of the order which directs how the nuisance complained of shall be abated, and the part which restrains the defendant Campbell from receiving on his property garbage for the purpose of feeding hogs, and from feeding hogs upon garbage, are in excess of the powers of a Judge acting under the Public Health Act, and an improper interference with a contract between the City of Kitchener and Campbell.

I am of opinion that the questions raised are such as to justify my granting leave to appeal: this I do, but on the terms that the applicants undertake to serve notices of appeal forthwith, and to set the appeals down, so that they shall be ready for hearing on Wednesday next, and also forthwith to apply to the Chief Justice of the Exchequer for a direction that the appeals be put upon the peremptory list for some day next week.

Costs of this application and order to be costs in the appeals.

Gideon Grant, for the Riverside Garbage Disposal Company Limited and A. B. Campbell, appellants.

R. S. Robertson and *H. J. Sims*, for the Corporation of the City of Kitchener, appellant.

Haight, for the Local Board of Health of the Township of Waterloo, respondents.

The judgment of the Court was read by

MULOCK, C.J. EX.:—Appeals by the Riverside Garbage Disposal Company Limited, A. B. Campbell, and the Corporation of

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*Section 4 provides: "There shall be no appeal from such order"—that is, an order made by a Judge as *persona designata*—"unless an appeal is expressly authorised by the statute giving the jurisdiction or unless special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court whose decision shall be final."

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the City of Kitchener, from the order of Hodgins, J.A., directing the appellants forthwith wholly to remove and abate a certain nuisance, and perpetually restraining the said Campbell from receiving upon the lands in question garbage for the purpose of allowing hogs to be fed thereon, and from feeding hogs on the said lands on the said garbage.

The circumstances which give rise to the question in issue between the parties are as follows:—

By a certain agreement, bearing date the 15th April, 1918, made between the Corporation of Kitchener, therein called "the city," and the Riverside Garbage Disposal Company, therein called "the contractor," the latter agreed for three years to collect garbage throughout the whole city, the city agreeing to pay to the contractor for such services the yearly sum of $10,000, the contractor agreeing to "remove all garbage from the limits of the city" and to "indemnify and hold the city harmless from all loss, costs, charges, damages, and expenses which the city may at any time hereafter bear, sustain, suffer, be at, or put to, by reason or on account of the improper or negligent collection or disposal of said garbage."

The contractor on or about the 15th April, 1918, and continuously thereafter, collected the city garbage, and, with the consent of Campbell, deposited it upon certain lands in his possession, situate in the township of Waterloo, being a short distance outside of the city limits; and there hogs, owned by Campbell, were allowed to feed on the raw garbage. The depositing of this garbage gave rise to an agitation for its prevention on the ground of its being a nuisance, and the matter came before the Local Board of Health of the Township of Waterloo, which, having investigated conditions, made the following report:—

"To the Riverside Garbage Disposal Company Limited, A. B. Campbell, and the Corporation of the City of Kitchener:

"The Local Board of Health of the Township of Waterloo has fully investigated the conditions arising and existing from the deposit of garbage from the city of Kitchener, collected in the city by the Riverside Garbage Disposal Company Limited, under a contract with the city, and deposited by the company on lands owned by A. B. Campbell, in the township of Waterloo, a short distance easterly from the corporation limits of the city, and has

found that a grave nuisance exists, and has existed there continuously since April last, in consequence of such disposal and deposit of garbage. The Board consequently requires the removal or abatement by you of such nuisance within 15 days from the service of this notice upon you.

"Dated this 5th day of October, 1918.

"The Local Board of Health of the Township of Waterloo.

"A. Jansen,
"Chairman.
"Peter A. Snider,
"Secretary."

The nuisance remaining unabated, the Local Board requested action by the Provincial Board of Health, and the latter, having investigated conditions, made the following report:—

"Report of the Provincial Board of Health in respect to a nuisance in the Township of Waterloo.

"In pursuance of the request of the Local Board of Health in the Township of Waterloo, dated the 26th October, 1918, and acting under the authority of section 81 of the Public Health Act, the Provincial Board of Health has investigated and now reports upon a nuisance existing on the border-line between the City of Kitchener and the said Township of Waterloo, and within the limits of the said township.

"The nuisance complained of exists in a woods said to belong to Mr. A. B. Campbell, who has a 3 years' contract for the removal and disposal of the garbage of the City of Kitchener, beginning in April last. Since that date it appears that the contractor has been depositing the city garbage along a roadway and for several yards on each side thereof, through the woods referred to, for a distance of a couple of hundred yards, commencing at the entrance to the woods from one of the main travelled roads leading to the city. The deposit of garbage consists of ashes, cast-off clothing, filthy paper, wire, tin, sheet iron and enamelled ware, decomposing animal and vegetable material, meat-bones, vegetables and fruit, kitchen waste, etc. The garbage referred to is practically uncovered and exposed and is being rooted over by hogs.

"Much of the garbage lies upon the bank of and drains to a creek, which a few hundred yards further on empties into the

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Grand River, the latter being a source of water supply to communities down that river. The whole situation is a most insanitary one, a serious nuisance, and extremely dangerous to the public. The Provincial Board of Health therefore recommends the abatement of this nuisance at the earliest date possible.

"Signed and sealed on behalf of the Board this 12th day of November, 1918.

"A. H. Wright,
"Chairman.
(Seal) "John W. McCullough,
"Chief Officer."

On the 15th November, 1918, the Local Board of Health of the Township of Waterloo served a notice of motion on the city, the contractor, and Campbell, that it would, on the 25th November, 1918, move before the presiding Judge at Osgoode Hall for an order directing them forthwith to remove and abate the nuisance in question, and restraining them from further depositing garbage on the said lands until said nuisance should be abated. This motion came on to be heard before Hodgins, J.A., when counsel for the appellants asked for an enlargement in order to enable them to adduce evidence of the non-existence of the nuisance and to cross-examine Dr. Thompson, Dr. McNally, Alfred Henhoeffer, Abram Baker, and James C. Haight, on affidavits to be used in support of the motion. The learned Judge refused an enlargement and made the order complained of, and this appeal is from that order.

The appellants attack the order chiefly on two grounds: (1) that an enlargement should have been granted in order to enable them to prove the non-existence of the nuisance complained of; and (2) that an issue should have been directed to determine the existence of the nuisance charged.

The method of determining whether a nuisance exists is set forth in the Public Health Act, ch. 218, R.S.O., sec. 6 of which enacts as follows: "It shall be the duty of the Provincial Board, and it shall have power to,— . . . (*d*) Determine whether . . . the disposal of sewage, trade or other waste, garbage or excrementitious matter is a nuisance or injurious to health." The Provincial Board investigated the conditions and made the report above set forth.

Sub-section 2 of sec. 81 of the Act provides that if the Provincial Board recommends the removal or abatement of the nuisance the Local Board or a ratepayer may apply to a Judge of the Supreme Court for an order for the removal or abatement of the nuisance, and "the Judge may make such order upon the report of the Provincial Board or upon such further evidence as he may deem meet."

The evidence shews that the Local Board of Health investigated the conditions and found that "a grave nuisance exists." Then the Provincial Board of Health conducted an investigation and found to the same effect. The undisputed evidence shews that the garbage of a city, having a population of about 20,000, has been deposited since the 15th April last on the surface of the land in question, that it is not covered with earth or in any way treated to prevent decomposition or the giving off of offensive odours, and that hogs of the appellant Campbell are allowed to feed upon this garbage, adding their excrement to the mass of garbage. That such conditions must create a nuisance is beyond reasonable doubt. There are persons to be found in every community who are indifferent to the practical application of measures for promoting public health and for preventing conditions injurious to health, and such persons might honestly be of opinion that the conditions present in this case are not a menace to public health. Such views, however, cannot be allowed to prevail against expert testimony to the contrary.

On this appeal the appellants produced a number of affidavits challenging the correctness of the finding of a nuisance by the Provincial Board of Health, and intimated that the enlargement asked for was for the purpose of enabling them to obtain these affidavits. I have carefully read them, and, except that of Alexander Hugh Miller, they all are to the effect that the Provincial Board of Health was not justified in finding the existence of a nuisance. The Act confers jurisdiction upon the Provincial Board of Health to determine that question, and there is no jurisdiction in the Court to try that question of fact. When it comes to enforcing the recommendation of the Provincial Board of Health, the Judge, before ordering abatement, may admit further evidence, but this provision does not mean that he may on further evidence set aside the finding of the Provincial Board, but that he may

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determine whether under all the circumstances an order for abatement should issue and if so upon what terms. Had the affidavits produced on the appeal been before the learned Judge, on the motion in question, for the reason above mentioned, he would not, I think, have been justified in attaching any weight to them, and therefore the appellants were not prejudiced by the refusal of an enlargement.

On the motion before the learned Judge, certain affidavits were filed in support of the finding of the Provincial Board of Health, and the appellants contend that they should have been allowed to cross-examine the persons who so testified. The question of nuisance had been determined by the Provincial Board of Health, and affidavits supporting the correctness of the finding by the Board were, I think, inadmissible, and, it may be assumed, had no weight with the learned Judge.

The excepted affidavit above mentioned, that of Alexander Hugh Miller, Clerk of the City of Kitchener, shews that the contract between the city and contractor for collection and disposal of garbage has been terminated, and that the garbage is now disposed of by incineration; and the affidavit of the appellant Campbell shews that since the 16th November, 1918, no garbage has been deposited on his farm. In his affidavit he says: "It will be an utter impossibility for me to remove the garbage and other refuse forthwith, as it took six months to deposit it there, and it will take an equally long time to remove it. Moreover, there is absolutely nothing there in an exposed condition which is dangerous to health."

The termination of the contract and the ceasing to deposit garbage on Campbell's land were not brought to the attention of the learned Judge. On the contrary, on the material before him, it appeared to him as if the depositing was continuing, and, according to the view of the Provincial Board of Health, it was necessary in the interest of public health that that practice should promptly cease.

It having ceased, the only question is as to what direction should be made in respect of the garbage now in place. Under these circumstances, the order of the learned Judge may properly be varied by extending until the 1st April next the time in which to abate the nuisance, with the right to the appellants to apply for a further extension of time.

The second clause of the order should be amended by adding words preventing the feeding of hogs on the garbage so as to cause a nuisance.

For the city it is contended that the Riverside Garbage Disposal Company was an independent contractor, and therefore the city was not liable for the nuisance caused by the contractor's disposal of the garbage. The contract did not provide for its disposal, but simply for its collection and cartage to a point outside of the city limits. Whilst there in the contractor's hands it remained the property of the city and under its control; and, in the absence of express instructions, the contractor had implied authority as agent or servant of the city to dispose of it, and its disposal was made by the garbage company not *quâ* contractor but *quâ* agent or servant of the city, whereby the latter became liable for its wrongful disposal: *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Robinson* v. *Beaconsfield Rural District Council*, [1911] 2 Ch. 188.

For these reasons, I think that, subject to the variations in the order above indicated, the appeals should be dismissed, with costs of this appeal and of the motions made before Hodgins, J.A., and Ferguson, J.A. *Order varied.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. May 10, 1919.

1. TRIAL (§ I A—1)—ACTION FOR DAMAGES—DAMAGES INCIDENT TO INJURY—ASSESSMENT OF—NEW EVIDENCE.
In an action for damages for injuries received, all the damages incident to the injury must be recovered at the trial, new evidence will not be admitted to shew that by medical examination after the trial, permanent injuries were sustained for which compensation should be given.

2. TRIAL (§ I D—21)—COUNSEL—ADDRESS TO JURY—INTRODUCTION OF MATTER NOT IN EVIDENCE—DUTY OF JUDGE IN INSTRUCTING JURY.
If counsel in addressing the jury introduces matter which is not in evidence, the trial judge is under an obligation where his attention is called to these statements to instruct the jury that they are not to be influenced by these statements. Where the instruction of the judge is not sufficient under the circumstances, and the court is satisfied that the jury were influenced by such statements a new trial will be granted.

Statement.

APPEAL by plaintiff from a judgment of Walsh, J., with a jury in an action for damages for injuries received as the result of negligence of a fellow workman. Affirmed.

G. H. Ross, K. C., for plaintiff; *G. A. Walker*, K.C., for defendant.

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HARVEY, C.J., concurred with Simmons, J.

BECK, J., concurred with McCarthy, J.

SIMMONS, J.:—The plaintiff's claim arose out of injuries received while working in defendant's workshop as a mechanic and he alleged that injuries he received were the result of negligence of a fellow workman, and of direct negligence of the defendant company in failure to supply proper equipment. He claimed by way of special damages as follows:—1 week's earnings at $28 per week, 17 weeks' earnings at $36 per week, and loss of earning from date of action until trial. He claimed general damages in the sum of $6,000. In the alternative he claimed compensation under the Workmen's Compensation Act.

The action was tried before Walsh, J., and a jury, and the verdict of the jury awarded the plaintiff $715 "according to the prevailing scale of pay and hours for his occupation as a pipefitter with no overtime, from April 27, 1918, to October 2, 1918, amounting approximately to $715." The jury awarded $750 for general damages. The trial judge amended the first computation by increasing it to $733.54.

The plaintiff appeals on the following grounds:—1. Counsel urged before the jury matters *dehors* the record. 2. Non-direction of trial judge. 3. Omission of jury to consider elements of damage. 4. Awarding of costs by trial judge against plaintiff and not against defendant.

Plaintiff's counsel made an application to this court to read an affidavit purporting to disclose new evidence and judgment was reserved. Counsel alleged, in effect, that the affidavit would disclose that the plaintiff's condition, as ascertained by medical examination subsequent to trial, was such as to establish permanent injuries for which compensation should be given.

Plaintiff submitted evidence at the trial to establish nervous condition commonly called neuritis, arising out of shock caused by his injuries.

The defendant submitted evidence of physicians to prove absence of such effects. The information which is the subject matter of the application, even though it might establish such a condition in the plaintiff, can not be ground for a new trial. The damages that result from one and the same cause of action must be assessed and recovered once for all. *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there.

Per Lord Halsbury, p. 132, in *Darley Main Colliery Co.* v. *Mitchell*, *supra*.

The citation would have a direct application in the present case.

It is alleged that there are symptoms of neuritis now which were not apparent on the date of the trial, but the matter is now *res judicata* and the affidavit cannot be received or used as the basis of an application for a new trial.

It is submitted by the appellant that reference by counsel for the defendant in addressing the jury to the willingness of the defendant to pay the plaintiff compensation under the Workmen's Compensation Act and a further willingness to pay the plaintiff 68 cents an hour up to the time Dr. Mackid issued a certificate that plaintiff was fit to go back to work, furnish ground, setting aside the award and granting a new trial.

The question is an important one and there is no room for controversy as to the validity of appellant's objection to the introduction of matter which is not in evidence. It should not be done, and if this court is satisfied that the jury were influenced by these statements of defendant's counsel there would surely be a mis-trial.

Our r. 329 is the English rule O. 39, r. 6, and provides that a new trial shall not be granted unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned on the trial.

Counsel for appellant, at the trial, called the attention of the trial judge to remarks of defendant's counsel and the trial judge said:—

Well, of course, you will not be governed in your decision of this case by anything that was said by Mr. Bennett in that respect. The statement was made by him as I would take it to be more as evidence of the desire of the company to deal fairly with this man than for any other purpose. The offer, of course, has really nothing whatever to do with your disposition of this case. It is simply something that shews the attitude of the company towards the plaintiff.

It is quite clear that under the circumstances, the trial judge

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was under an obligation to instruct the jury in the manner which he did, and that he was satisfied that his instructions were sufficient to meet the case.

Counsel for appellant did not press any further objection after the remarks of the trial judge above quoted, and I think under the circumstances that the trial judge was justified in assuming that his instructions to the jury had met the objections. The defendant company are not in the position of wilful tort-feasors. Under our law, the employer is liable to his servant or employee for the negligence of a fellow employee, and the statements to which objection are taken could not have any direct bearing on the origin or extent of plaintiff's injuries. The main contention was whether the appellant's injuries were such as to seriously impair the appellant's physical and mental condition and reduce his earning power. The jury evidently took the view that such was not the case. There is evidence which strongly supports this view.

It is obviously in the interests of justice that the results of trials should not be rendered nugatory by inadvertent matters if these can be cured by careful instructions to the jury. I am of the opinion that the instructions were ample, and that there is no sufficient ground for concluding that there was any substantial wrong or miscarriage of justice.

Under the head of misdirection by the trial judge, I fail to ascertain any grounds for interference. It is alleged the jury were not sufficiently instructed as to the probable after effects of shock as these might appear in the form of neuritis or neuralgia.

The jury were told that if they thought upon a review of the evidence of the medical men that he was entirely recovered he was not entitled to compensation for further injuries, but if he was still suffering he was so entitled.

Under the third claim of omission by the jury to consider elements of damage. So far as this claim relates to general damages it rests upon the allegations of undue comment by counsel and misdirections by the judge, which I have already discussed. In regard to special damages this claim relates to loss of wages.

It is claimed that the jury omitted to give compensation for earnings for overtime and also for 3 months' half time.

In regard to overtime, it was optional with the appellant

whether he worked over time or not, and the jury were not bound to allow him compensation as they might reasonably infer he would not exercise his option. In regard to the claim for compensation for 3 months' half time, the evidence is not very clear.

The injuries were received on April 26, 1918. The appellant went into the hospital for 14 days. He then went home where he remained for a month. About June 1 he went to Vancouver and Seattle, where he remained for a month and a half. He says when he returned Dr. Mackid advised him to take care of himself and to refrain from attempting to work.

He was then asked in his examination in chief:—

Q. Did he (Dr. Mackid) fix any time that you were not to go to work? A. Yes, the last time I got examined by him, I think it was the last of August, and the report he made out said I would be——

Mr. Bennett: I suppose it will speak for itself if you have the report. Have you the report?

Witness: No, he sent the report in to the claims agent. He read it to me what he said on his report that I *would be fit for work in three weeks or a month*, and on October 1 he gave me a certificate saying I was fit for work.

Dr. Mackid's certificate was not put in evidence. Dr. Mackid's evidence is as follows:—

Q. And he was discharged from the hospital after having gone through the experience you have mentioned? A. Yes.

Q. He was not then in your opinion as he said this morning, fit to go back to his work till he took some period of rest and recuperation? A. At the time he left the hospital he was not fit.

Q. And on October 2 you gave him a certificate that he could go back to work? A. That is right, he would be on three months' half time, that is he was——

The Court: You will have to speak up, Dr. Mackid, so that the jury can hear you.

At this time, counsel for the respondent intervened so that the witness apparently did not complete the answer. Now in dealing with questions of loss of time, the trial judge instructed the jury as follows:—

There is no question about that. He lost three days in April when he was working, at the rate of 48 cents an hour. Then according to the evidence of Dr. Mackid he was not able to work till October 2. Roughly speaking there were 22 weeks between May 1 and October 2. His rate of wages for that was 68 cents an hour. The hours of service due in that period were 47 hours a week. So that according to my figuring his weekly wage would be roughly $32 a week for 22 weeks, which would be slightly over $700. Then, as I understood Dr. Mackid's evidence, and his was the only evidence upon the point, on October 2 he gave him a certificate that he was able to work and that certificate, according to Dr. Mackid's evidence, was that he was put on three months' half time. I understood that to mean, that although he

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was not able to work at all until October 2, still from that time, according to Dr. Mackid's evidence, he was able to work half time. If that is right, then there would be 3 months' further allowance of money for half of the plaintiff's time and I figure that out at about $207. According to my figures, you gentlemen can check it up for yourselves, if you accept the evidence of Dr. Mackid as to the plaintiff's ability to work the loss of wages which he has suffered by reason of this accident is in round figures $925.

Counsel for the appellant argues that the instructions of the trial judge were ignored by the jury as to the item of $207, representing three months' half time.

It is quite clear, from the evidence I have quoted of the plaintiff and of Dr. Mackid, that the trial judge was under a misapprehension as to the three months' half time after October 2.

The appellant says he did not go to work on October 2. He says that he tried to get work but could not do manual work and hard work. He says he looked around this town for a whole month to get a light job and could not get one.

The jury were entitled to believe or reject the appellant's statement. Dr. Mackid s evidence does not support it, and the appellant has, therefore, in my opinion, failed to establish the allegation that the item of $207 was one which the jury were bound to award to him.

As to the disposition of costs made by the trial judge, I agree with the conclusions of McCarthy, J.

I would, therefore, dismiss the appeal with costs.

McCarthy, J.

MCCARTHY, J.:—This is an appeal by the plaintiff against the finding of the jury on the question of damages and the judgment entered thereon, and for a new trial, on the grounds:—1. That the damages were insufficient upon the evidence; 2. That counsel for the defendant urged before the jury matters not in the record; 3. Non-direction of the trial judge, and 4. Erroneous awarding of costs against plaintiff.

The action was tried at Calgary on the 22nd and 23rd January, 1919, before Walsh, J., and a jury.

It appeared that the appellant who was a pipe-fitter engaged at the respondent's shops was injured on April 26, 1918, by a crow-bar falling from the smoke-stack of an engine of the respondents the sharp point of which caused a slight abrasion to the side of his face, entered his right shoulder and penetrated to the lung, for which he claimed damages and the jury brought in a

verdict in his favour for $1,465. As to the insufficiency of the damages, there is early authority going to shew that as a general rule the court will not set aside a verdict in an action for a tort on account of the smallness of the damages. *Maurice* v. *Brecknock* (1780), 2 Doug. 509, 99 E.R. 325.

The leading case as to new trial for inadequate damages in the case of personal injuries is *Phillips* v. *London & South Western R. Co.* (1879), 4 Q.B.D. 406 and 5 Q.B.D. 78, and it is, I think, a fair statement of the law to say that when it is evident that a jury has not given proper attention to all the elements of the plaintiff's claim a new trial will be granted upon the ground that damages are insufficient. It is, however, never without reluctance and hesitation that the court sets aside a verdict in an action of this nature on the ground of insufficiency of damages, because there is no rule approaching to certainty by which they can be estimated, and it is peculiarly within the province of the jury to assess them. A jury can more conveniently deal with considerations of this nature than the court can and the statutes intend that they should entertain and dispose of them.

If the plaintiff, in any such case, receives a verdict too small for what he may have felt a serious injury he is, in general, compelled to abide by it. I might also say invariably; for the exceptions when a new trial has been granted on account of the smallness of damages are so extremely rare that they prove the rule to be nearly inflexible.

In this case I have been unable to satisfy my mind that the jury did not give proper attention to "all the elements" of the plaintiff's claim. How they arrived at the amount of their verdict, viz., $1,465, would seem to open a wide field for discussion. Reference was made to the fact that the jury did not give proper attention to the doctor's certificate and the three months' half time, the evidence as to these two matters is very indefinite and I cannot conclude that the jury did not give that attention. As a matter of fact the doctor's certificate put in at the trial makes no reference to the three months' half time referred to by the counsel for the plaintiff on argument before us.

It is impossible to say from the amount of the verdict arrived at by the jury how much they allowed as compensation for a probable reduction in his future earnings and how much was

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allowed as compensation for pain and suffering—what is meant by compensation is not a perfect arithmetical compensation.

As regards the objection that counsel for the defendant urged before the jury matters not in the record. It would appear that the statements to which counsel for the plaintiff takes exception are:—

> He (referring to counsel for the defendants) told them that the company was ready and willing to pay and always had been ready and willing to pay under the provisions of the Workmen's Compensation Act. He went even further and said they were willing to pay 68 cents an hour up to the time that Dr. Mackid issued a certificate certifying that Ryan was fit to go back to work.

It is prudent, I think, for the presiding judge in effect to instruct the jury in all cases that arguments or comments of counsel that are not supported by the evidence should not receive any consideration and should be regarded by them as valueless, that counsel addressing them is not giving evidence.

It would appear that the references by the defendant's counsel to matters to which the appellant takes exception are to be found in the pleadings and the evidence.

With regard to matters discussed by counsel before the jury, Phipson on Evidence would indicate that there are three matters not to be disclosed to the jury. 1. The amount of damages claimed; 2. The fact of payment into court; 3. Previous convictions of accused, and if such disclosure is made a fresh jury should be had. The fact of disclosure of payment into court which comes closely to the exception taken by counsel for the appellants in that counsel for the defendants stated to the jury that offers of settlement had been made it would appear that the English authorities supporting that proposition are based upon the English rule which says:—

> Where a case or a matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is given either of the fact that money has been paid into court or of the amount paid in. The jury shall be required to find the amount of the debt or damages as the case may be without reference to any payment into court.

It will be observed, however, that there is no such rule in the Alberta Rules of Court, and it is doubtful if the English authorities would be followed here. It would appear that the framers of the Alberta Rules of Court purposely left that out. But, at all events, the instruction by the trial judge after exception had been

taken to the references of the defendant's counsel was, I think, sufficient to direct the jury the proper course to pursue. The trial judge, upon the jury being recalled, addressed them in these words:—

Mr. Ross (counsel for the plaintiff) thought Mr. Bennett's (counsel for the defendants) remarks to you about the company's willingness to pay this man compensation under the Act and agreeing to pay him at the rate of 68 cents an hour from May 1 to October 2 should not have been made. Well, of course, you will not be governed in your decision of this case by anything that was said by Mr. Bennett in that respect.

In the statement of claim, the plaintiff pleads in the alternative claiming compensation under the provisions of the Workmen's Compensation Act (1908) and amendments thereto, and par. 10 of the statement of defence is as follows:—

The defendant further says that it has been ready and willing and at all times to pay the plaintiff whatever amount may be found due and payable to him under the Workmen's Compensation Act and submits to an award thereunder.

Surely when reference is made by the defendant's counsel to the Workmen's Compensation Act he is not referring to matters outside the record. It is possible that the record may have been before the jury or the pleadings may have been read to the jury and the reference to 68 cents an hour as is disclosed in the evidence would be the amount which the plaintiff would be entitled to under the Act and, therefore, it is not a matter not appearing in the record.

The appellant relies upon the case of *Watson* v. *Gas Light Co.* (1848), 5 U.C.Q.B. 244, but this case is clearly distinguishable as a reference to the headnote will disclose, which is as follows:—

Where an offer was made by the defendant's counsel at the trial, and which it was said was to be carried into effect without reference to the verdict, and the jury, being influenced by this statement, gave a less amount of damages than they might otherwise have done; the court, upon the refusal of the defendant to sanction the offer of his counsel, set aside the verdict, but with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement.

From which it will be observed that the jury might easily be influenced in arriving at the amount of their verdict by the offer of the defendant's counsel which offer his client refused to sanction.

In *Hallren* v. *Holden* (1913), 12 D.L.R. 570, 18 B.C.R. 210, on which the appellant relies, the court ordered a new trial because of inflammatory statements made by counsel not supported by

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the evidence, but as far as I can ascertain, no such statements were made here and, if they were, why did not the plaintiff's counsel ask the judge to discharge the jury as is pointed out by Martin, J.A., in that case? Nor have the other authorities relied on by the appellant supporting his view in this regard, so far as I can see, any application.

As to non-direction, it would seem to me the instruction of the trial judge on exception being taken by the plaintiff's counsel in these words: "Mr. Ross (counsel for the plaintiff) pointed out to me that the evidence of the doctors is that even if what this man is suffering from now is neuritis that may be the after results of the shock which he received in the course of this accident. You will remember that is what some of the doctors at any rate did say," met the objection of the plaintiff's counsel and left it to the jury to determine whether or not the then condition of the plaintiff was due to the accident complained of. The above statement of the trial judge taken in conjunction with the rest of his charge leaves no doubt in my mind that the whole question was left fairly to the jury.

In the matter of costs there is, of course, a discretion in the trial judge and I think that discretion was properly exercised by him. I fail to appreciate the contention of counsel for the plaintiff that, because there were two issues and that the plaintiff succeeded on the issue of negligence, that the defendants should be ordered to pay his costs. The facts are that nothing was accomplished by the plaintiff by proceeding after payment into court by the defendants and the amount realized being less than the amount that the defendants had paid into court was, I think, sufficient justification for the trial judge to order the payment of costs by the plaintiff to the defendants subsequent to the date of the payment into court.

I would dismiss the appeal with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. April 4, 1919.

COMPANIES (§ V F—235)—PURCHASE OF SHARE IN—RIGHT OF COMPANY TO QUALIFY AGREEMENT—PURCHASER ALLOWING NAME ON REGISTER AND ATTENDING MEETINGS—LIABILITY OF.

Taking a share in a limited company is an agreement to become liable to pay to the company the amount for which the share has been created and the company has no authority to alter or qualify such agreement, except in the particular way authorized by s. 45 of c. 35 R.S.M. 1913.

Although the contract to purchase shares at a discount may be an illegal contract, a purchaser of such shares who allows his name to be put on the register of shareholders and attends shareholders' meetings cannot deny that he is a shareholder and is liable for the amount unpaid on such shares.

[*North-West Electric Co.* v. *Walsh* (1898), 29 Can. S.C.R. 33; *Welton* v. *Saffery*, [1897] A.C. 299; *Ooregum Gold Mining of India* v. *Roper*, [1892] A.C. 125, followed.]

Statement.

APPEAL by plaintiff in an action against a shareholder of a company, a writ of *fieri facias* issued upon a judgment against the company having been returned unsatisfied.

E. Anderson, K.C., and *J. H. Chalmers*, for appellant; *R. W. Craig*, K.C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—The plaintiff holds a judgment against the Virden Brick and Tile Co., Ltd., a company incorporated under the Companies Act of this province, R.S.M. 1913, c. 35. The writ of *fieri facias* issued upon the judgment was returned unsatisfied and the plaintiff brings this action under s. 48 of the Act against the defendant as a shareholder in the company upon whose shares, as it is claimed, there is an unpaid liability of 50%. The defendant in April, 1911, purchased from the company, 10 shares of $100 each at a discount of 50%, he paying $500 and receiving a certificate for 10 shares.

The purchase was made in March, 1910, and a payment of $250 was made by defendant in the same month. On April 11, 1911, defendant gave a cheque for $250 to pay the balance. A certificate for 10 shares was issued to him on the last mentioned date, but the certificate did not shew that the shares were paid up in full or what amount had been paid upon them. In 1914 the certificate was got from the defendant and an entry made on the back of it by the treasurer to the effect that $500 had been paid on account on April 11, 1911.

The action was tried in the County Court of Virden before His Honour Cumberland, J., who entered a verdict for the defendant. The judge found that the defendant had acted in good faith, honestly believing that the transaction was permissible

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and regular, and that he agreed to buy the shares as a favour to the company, which he and others had been asked to help as a local concern.

S. 45 of the Companies Act of this province, R.S.M. 1913, c. 35, permits a company to dispose of shares and stock at a discount after having received the sanction of two-thirds in value of the shareholders at a special or general meeting. This action of the shareholders and directors must be by by-law. Twenty days' notice of the special or general meeting must be given to each shareholder, and the by-law shall not come into effect until a certified copy thereof has been filed with the Provincial Secretary and notice thereof given in the "Manitoba Gazette." None of this procedure was complied with by the Virden Brick and Tile Co., Ltd. The provisions contained in s. 45 were introduced by 3 & 4 Edw. VII. c. 6, s. 3, and 7 & 8 Edw. VII. c. 8, s. 1, and 3 Geo. V. c. 7, s. 2. The omission of the procedure required by s. 45 leaves the transaction in the present case in the position in which it would have been under the old Manitoba Joint Stock Incorporation Act, Con. Stat. Man. c. 9.

In *North-West Electric Co.* v. *Walsh* (1898), 29 Can. S.C.R. 33, a resolution of the provisional board of directors of the defendant company which was incorporated under the Manitoba Joint Stock Companies Incorporation Act, Con. Stat. Man. c. 9, had been passed authorizing the issue of paid up shares to trustees for certain purposes, and this resolution had been confirmed at a subsequent meeting of shareholders. The trustees who held the shares allotted to the plaintiff 160 shares at the price of one-tenth of their face value, calling them fully paid-up shares. This transaction was afterwards confirmed at a meeting of the directors, and a certificate for fully paid up shares was issued to the plaintiff Walsh. The company subsequently made a call upon the shares which the plaintiff refused to pay, and the shares were declared to be forfeited. The action was brought by the plaintiff against the company to have i declared that she was the owner of the shares. It was held by the Supreme Court of Canada, overruling the decision of the Full Court of Queen's Bench for Manitoba, that the directors had no power to make allotments of the capital stock of the company at a rate per share below its face value, and that a by-law or resolution of the directors assuming to make

such allotment without the sanction of a general meeting of the shareholders was invalid.

In the present case there was no by-law of the directors and no ratification by the shareholders. The assistance of s. 45 not having been invoked, it is difficult to see how the shares issued in the present case differ materially from those under discussion in the *North-West Electric Co.* case. Apart from s. 45 the provisions of the Companies Act of this province are sufficiently similar to those of the English Act to enable us to look to the decisions under the last mentioned Act for assistance in construing our own Act. It has been settled by a line of decisions in England, commencing with *Baron De Beville's* case (1868), L.R. 7 Eq. 11, that where shares are subscribed for in a limited company, incorporated under the English Act, payment in full must be made in money or money's worth. This principle was confirmed in *Re Almada & Tirito Co.'s* case (1888), 31 Ch. D. 38. It was held that the taking of a share in such a company is an agreement to become liable to pay to the company the amount for which the share has been created, and that the company itself has no authority to alter or qualify the agreement.

That decision was approved by the House of Lords in *Ooregum Gold Mining of India* v. *Roper*, [1892] A.C. 125. In that case the company being in want of money and the original shares being at a great discount, the directors, in accordance with resolutions duly passed, issued preference shares of one pound each with fifteen shillings credited as paid, leaving a liability of only five shillings on each share. It was held that the preference shares so far as the same were held by original allottees were held subject to the liability of the holder to pay to the company the full unpaid amount on the shares.

The principle was further extended by the House of Lords in *Welton* v. *Saffery*, [1897] A.C. 299. In that case a large number of shares were issued at a discount pursuant to a special resolution and to articles of association purporting to authorize the directors so to do. Many of these discount shares were issued to a purchaser who paid ten shillings for each share of the nominal value of £5, and he transferred these shares to the appellant Welton for a nominal consideration. It was urged by the appellant, that,

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although the contract could not have been given effect to as against creditors, the shareholders were bound to give effect to the contract upon which the appellant had become a shareholder, that there was no legal principle which would prevent the court from giving effect to it between the shareholders in determining the rights of contributories as between themselves. But the House of Lords extended the decision in the *Ooregum* case so as to make the principle stated in that case applicable to the holders of discount shares, whether these shareholders were original allottees or had acquired them from previous holders. I would cite the following passage from Lord Macnaghten's judgment in *Welton* v. *Saffery*, at pp. 321-2:—

> The articles in express terms purport to authorize the directors to issue shares at a discount. That provision, however, is in contravention of the statute of 1862 and simply void; neither the company nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind. If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but who, in fact, gave them none? The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

The defendant further contends that if the contract respecting the shares was beyond the powers of the company and therefore void, it is void from the beginning and the company cannot take advantage of an illegal transaction, and hold him liable to pay for the shares in full, a position which he had not contemplated, or agreed to be placed in. But he allowed himself to be placed on the register of shareholders and attended meetings of the shareholders on April 15, 1911, April 15, 1912, and on the 15th and 16th April, 1914. No application seems to have been made by him at any time to have his name removed from the register of shareholders, and this, even after he had become aware that the company contemplated making a call on his shares. It was his duty before buying the shares to enquire into the legality of

their issue, and not to trust the mere statement of the person who was canvassing for purchasers.

Re Railway Time Tables Publishing Co., Ex parte Sandys, 42 Ch. D. 98, is a case very similar to the present one. There one Mrs. Sandys had bought from a joint stock company, for 10 shillings a share, a large number of what purported to be fully paid-up shares of £5 each, and was registered as the owner of such shares. She sold some of the shares, and applied for as a shareholder, and sent in to the company, proxies in respect of the remainder. The issue of the shares was *ultra vires*. After a delay of nearly 2 years, the purchaser applied to the court to have her named removed from the list of shareholders. The Court of Appeal held that she must remain on the register as a shareholder in respect of the shares. Cotton, L.J., said, p. 112:—

> I doubt whether the mere fact of her selling a considerable number of these shares would not be an assent as regards the rest of them, but there are here other acts of ownership, and by obtaining proxies she acted as the registered owner of these shares. It is true that she never actually entered into any fresh agreement to pay the £4 10s. a share. Her liability to pay the £4 10s. does not depend on the agreement, but upon the obligation imposed upon her by the 25th section of the Act of 1867. As soon as she assented to being put on the register in respect of these shares, the law, independently of contract, threw upon her the liability of paying off the whole £5, which was the nominal amount of these shares.

Lindley and Bowen, L.JJ., were of the same opinion. This decision was followed in the recent case, *Re James Pilkin & Co.* (1916), 85 L.J. Ch. 318.

The same principles have been applied in the Ontario courts; see *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520; *Re McGill Chair Co.* (1912), 5 D.L.R. 73, 26 O.L.R. 254. In *Lake Ontario Navigation Co.* (1909), 18 O.L.R. 354, Teetzel, J., held a purchaser of discount shares liable for the unpaid amount of the shares. This decision was reversed by the Court of Appeal, but only upon the ground that the purchaser had promptly repudiated the transaction. I would also refer to the decision of this court: *Re Jones* v. *Moore Electric Co.* (1909), 18 Man. L.R. 549.

The respondent in the present case relied mainly upon *McCraken* v. *McIntyre* (1877), 1 Can. S.C.R. 479, which would, if the authority of that decision had remained unshaken, go far to support his contention. But since the later decisions in the same court of *North-West Electric Co.* v. *Walsh*, 29 Can. S.C.R. 33,

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and *Morris* v. *Union Bank* (1899), 31 Can. S.C.R. 594, and the decisions by the House of Lords above referred to, *McCraken* v. *McIntyre* cannot be regarded as a binding authority in the present case.

It was urged that the plaintiff is not in the same position in regard to enforcing payment in full of discount shares as a liquidator would be under the Winding-Up Act, but s. 48 of the Companies Act makes each shareholder liable to creditors for the amount unpaid on his shares and provides the remedy, which a creditor may exercise in such a case, namely, by obtaining judgment issuing execution against the company, and, if the execution is returned unsatisfied, bringing suit against the shareholders. This procedure has been adopted and followed in the present case.

The appeal should be allowed with costs and judgment entered against the defendant for $500. The plaintiff is entitled to costs in the County Court.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff bank which holds a judgment against the Virden Brick & Tile Co., Ltd., on which a writ of execution for $11,457.93 was issued to the sheriff of the Western Judicial District, and returned by him *nulla bona*. It is alleged that the defendant is the holder of 10 shares of the said company of the par value of $100 each, and has paid on account thereof $500, leaving a balance of $500 payable thereon. This amount is claimed by the plaintiff from the defendant. The defendant, amongst other defences, alleges that he purchased the stock from the company at the price of $50 per share, and upon making his payments he was entitled to receive ten fully paid-up and non-assessable shares. Alternatively, he claims if the transaction was illegal he had no knowledge of the illegality, but, if it was so, then it was void from the beginning.

The County Court Judge before whom the case was tried found the plaintiff had no knowledge that the arrangement to sell his stock as paid-up and non-assessable was beyond the powers of the company, save to the extent that everyone is presumed to know the law. The defendant, after accepting his stock certificate, attended meetings of shareholders April 15, 1911; April 15, 1912, and April 15 and 16, 1914. He never took any steps to have his name removed from the register. The stock certificate, dated April 11, 1911, certifies that the defendant is the owner of 10

shares, on which the amount endorsed on the certificate has been paid. This endorsement (made subsequently about 2 years after the defendant received the certificate), shews a payment of $500, which was made in two separate payments of $250, the first March 8, 1910, and the second, April 11, 1911, the day the certificate was issued.

The County Court Judge discusses the judgments of *McCraken* v. *McIntyre*, 1 Can. S.C.R. 479; *Page* v. *Austin* (1882), 10 Can. S.C.R. 132; *Morris* v. *Union Bank*, 31 Can. S.C.R. 594, and, while feeling uncertainty as to the weight of authority, decided to adhere to the views of Strong, J., in *McCraken* v. *McIntyre*, and held that the plaintiff was not entitled to recover. He further held that, in any event, the defendant could not be held liable on the ground on which Mrs. Sandys was held liable in *Re Railway Time Tables Co.*, 42 Ch. D. 98. He refers to the position of Hyndman, the plaintiff's manager at Virden, who was also secretary-treasurer of the company during the year in which Jones bought his stock. The form of action, akin to that on a *sci. fa.*, is not one that has been frequently adopted of recent years, the usual method of enforcing the payment of unpaid shares being under the Dominion Winding-Up Act.

McCraken v. *McIntyre* was decided under the provisions of the statute of Canada, 27 & 28 Vict. c. 23, s. 5 (27). Our s. 48, c. 35 R.S.M., the Companies Act, is practically identical, but it adds this proviso:—

> Provided that any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or director.

This proviso is not found in 27 & 28 Vict. c. 23. *Morris* v. *Union Bank*, 31 Can. S.C.R. 594, was decided under the Companies Act, R.S.C. 1886, c. 119, which provides in s. 27:—

> Every share on the company shall, subject to the provision of sub-s. 5 of s. 5 of this Act, be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise agreed upon or determined by a contract duly made in writing, and filed with the Secretary of State at or before the issue of such shares.

It was on this section that the shareholders whose liability was in question were held liable, and it was this section no doubt that was largely in Chief Justice Strong's mind when he declined to follow his own judgment (or opinion) in *McCraken* v. *McIntyre*, stating that there have been great changes in the statute law

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"and that the companies can no longer, as they could when mere corporations (as at the time of *McCraken* v. *McIntyre*) make special agreements respecting payments for their shares." Now we have not in our own Act any such provision as the above s. 27, but we have s. 45, c. 35, R.S.M., as follows:—

Every company heretofore or hereafter incorporated by letters patent, under the said Act, may from time to time dispose of shares and stock, at such times, to such persons and on such terms and conditions, and at such premium or discount, or in such manner as the directors think advantageous to the company, but if the proposed disposition be at a discount, then only after having received the sanction of two-thirds in value of the shareholders at a special or general meeting.

(2) Such action of the shareholders and directors shall be by by-law, at least twenty days' notice shall be given to each shareholder of the by-law proposed to be submitted at such special or general meeting, and the said by-law shall not come into effect until after a certified copy of the same has been filed with the Provincial Secretary and notice thereof given in the "Manitoba Gazette."

No such by-law was ever passed or filed or published.

The agreement to take shares is one which the company has no authority to alter or qualify and the company is prohibited by law "from doing that which is compendiously described as issuing shares at a discount." So Lord Halsbury held in the *Ooregum* case, [1892] A.C. at p. 134, and he went on to declare that the much discussed s. 25 of the Act of 1867, prescribing that every share in a company shall be taken to have been issued subject to the payment of the whole amount thereof in cash unless the matter is otherwise determined by a written contract duly filed, has nothing in it that affects the above conclusion. We are, therefore, bound to conclude that the provisions of s. 45, prescribing a particular method by which shares can be issued at a discount, absolutely prohibits the company from doing anything of the kind in any other way than that expressly formulated. I consider therefore that the statutory provisions under discussion in *McCraken* v. *McIntyre* have been so altered as to make the opinions of the majority of the court on that case of no present application. No doubt the decision of the Supreme Court in *Morris* v. *Union Bank* was also largely due to the English decisions *Re Almada and Tirito Co.*, 38 Ch. D. 415, the *Ooregum* case, *supra*, and *Welton* v. *Saffery*, [1897] A.C. 299; *Page* v. *Austin* can also be ruled out as an authority on the same ground. In *Welton* v. *Saffery* it was held that it being *ultra vires* for a limited company

to issue shares at a discount or by way of bonus, although so authorised by the Articles of Association, the holders of shares are not thereby released from liability, in a winding up, to calls for amounts unpaid on their shares for the adjustment of the rights of contributories *inter se* as well as for the payment of debts and costs. Lord Halsbury says in forcible language (p. 304):—

> The legislature, in permitting the existence of a company limited by shares and with limited liability, created a machinery which makes it impossible by any expedient, either by company or shareholder, to act otherwise than in pursuance of the provisions of the statute.

It is to be noted that in *Union Bank* v. *Morris* action was brought by the bank as a judgment creditor of the company there in question, which was at the time in liquidation under the Winding-Up Act. The bank's executions having been returned unsatisfied it brought action against the defendants under s. 55, c. 119 R.S.C. 1886, our s. 48. See *Union Bank* v. *Morris* (1900), 27 A.R. (Ont.) 396. As to the position of such a judgment creditor, I refer to the judgment of Richards, C.J., in the *McCraken* case at p. 495:—

> The doctrine put forth in some of the cases, and which seems to be assented to by some of the judges, that the rights of creditors cannot be greater than the rights of the company, cannot be true in all cases. If it does it seems to me it would work gross injustice to creditors.

also to the statement of our late Chief Justice, *Re Jones* v. *Moore*, 18 Man. L.R. 549, at p. 572:—

> I can easily understand that the company by their acts may estop themselves from denying that the stock is paid up, but the only defence to a creditor's action permitted by the Act in case of non-payment is set off.

McCraken v. *McIntyre* and *Morris* v. *Union Bank* are discussed by Mitchell in his work on Canadian Commercial Corporations (1916), at p. 518 *et seq.* It need hardly be remarked that the opinions of the Judges of the Supreme Court in *McCraken* v. *McIntyre* in so far as they dealt with the position of the original allottee were *obiter dicta*. Mr. Mitchell submits that Strong, C.J., in *Morris* v. *Union Bank* went too far in his statement as to the effect of the Winding-Up Act. It would seem to me that this point may be well taken. Looking closely over the provisions of the Winding-Up Act, I fail to find anything in them that materially adds to or alters the liability of the shareholder or contributory more than what is to be found in the Companies Act itself. It is true that the liquidator represents the creditors as

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well as the company, but not at the same time. The liquidator sues in his own name when acting for the creditors; in the company's name when seeking to recover its debts or property, Mitchell 522. On the whole I see little difference between the status and rights of the creditor when suing the shareholder under s. 48, and the status and rights of a liquidator acting as representative for the creditors. What s. 71 of the Winding-Up Act means is discussed by Mr. Mitchell at pp. 1527-1528. A contributory cannot set off a debt due to him by the company against demand by the liquidator. Why should that not be the case when the creditor sues? There is no mutuality in the latter case also, and it is difficult to make any effective distinction on the application of the different sections. That there is little to differentiate between a creditor suing by way of *sci. fa.* and a liquidator is well supported by authority. Mitchell says, at p. 523:—

> Creditors' proceedings by way of *scire facias* are now of little moment, but it is still necessary to define their position when proceeding against a shareholder. Our courts, following decisions under the English Act, seem generally to hold that if a person has subscribed to or purchased the company's unissued shares at a discount knowing that the transaction is illegal, or if he takes them at all events nominally as paid up by virtue of an illegal or fictitious transaction, which purports to be a payment in cash or its equivalent, to cover up the fact that they are being issued at a discount, he will be held liable for the amount unpaid thereon at the instance of a creditor proceeding by way of *scire facias* as well as at the instance of the liquidator in a winding-up.

He cites as authority for this *Union Bank* v. *Morris*, 27 A.R. (Ont.) 396 at 407, where Moss, J.A., says in words most applicable to the case before us:—

> The whole transaction was conceived in order to get over, if possible, the legal incapacity of the company to issue its shares at a discount and to endeavour to relieve or release these shareholders from their liability to pay the whole amount of their shares in cash, and that is a liability which, as observed by Lord Davey in *Welton* v. *Saffery*, *supra*, even the company cannot release or relieve the shareholder from.

The author also refers to the same case in the Supreme Court, p. 594; to Howell, C.J.A., in *Re Jones* v. *Moore*, 18 Man. L.R. 549, 575, and to *North-West Electric Co.* v. *Walsh*, 29 Can. S.C.R. 33. See the judgment of Sedgewick, J., in the last mentioned case, at pp. 50, 51, 52, and the important citation from Lord Macnaghten's judgment in *Welton* v. *Saffery*, at p. 53, which seems very much in point.

Mr. Mitchell goes on to discuss the question of the shareholder's liability on the contract where he takes unissued shares from the company upon the condition that they shall be paid up, p. 524. In such circumstances as to the company he holds it could not disregard the condition and force the applicant to take shares not fully paid-up. As to the shareholder's liability as such, he says:—

> If the subscriber or purchaser fails to repudiate the contract within a reasonable delay under the circumstances of the case, or if he conducts himself in a manner consistent with an intention to be treated as a member of the company after he discovers his position, his laches or conduct will constitute him a shareholder, and he could be compelled by the liquidator to pay the amount unpaid in the shares.

For this he cites *Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191, where the Court of Appeal reversed the judgment of Teetzel, J., as reported in 18 O.L.R. 354. It is to be noted that the judgment of the Court of Appeal proceeded upon the ground that the shareholder (Davies) before receiving the certificate of shares or assenting in any way to becoming a shareholder, absolutely repudiated the whole transaction, and notified the president of the company of such repudiation; and it is to be further observed that, the transaction to take shares being wholly void, it was held unnecessary for the shareholder to have moved to take his name from the register. Had it not been shewn that there had been such repudiation, however, the original judgment of Teetzel, J., would undoubtedly have been affirmed. This appears from the judgment of Maclaren, J.A., at p. 195, where he quotes from the decision of Lindley, L.J., in *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, at p. 205:—

> If . . . it was a contract to issue fully paid-up shares, then as these are not fully paid-up shares, the appellants might have repudiated them—but they have kept them, and cannot now get rid of them.

Teetzel, J., held in the same case in 18 O.L.R. p. 357:—

> No questions of company law are more clearly settled than that a company organized under the Ontario Companies Act cannot issue shares at a discount, and that *primâ facie*, in a winding-up proceeding, the holders of shares are liable for the full amount unpaid on shares issued to them, notwithstanding that they may have been issued as paid up, if in fact they were not paid up.

He bases this statement which in my judgment accurately states the law on the judgment in *Re Almada and Tirito Co., supra;*

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Ooregum Gold Mining Co. v. *Roper, supra; Welton* v. *Saffery, supra; Re Railway Time Tables Publishing Co., supra; Ex parte Welton,* [1895] 1 Ch. 255. He also refers to a decision of his own *Re Wiarton Beet Sugar Mfg. Co.; McNeill's* case (1905), 10 O.L.R. 219. The facts on which McNeill was held to be a shareholder and liable for the amount actually unpaid on his shares are stated at p. 222.

I refer also to *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, where those individuals who received bonus shares of stock issued to the amount equal to a cash bonus received from the Town of Cornwall, accepted the certificates therefor and dealt with the shares, were held by the Court of Appeal not entitled to be relieved from the obligation to pay for the shares they had accepted and were properly placed on the list of contributories.

In *Re McGill Chair Co.*, 5 D.L.R. 73, 26 O.L.R. 254, Chief Justice Meredith held that it is *ultra vires* for a company under the Ontario Act to issue shares at a discount, and that the respondents who had received seven and one-half shares, two and one-half of which were to be paid by promotion services, and had acted as holder of the seven and one-half shares could not on the ground of a mistake of law, be relieved from his liability to pay up the extra two and one-half shares. He holds the English cases applicable to Ontario Companies, p. 260.

In *Re Modern House Mfg. Co.* (1913), 12 D.L.R. 217, 28 O.L.R. 237, Middleton, J., refusing to place the respondents on the list of contributories, an appeal was taken to the Appellate Division which divided equally Meredith, C.J.O., and Magee, J.A., upholding Middleton, J., while Hodgins, J.A., and Maclaren, J.A., held that the respondents should remain on the list. Meredith, C.J.O., took a view of the facts, which made the transaction perfectly *bonâ fide*, the shares in question being issued (from this standpoint) as part consideration of property to be conveyed to the company by the respondents. Hodgins, J.A., took an entirely different view of the transaction, holding that there was an original contract which was unexceptionable, but that this was superseded by a subsequent contract between the respondents and the company, in which the former assumed the status of unpaid shareholders for the 3,000 shares in question, the basis of the subsequent agreement being that the respondents were to become shareholders

in præsenti, with a condition subsequent that they might pay by conveying the lands or become liable for $5,000. Looked at from this viewpoint, the decision of Hodgins, J.A., is a strong authority for the plaintiff.

In *Alberta Rolling Mills Co.* v. *Christie* (1919), 45 D.L.R. 545, 58 Can. S.C.R. 208, plaintiff subscribed to shares on condition that the company should erect a steel plant in Medicine Hat. He paid for his shares in instalment and share certificates were published, though he said he never saw them. There were other facts tending to shew that he regarded himself and acted as a shareholder. The steel plant was not erected and the plaintiff brought an action for rescission, and for a return of the purchase money, or alternatively for damages. It was held by the Supreme Court of Canada that the plaintiff must fail. The condition was a condition subsequent, and ceased to operate after the plaintiff became a shareholder; if it were to be considered as operating as a collateral agreement, such an agreement would be *ultra vires* of the company.

On the authority of *Morris* v. *Union Bank*, which seems to me closely in point (for there can be no difference in legal consequences between the section of the Act there in question requiring an agreement in writing where shares are issued not for money but for money's worth, and the section here forbidding the issue of shares at a discount) and on the authority of the Ontario cases cited, and having in view the governing statutory provisions, there seems to me no reason why the plaintiff should not be entitled to the remedy claimed.

I have already referred to some of the English cases which were cited to us: *Re Almada and Tirito; Ooregum Mining Co.* v. *Roper; Welton* v. *Saffery*. In *Re James Pilkin & Co.*, 85 L.J. Ch. 318, a director made a loan to his company in consideration of his being allowed to take up £1 shares for 10s. each. The shares were registered in his name, but he was unaware of the legal consequences. It was held by Eve, J., March 3, 1916, that the transaction was a contract to issue shares at a discount and therefore illegal; and that the director by assenting to the allotment made himself liable to pay the full nominal amounts of the shares in cash. This recent authority seems very direct.

We were also referred to *Re Eddystone*, [1893] 3 Ch. 9, where it

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was held that a company, under the Companies Act, 1862, cannot issue shares as a free gift or bonus, and the shareholder was held liable for the full nominal value of the shares, a decision followed in *Re Jones* v. *Moore*, 18 Man. L.R. 549, at 571; and to *Re Addlestone Linoleum Co.*, 37 Ch. D. 191, where it was held that if the contract was to issue shares at a discount, not even a registered contract could exonerate the shareholders from liability to pay up in full.

These English decisions which, as pointed out by Meredith, C.J., are applicable to cases arising under the Ontario Act, which is, in respect of the provisions, similar to our own, strengthen the conclusion derived from a perusal of the Ontario cases. It seems to me that the defendant elected to be a shareholder by his payment on account of the shares he agreed to take; by his acceptance and retention of the certificate of shares; his attendances at shareholders' meetings, and by his refraining to take steps to have his name removed from the register. On this point I would refer particularly to *Re Sandys*, 42 Ch. D. 98, where the shareholder brought an action to have her name removed from the register, but relief refused on the ground that she had by her acts assented to become such. In these circumstances, and in view of the authorities cited, it is, in my opinion, impossible to hold that the defendant can be exonerated from his liability to pay up the full nominal value of his shares. The provisions of the statute, ss. 48 and 45 are intended for the protection of creditors whose interests are made paramount and no private bargaining can whittle them away.

Counsel for the defendant relied strongly upon the utterances of Strong, J., and Henry, J., in the *McCraken* case, but these did not bear upon the issues there before the court, and moreover, they have been rendered of no application by the subsequent legislation and by the subsequent English decisions. Furthermore, we have Strong, C.J., in *Union Bank* v. *Morris*, withdrawing from his previous position in the *McCraken* case. As I have said, the authority of *Union Bank* v. *Morris* is one that seems most directly in point. As for *Page* v. *Austin*, there differing from this case, the issue of shares was wholly illegal and one that could not, in any way, be made, and, in any event, the judgments in that case must yield to subsequent decisions.

Amongst the cases cited to us on behalf of the defendant was *Carling's* case (1875), 1 Ch. D. 115. There the shares given to Carling were part of the shares given the vendor as part of his purchase money, the transaction being the same in substance as if the shares had been issued to the vendor and transferred by him to Carling. The case is clearly inapplicable on the facts. We were also referred to *Stace and Worth's* case (1869), L.R. 4 Ch. App. 682. As to this "difficult" case I would point to the criticism of it by Lindley, L.J., in his Law of Companies, 6th ed. at p. 1066. *Bank of Hindustan* v. *Alison* (1870), L.R. 6 C.P. 54 and 222, involved shares which the directors of the bank had no power whatever to issue. Lindley, L.J., puts the law clearly at p. 1065 where he says:—

> A distinction must be made between shares which the company has no power to issue and shares which the company has power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company have no power to issue, in truth, hold nothing at all, and are not contributories.

Great Australian Gold Mining Co. (1881), 18 Ch. D. 587, was mentioned, but the circumstances of that case do not seem analogous to those before us. The contract with the shareholder there was expressly held *intra vires*, and the shares were properly issued as paid-up shares to the vendor, who transferred them to the shareholder.

On the question of set off there was cited to us *Government of Newfoundland* v. *Newfoundland R. Co.* (1888), 13 App. Cas. 199, and *McManus* v. *Wilson* (1908), 17 Man. L.R. 567. But I think it clear the defendant has no right of action against the company in this case for reasons I point out later on.

Counsel urged that the whole transaction was void *ab initio*, and Jones, therefore, never was a shareholder, and cannot be made liable. But this is at variance with the authorities I have cited. See especially *Re James Pilkin*, *supra*. Counsel further urged that if Jones is a shareholder there is nothing unpaid on his stock as his contract was to get $1,000 stock for $500. This contention is also untenable in view of the Ontario and English authorities referred to.

Lastly, counsel argued that if Jones is a shareholder and $500 remains unpaid, then he has a set-off to the extent of $500 in an action for damages for fraud or misrepresentation, or for breach

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of warranty, or breach of the contract. A party induced by the agents of a company to take shares in it can bring no action for damages against the company while he remains in it. *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, at 323, 324, *per* Earl Cairns, L.C. Here Jones has held on to his shares throughout. There was no misrepresentation of fact in this case on which an action could be based. And it is impossible to say there was a breach of warranty or of contract when all parties, Jones and the company, had the same knowledge of their legal rights and liabilities, and it was plain that the company had no power to make a contract to sell its shares at a discount, save under the provisions of s. 45 of the Act.

A good deal of stress was laid by the defendant upon the position occupied by Hyndman, the plaintiff's manager at Virden and secretary-treasurer of the company at the time of Jones taking the shares.

It seems to me difficult to argue that this in any way affected the plaintiff's position. It is surely out of the question to say that the plaintiff's knowledge of the transaction acquired in this way precludes it from asserting Jones' liability for the amount unpaid on his shares. Even if the bank did know the facts, I see no reason why it should not have regarded the transaction as an attempt to exercise power which the company did not have and which it (the bank) reserved the right to call in question, should the necessity arise. To my mind, Hyndman's dual position does not affect the transaction in the slightest.

In my opinion, the appeal must be allowed, and judgment entered for the plaintiff against the defendant with costs here and below.

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiff recovered judgment against the Virden Brick & Tile Co., and on April 29 a writ of execution issued thereon was returned *nulla bona*.

Plaintiff thereupon began this action against the defendant as the holder of 10 shares of the capital stock of said company of the par value of $100 each, upon which $500 only had been paid and under s. 48 of the Companies Act claims to recover $500, the difference between the amount paid on the 10 shares and the par value of the same.

The trial judge has found as a fact that the defendant purchased

the stock in good faith and without knowledge of the fact "that the arrangement to sell him the stock as fully paid up and non-assessable was beyond the powers of the directors or otherwise illegal."

S. 45 of the Companies Act says:—

> Every company heretofore or hereafter incorporated by letters patent, under the said Act, may from time to time dispose of shares and stock, at such times, to such persons and on such terms and conditions, and at such premium or discount, or in such manner as the directors think advantageous to the company, but if the proposed disposition be at a discount, then only after having received the sanction of two-thirds in value of the shareholders at a special or general meeting.

There is no pretence here that any such sanction of the shareholders was ever received. In fact, the only evidence is that the question was discussed informally among the directors who decided to sell the shares at fifty cents on the dollar.

In the absence of the authority required by the section, it is clear that the action of the directors in attempting to sell the shares at a discount was *ultra vires* and illegal.

In *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, at p. 437, Lord Macnaghten said:—

> When parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.

Counsel for the defendant contends that the whole transaction was *ultra vires* and void from the beginning and that as the requirements of s. 45 were not complied with the company cannot now take advantage of what it did illegally to fasten any liability on the defendant.

The authorities both in England and in Ontario hold that where a man agrees to purchase from a company paid-up shares at a price less than their nominal value he may repudiate the agreement at any time before he actually becomes a shareholder on the ground that the company cannot legally give him what he bargained for. The moment, however, he does any acts, such for example as accepting certificates, attending meetings, receiving dividends, etc., which shew that the company treated him as a shareholder and that he acquiesced in being so treated, he becomes a shareholder for all purposes and is liable for the amount unpaid on his shares.

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The contention was made that the English cases do not apply owing to the difference between the provisions of our statute and those of the English Companies Act.

The English cases cited turn on s. 25 of the English Companies Act which is as follows:—

> Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined.

S. 48 of c. 35 R.S.M. 1913, provides that:—

> Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, but shall not be liable in an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall, subject to the provisions of the next succeeding section, be the amount recoverable, with costs, against such shareholders.

While the wording of the two sections is quite different, it appears to me that their effect is the same in so far as the question we are now considering is concerned.

In *Re Railway Time Tables Publishing Co.; Ex parte Sandys*, 42 Ch. D. 98, Mrs. Sandys applied under s. 35 of the Companies Act 1862 for an order that the register be rectified by striking out her name in respect of shares issued at a discount, and that the sum paid by her to the company in respect of such shares might be repaid to her.

Stirling, J., held that the contract to take the shares at a discount was void and that Mrs. Sandys was entitled to relief.

The Court of Appeal, consisting of Cotton, Lindley and Bowen, L.JJ., allowed the appeal, holding that although the contract under which she took the shares could not have been enforced against her, the respondent having, with knowledge that her name was on the register as the holder of the shares, dealt with them as if she had been a member of the company in respect of them, had assented to keep them, and was liable under s. 25 of the Companies Act of 1867 to pay the whole amount of them in cash, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into.

Cotton, L.J., at p. 112, after pointing out that if she had never been registered and had not recognized the fact of her being registered the company could not have forced her to take the shares, said:—

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But she has in fact assented to her name being on the register in respect of these 523 shares. . . . It is true she never actually entered into any fresh agreement to pay the £4 10s. per share. Her liability to pay the £4 10s. does not depend on the agreement, but upon the obligation imposed upon her by s. 25 of the Act of 1867. As soon as she assented to being put on the register in respect of these shares, the law, independently of contract, threw upon her the liability of paying off the whole £5 which was the nominal amount of these shares. It is a mistake, therefore, to consider this case as if it depended upon her having entered into a contract to pay something smaller than the full amount of £5 payable on the shares.

Lindley, J., at p. 115:—

But if she does accept the shares the company gave her, it does not require a fresh bargain on her part to pay for them. That is the fallacy of the whole argument. If I ask for one thing, and have another thing sent me, and I keep it, I must pay for it—not because I make another bargain to pay for it when I say I will not, but because the law imposes on me an obligation to pay for it if I keep it. Now the moment she gets these shares and finds she is on the register what does she do? Does she repudiate? Assume she might but does she? Quite the reverse; being still in ignorance, as she says, of her rights—not in ignorance of any material fact, but still in ignorance, or under an erroneous impression as to the legal effect of what she is about—she treats herself as a shareholder in respect of these shares. She sells some of them at an advantage. She exchanges the certificate which she had for the whole for the certificate of the residue which she continues to hold. Then she receives notices of meetings, she signs proxies, she writes letters opposing the increase of capital and so forth; and in short, knowing that she is a shareholder in respect of these shares she accepts the position. Well, then comes the question, does her liability depend upon whether she will or will not agree to pay for what she has bought? Certainly not. There she is met by the Companies Act, 1867, s. 25. . . . That is her statutory obligation independent altogether of the question whether she agrees to pay for the shares or whether she does not. She has chosen to accept them with full knowledge of all the facts, and though the company is not being wound up it is far too late for her to repudiate them now.

Bowen, L.J., p. 117:—

The question is, whether the respondent, whose name is upon the register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognize, and the company had no right, disregarding the condition, to force upon her something which she had not asked for.

If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company was not giving her what she asked for.

But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat

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herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is. . . . Here it is not that she kept all these new shares promising expressly to release the company from the original condition and to pay the entire sum, but she consented to allow her name to remain on the register and to keep the shares although they had not been allotted to her in conformity with the condition which she had imposed in her letter of application. From such assent to be on the register, and from such dealings with the shares which took place after she knew she was upon the register, there can be but one inference which the court ought to draw, namely, that she agreed to be a member of the company; and her name being on the register, her liability to the company is complete.

Neither the Ontario Companies Act nor our own has a provision exactly similar to s. 25 of the English Companies Act. S. 37, however, of the Ontario Companies Act is almost word for word the same as ss. 48 and 49 of the Companies Act of Manitoba.

It has been held in Ontario that notwithstanding the omission of a provision similar to s. 25 of the English Companies Act the holder of unpaid stock is liable if he has accepted the stock. *Re Wiarton Beet Sugar Mfg. Co.*, 10 O.L.R. 219. A certificate of 238 shares of stock was issued to McNeill described as fully paid up, pursuant to an understanding between him and the directors. He paid for 171 shares and accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability in respect to them. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as director of the company.

It was held that he was a shareholder with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares.

Teetzel, J., at p. 222:—

> Having chosen to accept the certificate of ownership of these shares and having acted upon the same with full knowledge of all the facts, he cannot now repudiate his status as a shareholder in respect of them.

Re Lake Ontario Navigation Co.; Davis's case, 18 O.L.R. 354. Davis applied for 130 shares, of $100 each, and agreed to pay $1,300 for same. The application contained the following provision: "I apply for these shares on the condition that no further calls be made thereon."

The directors by resolution, confirmed this arrangement. Davis was notified by the president of acceptance, sent his cheque

to the company for $1,300, and gave a shareholder a proxy to vote which was exercised. Hearing of a dispute which arose at a meeting of the directors in regard to his stock he stopped payment of his cheque. A winding-up order was made against the company shortly afterwards. Teetzel, J., made an order placing Davis on the list of contributories. In his judgment at p. 357, he says:—

No questions of company law are more clearly settled than that a company organized under the Ontario Companies Act cannot issue shares at a discount and that *primâ facie* in a winding-up proceeding the holders of shares are liable for the full amount unpaid on shares issued to them, notwithstanding that they may have been issued as paid up, if in fact they were not paid up.

Again, at p. 360, he says:—

While the matter rested merely in agreement between the company and Davis, he could not have been placed on the list of contributories, but I think on the authority of the *Sandys* case, that what he did was an election by him to *treat himself and be treated as a member of the company*, and he cannot now as against the liquidator be relieved from statutory liability.

On appeal, the order made by Teetzel, J., was set aside (20 O.L.R. 191), on the ground that Davis had promptly repudiated. See also *Re Cornwall Furniture Co.*, 20 O.L.R. 520, and *Re McGill Chair Co.*, 5 D.L.R. 73, 26 O.L.R. 254.

The certificate for the 10 shares does not purport to be one for fully paid-up shares. It reads: "This is to certify that Samuel E. Jones is the owner of 10 shares on which the amounts endorsed hereon have been paid, etc."

When the certificate was delivered to Jones no indorsement of the amount paid was on the back of it. On the face of the certificate appear the words "shares $200 each."

It is clear, therefore, that there never had been any mistake about the facts on the part of the defendant. He, however, was mistaken as to the law and fully believed that the company had power to issue the shares at fifty dollars per share as fully paid-up shares. He, however, accepted the certificate and attended several meetings. I think under the authorities he elected "to treat himself and be treated as a member of the company" and cannot now be relieved from liability.

The trial judge in his reasons for judgment, expressed the view that inasmuch as Hyndman was a director and secretary-treasurer of the Virden Brick & Tile Co., Ltd., and was also manager of the plaintiff's branch at Virden, where the company did its banking business, it must be presumed that he advised the plaintiff of the position of the stock sold to the defendant and that therefore the

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plaintiffs are estopped from enforcing the present claim. In my view if it were shewn in the clearest possible way that the plaintiff knew of the attempted issue of the shares in question at a discount their position would be the same. They had no right to interfere with the action of the directors and were entitled to assume that the stock would be paid for in full either in money or money's worth.

On the statement of defence the defendant asks to set-off the sum of $500 "by way of damages for misrepresentations and breach of warranty by the said Virden Brick & Tile Co., Ltd., to the defendant."

I can see no misrepresentation of any fact in the case. The facts were well known to all parties, the only mistake being as to a matter of law.

I would allow the appeal with costs and enter judgment for the plaintiff for the sum of $500 with costs of the trial.

Appeal allowed.

ALTA.

S. C.

NORTHERN CROWN BANK v. WOODCRAFTS, Ltd.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and McCarthy, JJ. May 8, 1919.

EXECUTORS AND ADMINISTRATORS (§ III B—70)—JUDGMENT AGAINST—PAYMENT IN DUE COURSE OF ADMINISTRATION—ELECTION OF JUDGMENT CREDITOR IN CERTAIN CASES.

The proper form of judgment against executors or administrators, in respect of a liability of the deceased, is a judgment for payment in due course of administration; unless there is on their part a distinct affirmative admission of assets sufficient to pay all the creditors of the estate, in which event the judgment creditor may at his election, have judgment either against the executors or administrators personally or judgment for payment in due course of administration.

[*J.I. Case Threshing Machine Co.* v. *Bolton* (1908), 2 Alta. L.R. 174, followed.]

When judgment is for the amount recovered to be paid in due course of administration, it is improper to issue any executions whatever on the judgment. The remedy in case of anticipated or actual default on the part of the executor or administrator is to apply for an order for administration and, if necessary, the appointment of a receiver.

[See also 28 D.L.R. 728; 33 D.L.R. 367; 42 D.L.R. 326.]

Statement.

APPEAL from an order of Simmons, J. A previous order made by him set aside an execution in so far as certain executors were concerned. The order appealed from set aside the previous order and reinstated the execution. Reversed.

Harvey, C.J.

HARVEY, C.J., concurred with Beck, J.

A. H. Clarke, K.C., for respondent.

M. B. Peacock, for appellant.

STUART, J.:—I think it is well that Beck, J., has directed attention to the matters dealt with in his judgment because the fact that it is only now that they are referred to in this case, and that by a member of court, rather points to a tendency to overlook them in practice. And I quite agree that if the point made by my brother had been raised at the trial or even on either of the two appeals the judgment should possibly have gone as he has indicated. But, at this stage, and upon this application, I confess, that I cannot quite assent to the propriety of applying the rule he has laid down as a means of deciding the matter before us.

It cannot be said, I think, that the judgment which was entered would in no case be a proper one and I do not, indeed, understand that my brother Beck takes that position. If sufficient assets were admitted to meet all debts I understand that the judgment as entered would have been considered proper. How can we say now that it was not understood at the trial and when the judgment was being entered that there were sufficient assets to meet all debts? Indeed, I rather imagine that, at that time the assets were thought to be very largely in excess of all possible liabilities. The affidavit of the executor upon which the order of April 8 was made impliedly asserts that the assets were quite sufficient.

In Holmested and Langton, 4th ed., p. 1129, it is stated that the executor should, if the estate is not solvent, ask for a judgment for administration of the estate and for payment in due course of administration and *McKibbon* v. *Feegan*, 21 A.R. (Ont) 87 at 95, is cited. In that case Maclennan, J.A., referred to the "judgment which was always pronounced in Chancery in such cases, namely, a judgment for payment in due course of administration, *or in other words, a judgment for the administration of the estate.*" Now I think this means a judgment by which the court itself takes charge of the administration of the estate. See 14 Hals., p. 338. In *Bank of B.N.A.* v. *Mallory* (1870), 17 Gr. 102, at p. 106, Spragge, C., referring to the Ontario statute in regard to payment of all debts *pari passu*, says:—

> It contemplates, as far as possible, an administration by the personal representative *without suit;* and points out, in s. 27, how a personal representative may, *out of court*, adopt the practice of this court *in administration* suits, and, thereupon, distribute the assets of the debtor with safety to himself.

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I think these authorities shew that a judgment "for payment in due course of administration" is a judgment which can only be entered in an administration action where the court takes *upon itself* the administration of the estate. In such a case, just as where a receiver has been appointed or a winding-up order made, there is no need of a writ of execution, and it is improper, because the court itself has already laid its hands upon the estate. But I do not conceive that an executor appointed by the testator and having given no bond is in any sense an officer of the court. While the property is in his hands it is in the hands of a private party and out of court. In such a case where the executor is a defendant and *no administration order is made*, I see no reason why execution should not issue. At any rate the judgment was there and it was never disturbed. The parties apparently considered it a proper judgment and admittedly it is in some circumstances at any rate a proper judgment. At this stage I think we should assume that the circumstances which would make it a proper judgment, viz.: a sufficiency of assets, were treated by all parties as existing. I was no doubt considered by all that a judgment against certain persons named in the style of cause as executors of a deceased person should in the absence of any special direction be treated as one upon which execution *de bonis testatoris*, and not *de bonis propriis*, should issue and no doubt the writ which was issued was interpreted n that sense.

I, therefore, think the execution was properly issued in the first instance. The question of the validity of the order of December 2, 1918, seems to me therefore to depend upon the validity of the order of April 8, 1918. If that first order was validly made or if, for any reason, we should now treat it as having been valid, I think the result is, that the writ of execution was set aside and destroyed and it could not be revived by any subsequent order. If the order of April 8 was invalid or should be treated still as having been invalid then I think the order of December 2, was properly made and should have the effect of putting everything back as it was before the order of April 8. I do not think the order of April 8 was properly made at the time. The fact that counsel for the plaintiff appeared and merely did not consent thereto and yet did not approve seems to me merely to shew that the plaintiff said in substance to the court "We take no part

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one way or the other but we assume the court will do what it has the power to do and what is right to do." If there had been nothing else I think that is all that could be imputed to the plaintiff; and in that case I think it was not right to set aside the writ. The defendant executors' proper course was, even at that stage, to ask for an administration order if they wished to avoid writs of execution. Then the writ could properly have been set as de. But the plaintiff with knowledge of the order and its effect acquiesced and did not appeal. On that account, I think, we should now treat the order of April 8 as a good and valid order and that its effect was, not to suspend, but to set aside, that is, to destroy entirely, the writ of execution. That being so, I do not think any subsequent order could recreate the writ as of its original date and that therefore the order of December 2 was wrong and should be set aside.

The plaintiff is of course and was on December 2, 1918, quite at liberty, in the view I take of the matter, to issue a new writ of execution, because there was no order of any kind staying execution at that date.

I think also, though at first with some hesitation, that it should be with costs. The plaintiff could have issued execution without leave and without adding all the costs involved in the order appealed from. That order was clearly wrong, and I think the executors were entitled legally at any rate, to object to it and to get it set aside.

Beck, J.

BECK, J.:—The present appeal arises in the working out of the judgment in the case reported (1916), 28 D.L.R. 728 (May 26, 1916, Walsh, J., at the trial) 33 D.L.R. 367, 11 Alta. L.R. 1 (January 13, 1917, Appellate Division, S.C. Alberta, varying the judgment of Walsh, J.) 42 D.L.R. 326, [1918] A.C. 903 (July 28, 1918, Privy Council affirming the decision of the Appellate Division).

Judgment was given against Woodcrafts Limited, the principal debtor, for a large sum. Judgment was directed against the other defendants—seven individuals and three others "executors of the last will and testament of John Breckenridge, deceased"—these eight persons having been sureties for the principal debtor—for an amount to be ascertained on a reference, the basis on which the reference should be conducted being set forth in the judgment.

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This amount was ultimately agreed upon in writing between the parties.

In the first instance $56,459.61 was fixed as "the amount of the liability of the defendants Egbert, *et al.* (seven) and Thomas Roach, Irene Breckenridge and William Breckenridge, executors of the last will and testament of John Breckenridge, deceased;" then $58,972.61 was fixed as "the amount of the further liability of the said defendants *other than the Breckenridge Estate;*" and in summary form was the statement: "The total liability against all the said defendants being $56,459.61 and the total liability against the said defendants *other than the Breckenridge Estate* being $58,972.61."

The referee made his report in pursuance of this agreement on November 14, 1918.

On November 16, 1918, the plaintiff's solicitors wrote to the sheriff referring to the execution then in his hands issued upon the judgment directed by Walsh, J., and pointing out that the amount to be levied had been altered by reason of the decision of the Appellate Division of this court. The letter stated, amongst other things, the amount to be levied against all the individual defendants "*except as against the Breckenridge Estate.*"

After the judgment of the Appellate Division and while the appeal to the Judicial Committee of the Privy Council was pending and before the referee's report fixing the amounts, namely, on February 26, 1918, the defendants, the executors of Breckenridge deceased, moved for an order setting aside the execution which had been issued upon the judgment directed by Walsh, J., in so far as it affected "the executors of John Breckenridge and the estate or certain real estate."

An affidavit of one of the executors filed in support of the motion stated amongst other things that the executors had not yet paid the government succession duties, nor the costs of the administration of the estate; that the City of Calgary had a claim for taxes exceeding $10,000; that the executors were anxious to sell certain assets belonging to the estate in order to pay the debts, liabilities and legacies as set forth in the testator's will; that the execution prevented the executors from realizing upon the estate of the deceased.

On April 8, 1918, Simmons, J., made an order, on the executors

undertaking and agreeing to properly account for and distribute all moneys received by them as executors, setting aside the execution in so far as the said executors were concerned, and directed the registrar to discharge the said execution "in so far as it affects the executors of the said estate and any land belonging to the said estate."

This order was in my opinion properly made, not on any ground present to the minds of counsel on either side or indeed of the judge—for the application seems scarcely to have been contested—but upon grounds which I shall endeavour to make clear.

In November, 1918, the plaintiff made an application, which also came before Simmons, J., who on December 2, 1918, made an order setting aside his order of April 8, 1918, and ordering that the execution be reinstated as of the said April 8, 1918, "subject however to the rights of any purchasers who have acquired *bonâ fide* and for value any interest in any of the lands affected by the execution subsequent to the making of the said order and the registration thereof."

This is an appeal by the executors from the last mentioned order and in addition thereto a motion that the said order be altered "so that the execution shall be only against the goods and chattels which have been or now are or shall hereafter come into the hands of the appellants as executors to be administered in due course of administration."

It is evident from what I have set forth that the solicitors and counsel, both for the plaintiff and the executor defendants, until a very recent date, had no other thought in their minds but that the judgment and execution were against the assets of the Breckenridge Estate and not against the executors personally, even in respect of costs. In so thinking, they were, in my opinion, absolutely right.

Eleven years ago in the case of *J. I. Case Threshing Machine Company* v. *Bolton* (1908), 2 Alta. L.R. 174, I held that in view of numerous statutory provisions in this province, the proper form of judgment against executors or administrators, in respect of a liability of the deceased, is a judgment for payment in due course of administration; unless there is, on their part, a distinct affirmative admission of assets sufficient to pay all the creditors

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of the estate, in which event the judgment creditor may, at his election, have judgment either against the executors or administrators personally, or judgment for payment in due course of administration. In so holding, I followed the opinion of Maclennan, J.A., in *McKibbon* v. *Feegan* (1893), 21 A.R. (Ont.) 87, pointing out that stronger reasons for so holding existed in this province than in the Province of Ontario. The decision in the case of *Case* v. *Bolton*, has been expressly followed by more than one of my brother judges and dissented from, as far as I believe, by none. Furthermore, with 30 years' experience as a practitioner and a judge in this jurisdiction, I am in a position to say that I have never heard of a case in which it was thought that it was necessary, in order to protect executors or administrators of insolvent estates, to have recourse to defences founded upon an insufficiency of assets to satisfy all the liabilities of the deceased, or that the bringing of an action against executors or administrators could have any other purpose or effect than to fix the amount for which the estate was liable.

It must, therefore, be taken to have been settled for many years that the practice with regard to the matter now in question is as I declared it eleven years ago and that the judgment in this case must be interpreted in the light of that practice and be treated as if it expressly stated that the amount to be recovered was to be recovered by payment in due course of administration, and that the omission of these words is an error arising from an accident, slip or omission, which the court can correct on motion (rule 270 Eng. O. 28, r. 11).

If then, the proper practice where there is not a distinct affirmative admission of assets is judgment for the amount recovered to be paid in due course of administration, the further result necessarily follows that it is improper to issue any executions whatever upon the judgment. The remedy, in the case of anticipated or actual default on the part of the executor or administrator, is, as I also pointed out in the earlier case, to apply for an order for administration (which may be quite limited in its extent) and, if necessary, the appointment of a receiver.

In the former case, I make no distinction between the debt or damages and the costs. I see no reason, in view of the existing practice and the large discretion of the court or a judge over

costs, why any different rule should be applied to the costs, unless, under exceptional circumstances, where there has been some kind of fault on the part of the executor or administrator. Indeed there is never any need of an action against executors or administrators unless the liability is disputed. If a creditor unnecessarily brings an action, he should pay the costs.

The judgment should, therefore, be read as if, so far as it is a judgment against the executors, it contained the words "to be paid in due course of administration."

Then it follows that for the reasons I have given the order of Simmons, J., setting aside the execution was right, and consequently, his order (now appealed from) setting aside that order and reinstating the execution was wrong.

I would, therefore, allow the appeal with costs, including the costs of the order appealed from.

McCARTHY, J., took no part in the judgment.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 18, 1918.

1. COURTS (§ II A—150)—ONTARIO RAILWAY AND MUNICIPAL BOARD ACT—CONSTRUCTION—INTENTION—JURISDICTION OF COURT.

Section 63 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII., c. 31 (transferred with some modification to the Ontario Railway Act, R.S.O. 1914, c. 185, s. 260), which was intended to get over the difficulty of forcing the railway company to obey an order of the Board does not deprive the Supreme Court of jurisdiction to entertain an action for damages for breach of contract.

2. STREET RAILWAYS (§ I—5)—AGREEMENT WITH CITY CORPORATION—NEGLECT OF RAILWAY TO REMOVE SNOW AND ICE—REMOVAL BY CORPORATION—DAMAGES.

Under ss. 21 and 22 of the Ontario Railway Municipal Board Act, R.S.O. 1914, c. 186, the defendant company is liable for expense incurred by the plaintiff in removing snow and ice from the streets of the city, which it was the duty of the defendant company to remove. The refusal of the plaintiff's engineer to instruct the defendant company as to where such snow should be deposited does not release it from its liability for non-removal.

Statement.

APPEAL by the defendants from the judgment of Lennox, J., 42 O.L.R. 603. Affirmed.

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D. L. McCarthy, K.C., for appellants.

C. M. Colquhoun and *Irving S. Fairty*, for the plaintiffs, respondents.

CLUTE, J.:—Appeal from the judgment of Lennox, J., dated the 13th April, 1918, for $16,118.44. The claim is for the cost of removal of snow from streets of the city, in January and February, 1915, which the plaintiffs contend the defendants are liable for.

Under an agreement dated the 1st September, 1891, between the plaintiffs and one G. W. Kiely and others, set out in schedule A to the statute of 1892 incorporating the defendants, 55 Vict. ch. 99 (O.), the plaintiffs claim:—

1. That the defendants unlawfully deposited snow upon those streets upon which the tracks of their railway are situated without having first obtained permission of the City Engineer, contrary to the provisions of sec. 25 of the said statute.

2. That the defendants in the said months by an electric sweeper swept the snow from their track allowances on the said streets on to the other parts of the said streets, and there unlawfully and negligently allowed the same to remain, although notified by the plaintiffs to remove the same; that the snow so swept and allowed to remain on the sides of the streets was a menace to the traffic upon the streets, and made the same dangerous and out of repair, and that the defendants neglected and refused to remove the same upon notice.

The defendants claim that they have discharged all their duties under the said agreement, and further dispute the correctness of the plaintiffs' claim. By amendment the defendants dispute the jurisdiction of this Court, and claim that the Ontario Railway and Municipal Board, by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 22, have exclusive jurisdiction in the premises, and the plaintiffs were allowed to plead denying the exclusive jurisdiction of the Board and alleging that the legislation which purports so to enact is *ultra vires*.

The clauses referred to, in the schedule to the Act of 1892, are as follows:—

"21. The track allowances (as hereinafter specified) . . . shall be kept free from snow and ice at the expense of the pur-

chaser" (the company), "so that cars may be used continuously," etc., etc.

"22. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks, sixteen feet six inches, and for single tracks, eight feet three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer."

It is declared by sec. 25 of the defendants' incorporation Act, 1892, that:—

" . . . whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

I agree with the learned trial Judge that this Court has jurisdiction.

The Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 22 (from 3 & 4 Geo. V. ch. 37), provides that:—

"The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act."

The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 63 (transferred with some modification to the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 260), provides that where a street railway is operated upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation, and shall make such order as may seem just, and by such order may direct the company or person operating the railway to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain

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from doing such acts as in its opinion constitute a violation thereof; and (sub-sec. 2) for that purpose may enter upon the company's property and may exercise the functions of the directors.

This section was intended to get over the difficulty of forcing the railway company to obey an order of the Board; but it does not deprive this Court of jurisdiction to entertain an action for damages for breach of contract, and the question of *ultra vires* does not arise. In my opinion, therefore, this Court has jurisdiction in the present case.

Clauses 21 and 22 of the agreement, and sec. 25, explaining these clauses, above set out, were considered in the case of *Toronto* v. *Toronto Railway* (1908), 16 O.L.R. 205, by this Court, upon an appeal by the city corporation from the judgment or order of the Railway and Municipal Board, on an application by the city to compel the railway company to desist from throwing the snow which falls upon the track allowances on to the sides of the street adjacent thereto without the permission of the City Engineer, in alleged violation of the said clauses 21 and 22. The Court "held that there was nothing in the above" (clauses and section of the Act) "to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (Meredith, J.A., dissenting) the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed."

The members of the Court were not unanimous as to the meaning of the clauses as explained by sec. 25; Osler, J.A., said (pp. 207, 208):—

"Take the clauses as they stand. The track allowances are to be kept free from snow and ice, at the expense of the defendants, so that the cars may be used continuously—that is, so far as it is necessary to attain that object. If the fall of snow is less than six inches at any one time it must be *removed* from the track allowances as defined, and, if the City Engineer so directs, must be evenly spread by defendants on the adjoining portions of the roadway. But if he does not so direct, there is nothing in clause 22, whatever may be the defendants' obligation at common law not to create a nuisance by doing so, which prevents them from leaving the small falls so removed on the sides of the roadway, where accumulations of successive falls might ultimately cause a serious

interruption of the traffic. Then comes the statute, which forbids the *deposit* on the streets without the consent of the City Engineer. That means, as I understand it, a deposit for the purpose of leaving it there—a final deposit. This must refer to the first branch of clause 22, because the second branch of that clause, which deals with the case of the heavier snowfalls, expressly provides for the removal of that and for the depositing of it at such points on or off the streets as may be ordered by the City Engineer. That is the sense in which the word 'depositing' is used in the second branch of the clause, and the word 'deposit' in the declaratory section is, in my opinion, used in the same sense. When a snowfall of more than six inches occurs, the whole space occupied by the track allowances is, if the City Engineer so directs, to be *at once* cleared of snow and ice, and the material *removed* and *deposited* at such points on or off the streets as the engineer directs. The first object is to ensure the continuous running of the cars. If that can only or most conveniently be accomplished by first throwing the material off the tracks to the sides of the road, then, subject to any further obligation of the defendants, whether under the agreement or at common law, why is not that a perfectly reasonable way of complying with the agreement and the Act? . . . It becomes a question of the reasonable user of the streets within the meaning of the agreement and the Act, and I can see nothing which prevents the defendants from sweeping the small snowfalls or the large to the sides of the road by means of their sweeper, so long as they afterwards deal with it either in accordance with the directions of the engineer or otherwise, so as to prevent it from becoming a nuisance. Thus, their whole duty, whether under the agreement or the Act or at common law, is performed."

Garrow, J.A., after reviewing the sections, reached the conclusion (pp. 210, 211) "then the statute does not . . . alter the situation. It, in fact, helps to support the view which I take—namely, that the company is bound to keep its track open, in order to give a continuous service; to do so it must at its own expense remove the snow and ice. And in dealing with it after removal and so as to prevent an undue interference with the rest of the highway, it must act under the direction of the City Engineer."

He then held that there was no objection to the use of the electric sweeper as a convenient and expeditious mode of removing the

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snow from the track and depositing it temporarily upon the highway at the side. "That is not," he said, "in my opinion, an infraction of sec. 25. 'Deposit' there must mean a deposit of a permanent character, and not one made merely in the course of removal to a permanent place."

Meredith, J.A., was of the opinion that sweeping the snow to the side of the road was depositing it within the meaning of the enactment, and that sec. 25 prohibits such deposit, and was in favour of allowing the appeal.

Moss, C.J.O., and Maclaren, J.A., concurred in dismissing the appeal.

The result of this decision was that the use of the electric sweeper was permissible. This appears to me in effect to decide that the snowfall upon the track and swept to the side was not a deposit within clause 22 of the agreement and sec. 25 of the Act. In my opinion, the effect of the clauses and the Act is to make it imperative upon the part of the railway company to remove the snow and ice, whether six inches or more. If less than six inches, it may be evenly spread upon the adjacent portions of the roadway. If more than six inches, it should be removed and deposited at such point as may be ordered by the City Engineer; and sec. 25 prohibits such deposit upon any street, square, highway, or other public place in the city, without permission of the City Engineer or the person acting as such. In my view, the effect of sec. 25 is not to do away with that portion of clause 22 which provides that, "if the City Engineer so directs," the snow and ice to be removed shall be "deposited at such point or points on or off the street as may be ordered by the City Engineer." In other words, the City Engineer may direct the railway company to deposit the snow and ice required to be removed at any particular point; and, by sec. 25, the railway company shall not deposit the same upon any street etc., without permission of the City Engineer. In the present case the defendants were ordered to remove the snow and ice, and asked direction where it should be placed. This the city authorities refused to give, taking the position that they were not bound to furnish a place whereon the snow and ice might be deposited.

After the best consideration that I can give, I am of opinion that the railway company are not relieved from their obligation

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under the clauses and the sections to remove the snow and ice, even although the City Engineer refuses to name the point where the same may be deposited.

For what then are the defendants liable? They have the right to sweep the snow away under or over the six inches that is to be removed. How is this to be ascertained? It is a question of evidence.

The account was made up, according to the Works Commissioner, by a proportion of the tracks to the whole width of the road, that is, eighteen feet six inches to sixty-six feet, whereas in fact the road exclusive of sidewalk and boulevard is only forty-two feet. This would be in favour of the railway company, and he stated that it actually cost the city to remove the snow which had fallen upon the railway much more than they have charged. The amount was made up (exhibit 5) by sheets shewing the amount paid for labour and for teams for the whole roadway upon which the tracks were laid, and then charging the railway company with their proportion.

These accounts are made up of numerous items shewing the amounts paid for the different streets, Adelaide street, Avenue road, etc., but no witness was called to prove these items; they were simply produced from the books of the city, made up from the returns of the foremen. The foremen were in Court but not called. I understood Mr. McCarthy to say that he did not complain of the proportion of the expense if the amounts were correct. From the evidence one might infer that no more had been charged than a fair proportion to the railway company, but the evidence is of that uncertain character that, if the defendants desire, they should have a reference as to damages only.

The defendants should have ten days to take a reference if they so desire. If not, the appeal should be dismissed with costs. If a reference is taken, the costs of the appeal and of the reference should be in the discretion of the Master, and in other respects this appeal should be dismissed.

MULOCK, C.J. Ex., agreed with Clute, J. Mulock, C.J.Ex.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Lennox in favour of the plaintiffs, the Corporation of the City of Toronto. Riddell, J.

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The defendants, operating an electric railway on and along the streets of the city, failed at certain times to remove from the streets the snow which fell upon their line: after having thrown it off their line upon the other parts of the streets, the city corporation removed it, and now sue the railway company.

There were three points argued before us on this appeal: (1) the jurisdiction of the Court to entertain the action; (2) the liability of the company; and (3) the quantum.

The argument for the defendants on the question of jurisdiction is based upon the provisions of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 21, giving the Board power to investigate complaints that a railway company has failed in its duty under the statutes or agreements, and on sec. 22, which gives the Board exclusive jurisdiction in such matters.

Had the statute given the Board jurisdiction to try actions for damages based on a breach of statutory or contractual duty, there might be much in the contention: but there is nothing of the kind to be found in the statute. The Board cannot award damages; it can order a discontinuance of an improper course etc., and enforce such order; this, however, looks to the future, not the past.

To oust the jurisdiction of the Courts, an enactment must be clear—"there can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament:" *per* Lord Campbell in *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at p. 500, 8 E.R. 190; "the jurisdiction of a superior court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament:" *per* Pollock, B., in *Oram* v. *Brearey* (1877), 2 Ex. D. 346, at p. 348; see to the same effect *Albon* v. *Pyke* (1842), 4 Man. & G. 421, 424, 134 E.R. 172.

(The Board has, in fact, never asserted jurisdiction in such a case.)

(2) To dispose satisfactorily of the second point it would be sufficient (as it seems to me) to bear in mind that the rights and duties of the parties are partly statutory and partly contractual.

The contract is, by sec. 1 of the Act (1892) 55 Vict. ch. 99, sec. 1 (Ont.), declared to be "valid and legal and to be binding upon the . . . parties:" but it is not made a part of the Act, so that it becomes itself statutory, as was the case with the agreement

considered in this Court recently in *Re City of Toronto and Toronto and York Radial R. Co.* (1918), 43 D.L.R. 49, 42 O.L.R. 545. While legal and binding, it is legal and binding as a contract upon the parties, it is no different from any other contract: *City of Kingston* v. *Kingston Electric R. Co.* (1898), 25 A.R. (Ont.) 462, at pp. 468, 469, and cases cited.

But there is the statute itself, and all our Acts are public Acts—Interpretation Act, R.S.O. 1914, ch. 1, sec. 8. Whatever those seeking the Act intended or supposed, we cannot go behind the language of the statute—nor, where the language is plain and unambiguous, can we look to the supposed purpose of the legislation: *Steele* v. *Midland R. Co.* (1866), L.R. 1 Ch. App. 275; *North British R. Co.* v. *Tod* (1846), 12 Cl. & F. 722, 8 E.R. 1595. S. 25 of the Act (1892) 55 Vict. ch. 99 (Ont.) says in effect that, whatever the parties may have meant in clauses 21 and 22 of their conditions, the "company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer . . . ."

This is a statutory prohibition in no way affected by anything the parties may have agreed to or supposed they had agreed to. Every citizen of Toronto is as much entitled to the protection of this section as the city corporation, and a wilful violation of it is undoubtedly an indictable offence under sec. 164 of the Criminal Code, R.S.C. 1906, ch. 146.

When the company appeals to clauses 21 and 22 of the conditions, the answer is plain—"Whatever these sections may on their face mean, whatever we thought that they did, must, or should mean, no such meaning, real or supposed, is to give you the right to deposit snow on the streets without the permission of the Engineer."

Of course nothing in the way of estoppel can be claimed against the city—it cannot legally violate a statute, or give permission to violate a statute: any contract purporting to give such permission is merely void and does not create an estoppel: Halsbury's Laws of England, vol. 13, pp. 379, 380, para. 537, and cases cited in notes (*n*) (*o*) (*p*), on p. 380.

As Bowen, L.J., tersely puts it in *British Mutual Banking Co.* v. *Charnwood Forest R. Co.* (1887), 18 Q.B.D. 714, at p. 718:

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"If they cannot contract, how can they be estopped from denying that they have done so?"

We are concluded by the decision of the Court of Appeal in *City of Toronto* v. *Toronto Railway*, 16 O.L.R. 205, to hold that the mere removal by the company of the snow from their tracks upon the other parts of the street is not a "deposit" of such snow under the Act. Mr. Justice Garrow, at p. 211, says: "'Deposit' . . . must mean a deposit of a permanent character, and not one made merely in the course of removal to a permanent place." Moss, C.J.O., and Maclaren, J.A., seem to have agreed with Mr. Justice Garrow, while Meredith, J.A. (now C.J.C.P.), thought "deposit" would cover even a deposit made in the course of removal.

In the present case there was no intention on the part of the company to remove the snow from where it was placed on the street—so that the deposit was not made merely in the course of removal. I think this deposit was in violation of the statute, and the act was an actionable tort.

Even if the company can appeal to conditions 21 and 22 (and if we assume that these could qualify the statute), I do not think the defence will be advanced.

Number 21 makes provision for the track allowances being kept free from snow and ice so that the cars may run continuously, and it requires no further consideration; it gives no right to, it imposes an obligation on, the company; nor does No. 22 give the company any rights—that would dispose of the defence. But, in view of the stress laid upon this condition, it may be well to state my conception of its meaning. It has been interpreted by Mr. Justice Garrow in the case in 16 O.L.R., but his remarks are *obiter;* and we are not bound by his views. Approaching the question independently, in the interpretation of this as of any other contract, "all the surrounding circumstances must be taken into consideration—the law does not deny to the reader the same information that the writer enjoyed: he is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language . . . :" Addison on Contracts, 10th ed., p. 43, and cases cited.

The fact that the agreement with the conditions is made valid

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by Act of the Legislature does not change the rules for its interpretation. The effect of the validation is to give every part statutory validity, but, I think, no more: *Corbett* v. *South Eastern and Chatham Railway Companies' Managing Committee*, [1906] 2 Ch. 12, at p. 20, and cases cited.

It should be borne in mind that the contract was to run for many years, 30 if legislation could be procured: it is therefore likely that the parties intended to provide for all cases which might be expected to arise. In our climate the winter's snow is a most important feature: and it was to be expected that all its vagaries would be kept in mind in the making of the contract.

The clearing of the track allowances being already provided for by condition 21, the ultimate disposition of the material so cleared off the track allowances is the subject of condition 22.

At the time the contract was entered into, 1891, the automobile had not made its appearance to lend a new joy—and peril—to life; in winter the usual conveyance in time of snow was the sleigh, the cutter, not the wheeled vehicle—a certain amount of snow was a desideratum, but too much was to be feared lest the spring thaw should flood the drains and fill the cellars.

The city by this condition reserved or received the right to control the disposal of the cleared matter (through the command of their engineer)—whether to better the sleighing in the streets or to prevent it being injured. In my opinion, condition 22 was intended to cover every eventuality, and the word "but" must be given its full adversative force. All difficulty may be got over by interpreting the earlier part of the condition by the latter, and reading it as though it would read when transposed, "If at any one time the fall of snow is less than six inches," and not "If the fall of snow at any time is less than six inches." The latter interpretation, it seems to me, has insuperable difficulties—no period is set for the "one time," a day, a week, a month, or less or more—nor can "one time" fairly mean "one occasion" or "one storm:" it seems to me that, reading the whole section, what was in mind was not the depth of snow which might fall in any particular period, but the condition of the streets for runner traffic. Six inches was, I think, thought by the city a desirable depth for snow, beyond that, rather a danger at any (one) time. When the depth separating the runners from the pavement was less than six inches,

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the city reserved the right to compel the company to place their removed material on the streets and to spread it evenly on the adjoining parts thereof, and this was not for the advantage of the company but for that of the city. When the accumulation of snow, ice, etc., was more than six inches, the city had the right, through its engineer, to compel the company to place the snow on any part of the street they chose, but not to spread it evenly at all. Surely this was to enable the city to have snow placed on those parts of the streets where there was a deficiency of "bottom"—the company bring their snow etc. and place it where directed, and the city spread it as the state of the road requires. There may be no need of snow for the streets at all: in that case the City Engineer would direct its removal elsewhere.

There is no difficulty in interpreting "the fall of snow" as meaning "the quantity of snow theretofore fallen;" we speak of the fall of snow for a year or a month, meaning the snowfall up to the end of the year or the month. The difficulty lies in the fact that in our climate snow does not always or generally lie long: the day-time sun melts and the night-cold freezes, rains come, and we have slush with all its discomforts—consequently the depth of the snow on the streets will generally not be as great as the snowfall up to that time. But I think that the parties were considering the state of the streets existing "at any one time," i.e., "at any particular time"—not the depth of the snow as it fell—and that they used the words "the fall of snow" in the same sense as "the quantity of snow or ice, etc.," in the latter part of the condition, i.e., the depth of the matter on the street, the product of the snow falling.

This interpretation, no doubt, has its difficulties, but they are not greater, but in my view less, than any other so far suggested.

In any event, however, as I have said, these conditions are not a defence for these defendants. The defendants then unlawfully placed a quantity of snow on the streets of the city, and are liable to an action in tort. The whole amount claimed in this action, however, is for the cost of removal of the snow which they threw on the street at times at which the snowfall in a snowstorm was more than six inches—the information being derived from the Meteorological Observatory. It must be admitted that, when there has been a snowfall of more than six inches on the level, it may be taken for granted that "the quantity of snow or ice, etc.," at that

time, is more than six inches, and the second part of condition 22 applies, so as to give an action also in contract. But a difficulty in the way of the city suing in contract is said to arise from the alleged fact that the duty of removal under this clause arises only when the City Engineer directs not only the removal but a "point or points on or off the street" for the deposit. There was a direction to remove; and I think the direction to deposit some place off the streets etc. of the city was a sufficient direction as to "point or points"—there being an infinity of points outside the forbidden space, any of which would satisfy the Engineer. The defendants might complain if the Engineer were too stringent and exacting, but not, I think, that he left them the whole world of land and water to choose from, saving only parts of one little city. The plaintiffs can, therefore, in my view sue in contract.

But it is unnecessary to decide that an action in contract lies: there is an action in tort, and the measure of damages is not different in the two classes of cases.

3. As to the quantum, I think the plaintiffs have claimed a much smaller sum than they could rightfully recover, and therefore the defendants have not much to complain of. But the evidence is loose and not conclusive; and, if the defendants so desire, they should be allowed a reference as to damages.

If the defendants so elect, the plaintiffs should have leave to amend, claiming a larger sum.

The defendants electing within ten days, they may have a reference as to damages only, with leave to the plaintiffs to amend; in which case the costs of the appeal and reference will be in the discretion of the Master, and the defendants will pay the costs up to appeal; if the defendants do not so elect, the appeal will be dismissed with costs.

I am unable to see that any argument can be based by either party upon the application before His Honour Judge Winchester, and the award thereon of the 5th March, 1914.

I have received from the Chairman of the Ontario Railway and Municipal Board the following communication:—

"The attitude taken by the Board is identical with the view you express. If complaint is made that an agreement between a municipal corporation and a street railway company under the

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Board's jurisdiction is not being performed, and an order of the Board is sought compelling performance in specie, the Board entertains jurisdiction, and in a proper case makes an order. But, if the claim is merely in debt or damages—for a sum of money certain or capable of being ascertained in respect of a breach of contract—the Board has taken the ground that such a claim should be sued for in the Courts, and does not fall properly within its jurisdiction."

Sutherland, J.

SUTHERLAND, J., agreed with Riddell, J.

Kelly, J.

KELLY, J.:—In the months of January and February, 1915, the respondents expended large sums of money in the removal from their streets of snow and ice, part of which, they say, the appellants were under obligation to remove, and having failed in that obligation, the respondents were compelled to remove. To recover the cost of the removal of that part, this action was brought, and judgment was given on the 13th April, 1918, in the respondents' favour for $16,118.44 and costs. From that judgment the railway company now appeal.

The respondents base their claim chiefly upon Nos. 21 and 22 of the conditions attached to the agreement of the 1st September, 1891, between the persons named therein as purchasers and the city corporation, which agreement, with the conditions and tenders therein referred to, was validated by 55 Vict. (1892) ch. 99. By sec. 25 of that Act, conditions Nos. 21 and 22 were interpreted and construed.

Condition No. 21 is as follows:—

"The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously; but the purchaser shall not sprinkle salt or other material on said track allowances for the purpose of melting snow or ice thereon without the written permission of the City Engineer, and such permission shall in no case be given on lines where horse power is used."

And condition No. 22:—

"If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces here-

inafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks sixteen feet six inches, and for single tracks, eight feet three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer."

Section 25 of the Act is:—

"25. And whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

For this removal from the track allowances the appellants made use of electric sweepers, which, by means of revolving brushes, throw the snow and ice on to the part of the pavement adjoining the track allowances. The right to use these sweepers was considered by the Court of Appeal in November, 1907, on an appeal by the city corporation from an order of the Ontario Railway and Municipal Board, and by a judgment of that Court on January 22nd, 1908, *City of Toronto* v. *Toronto Railway*, 16 O.L.R. 205, it was held that there was nothing in the conditions above referred to, or in sec. 25 of 55 Vict. (1892) ch. 99, to prevent the company from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (Meredith, J.A., dissenting) that, the purpose of the application having been to prevent the use of sweepers altogether, the appeal should be dismissed. Written reasons were given by three of the five members composing the Court. Two, Garrow and Meredith, JJ.A., were of opinion that in all cases the company were bound to remove the snow and ice after sweeping it to the side unless the City Engineer directed that it should be spread there. Osler, J.A., stated that, when the snowfall was less than six inches at a time, the company might leave it at the side of the road unless that would create a nuisance. The other members of the Court (Moss, C.J.O., and Maclaren, J.A.) concurred in dismissing the appeal.

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I call attention to the fact that the issue there was the right to use electric sweepers. It is manifest from a perusal of the reasons for judgment that there is no declaration of even a majority of the Court that, while the company were not exceeding their rights in using these sweepers, and thus throwing the snow and ice upon the part of the roadway adjacent to the track allowances, they were at liberty to deposit the material, and so let it remain there permanently.

The company's defence in the present action sets up that they have carried out all the obligations imposed upon them with regard to the removal of the snow and ice; that the removal thereof by the city was voluntary; and that, even if the alleged expenditure was made, the money was not expended *bonâ fide* and for the purpose alleged in the claim, but was recklessly and wastefully expended for other purposes than the ostensible purpose of removing the obstruction to traffic.

An objection to the jurisdiction of the Court to entertain the action was also urged, on the ground that such jurisdiction now rests with the Ontario Railway and Municipal Board. My opinion is that the jurisdiction of the Court to hear and determine an action such as this is not ousted by the legislation from which the Board derives its powers.

The first obligation imposed upon the company by the conditions above referred to is that the track allowances shall be kept free from snow and ice at the company's expense, so that the cars may run continuously. Any doubts that might have arisen from the peculiar wording of condition No. 22 in regard to the company's obligation as a consequence of keeping the track allowances free from snow and ice in the manner directed by condition No. 21, are set at rest by the interpretation put upon these conditions (21 and 22) by sec. 25 of the Act, that the company "shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

The judgment of the Court of Appeal above referred to declares the right of the company to use electric sweepers in clearing the track allowances, and though in this operation snow, ice, and other material so cleared are thrown upon the adjoining portion of the pavement, the judgment does not expressly say and does not

necessarily imply that the material when so thrown may remain where thrown without further obligation upon the company.

As I read the reasons for the judgment of the Court in the light of conditions 21 and 22 and of sec. 25 of the Act, and having in mind that the only issue then involved was the right to use these sweepers, the judgment went no further than to sanction their use as one step in the process of clearing the tracks and making such disposition of the ice, snow, and other material as the company are called upon to make by these conditions, as explained and interpreted by sec. 25 of the Act. It could not have been intended to override the positive language of this legislation, nor can it successfully be argued that the judgment gave unqualified judicial sanction to an act which in itself might create a nuisance on the highway. On the evidence there can be no doubt that the snowfall which caused the accumulation, the removal of which has resulted in the present action, exceeded six inches. It is equally clear that, if not removed promptly from the portion of the pavement adjoining the track allowances where it had been thrown in the process of its removal from these track allowances, it would have been a source of great danger to those using that part of the street for purposes of ordinary and usual traffic.

But it is urged by the appellants that, even if under obligation to remove from the streets snow, ice, or other material, etc., so cleared from the track allowances, it was not their duty to do so until the City Engineer had directed and indicated the place to which such material should be removed, thus implying that it was the duty of the respondents, through their engineer, to provide a place or places for that purpose. That seems an unreasonable interpretation to put on these conditions. When taken together, and as interpreted by sec. 25, what was evidently aimed at was that the company, when under obligation to remove from the part of the street adjacent to the track allowances material (snow, ice, etc.), cleared from the tracks, should not be at liberty to deposit it on other parts of these streets or on any street, square, highway, or public place in the city, unless with the permission of the City Engineer, and that in such case it must be deposited in such places as the City Engineer would not object to. What the Engineer did in this instance was to notify the company to deposit the snow, ice, and material now in question at some point "off the streets, squares, highways, and other public places in the city;" in other words, he

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stated his objection, and in plain language refused his permission to the deposit being made on any of these places—the very places prohibited by the conditions and sec. 25 referred to, unless with his permission.

The permission having been thus refused, it by no means follows that the respondents had any duty to select a place outside of these restricted or prohibited places where the deposit could be made. What the respondents were concerned in was that the place of final deposit chosen by the company should not be a place to which they (the respondents) had a right to object and did, through their Engineer, object. So far as it mattered to the respondents, all other places outside of these prohibited places were available to the company for that purpose, and if the company desired to make final deposit on any street, square, highway, or other public place in the city, of any snow, ice, or other material which they were under obligation to remove, that could be done only with the permission of the City Engineer or the person acting as such.

The Engineer's permission not having been obtained, and particularly when it was made clear to the company that it would not be granted, it was then for the company to determine where, outside of the prohibited places, the final deposit should be made. This view is not inconsistent with the conditions of the statute.

The appellants also object that the amount for which judgment has been given was not strictly proven at the trial.

An analysis of the statement setting out the claim shews clearly that the amount of it, if satisfactorily proven, is by no means excessive, but on the contrary that it is made up with liberality in favour of the appellants. Though proof was not made strictly, it seems to have been regarded by both parties as sufficient. If, however, the appellants desire proof with that strictness which they are entitled to exact, an opportunity should be afforded in a reference for that purpose, but at their risk as to costs; and, if the matter be so opened up, the respondents should be at liberty, if so advised, to amend their claim so as to meet the facts if the claim as already submitted is over-generous in amount to the appellants.

The respondents should have their costs to the time of the appeal; and, if the appellants elect to have the reference suggested above, then costs of the appeal and of the reference will be in the Master's discretion; if the appellants do not elect, the appeal will be dismissed with costs.

Appeal dismissed, subject to a reference as to damages if desired.

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N. B.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Grimmer and Chandler, JJ. April 17, 1919.

JUDGMENT (§ I F—46)—MOTION FOR—LEAVE TO DEFEND—N.B. JUDICATURE ACT—ORDER 14.

Judgment on a specially endorsed writ for the amount endorsed on the writ, with interest and costs, should only be ordered under order 14 of the New Brunswick Judicature Act, 1909, where assuming all the facts in favour of the defendant, they do not amount to a defence in law, and where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court, either by having judgment entered against him or by being put under terms to pay money into court as a condition to obtaining leave to defend.

[*Neil* v. *Balmain* (1912), 11 D.L.R. 294, 41 N.B.R. 429, followed.]

Statement.

APPEAL by defendant from judgment and order of McKeown, C.J. K.B.D., allowing plaintiff to sign summary judgment under the provisions of O. 14 of the Judicature Act, 1909.

B. L. Gerow, supports appeal; *M. G. Teed*, K.C., *contra*.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This is an appeal by the defendant from an order of the Chief Justice of the Court of King' Bench made under the provisions of O. 14, authorizing the plaintiffs to sign judgment on a specially endorsed writ for the amount endorsed on the writ, with interest and costs.

The law which should govern in applications of this sort is set out in the judgment in the case of *Neil* v. *Balmain* (1912), 11 D.L.R. 294, 41 N.B.R. 429, wherein it was decided that the defendant is entitled to leave to defend if the facts submitted by him which he alleges he can prove, raise a defence which ought to be tried. This judgment followed the law as laid down in *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262, which decided that judgment should only be ordered under O. 14 where, assuming all the facts in favour of the defendant, they do not amount to a defence in law; and that where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court either by having judgment entered against him or by being put under terms to pay money into court as a condition to obtaining leave to defend. In the language of Lord James of Hereford, the view which ought to be taken of O. 14 is that the tribunal to which the application is made should simply determine —is there a triable issue to go before a court or jury? It is not for

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that tribunal to enter into the merits of the case at all, and it ought to make the order only when it can say to the person who opposes the order—you have no defence.

The respondents claim a balance due them of $30,533.31, on an account arising out of a stock speculation. On the application for summary judgment, the appellant made affidavit that the respondents were engaged in supposed buying and selling of stocks for the appellant on margin, and that the respondents did not, at any time, deliver any of said stocks and securities, in pursuance of any alleged purchase or sale either on margin or otherwise to the appellant, and that the appellant did not, in connection therewith, ever deliver any stocks or securities to the respondents; and the appellant also claimed that he had been instructed by his solicitor that he believed that such transactions on margin where there has been no delivery of said stocks or securities by the plaintiff to the defendant or from the defendant to the plaintiff, are illegal, and alleged that his defence went to the whole part of the respondents' claim. These facts and others were embodied in an affidavit that was laid before the Chief Justice of the King's Bench, and in reply thereto affidavits were read by John H. McLean, a former manager for the respondents, and R. H. Metzler, which alleged that the appellant had signed a letter of acknowledgement of his liability to the respondents in his (McLean's) presence in the office of the respondents, who were acting as brokers for the appellant in a purchase of stocks and securities on commission and on order of the appellant, and denied the statement that no stocks or securities were actually bought by respondents for the appellant or sold by them for him. The affiants further alleged that the respondents purchased the stocks and bonds as ordered, and were always prepared to deliver the same to the appellant on payment of the amount unpaid to them on the purchase-price and interest, and that the appellant never paid the full amount of purchase-price of any stocks bought for him and never asked for or received delivery thereof, and that the respondents were always ready to deliver the same to the appellant upon payment, and that they held the same as security for advances made by them for him. After these affidavits had been read, time was granted to the appellant, who made an affidavit at a later date in which, after again affirming according

to his knowledge, information and belief, no stocks or securities of any kind were actually bought or sold by the respondents for him, alleged that a short time after the commencement of the said dealings and transactions and up to the time of their consummation, John H. McLean, the manager of the respondent company, took absolute charge or control over said dealings and transactions, and furthermore that he, the appellant, was not allowed thereafter to have any say or opinion regarding subsequent alleged purchases and sales of stocks and securities. He also repeated in another paragraph that the said manager took absolute control of the said account, and at a time when he was supposed to be indebted to the respondents in a sum not exceeding $1,000, which indebtedness accrued through the manager's bad advice on the rise and fall of stocks on the stock market, and that the manager requested him after admitting that his (the manager's) advise was responsible for the losses, to hand over to him for his exclusive control and management the said account, which the appellant did on the understanding that the appellant would endeavor to pay said alleged indebtedness; that the manager said respondents would not hold the appellant responsible in any manner, and that the said manager would, in the meantime, handle the account which would continue to be run in the name of the appellant; that the respondents' manager thereupon took over the account and informed appellant on several occasions that the account was getting in a worse financial state, and in spite of protests on the appellant's part the manager continued to control and operate the account in the appellant's name on his own initiative exclusively, without consulting the appellant, and continued to handle and operate it until the appellant was notified by the respondents as to his alleged indebtedness. No affidavit in reply to this was read before the Chief Justice of the King's Bench.

Without expressing any opinion on the merits of the case, I am of opinion that there is a triable issue to go before a jury or a court. I do not think it can be said to the appellant when opposing the order—"You have no defence. You could not by general demurrer if it were a point of law, raise a defence here. We think it impossible for you to go before a tribunal to determine the question of fact." On the other hand, it does appear to me that

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there is a fair issue to be tried by a competent tribunal, and that the order of the Chief Justice of the Court of King's Bench ought to be reversed, the respondents to pay to the appellant the costs both here and below. *Appeal allowed.*

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EX. C.

THE KING v. McCARTHY.

Exchequer Court of Canada, Audette, J. March 17, 1919.

EXPROPRIATION (§ III C—135)—AGREEMENT OF SALE—AUTHORITY OF MINISTER — JURISDICTION — ARBITRATION — COMPENSATION — SHIPYARD — EARNING CAPACITY — MARKET VALUE — ABANDONMENT—DAMAGES—SEVERANCE.

The Dominion Government, for the purposes of its shipyard at Sorel, Quebec, expropriated some shipyard property on Richelieu and St. Lawrence rivers. The owners, claiming compensation, set up an agreement for the purchase of the property on behalf of the Crown entered into by the Minister of the Public Works, providing that payment therefor should be established by arbitration, and they contended that the Exchequer Court had therefore no jurisdiction to hear and determine the matter of compensation.

Held, that as the agreement failed to comply with the requirements of art. 1434 of the Quebec Code of Civil Procedure, it was invalid as submission to arbitration, and as no time was fixed the submission was revocable, by virtue of art. 1437, at the option of either party, and under the English common law at any time before the award.

2. The King has the undoubted right attached to his prerogative of suing in any court he pleases.

3. The Minister had no power, unless authorized by an order-in-council or statute, to bind the Crown with such agreement.

4. In fixing compensation for the expropriation of such property its "earning capacity" cannot be taken as the basis of the market value; the best test is what similar property sold for in the immediate neighbourhood.

5. In the valuation of the wharves, regard must be had to their present condition and allowance made for their depreciation.

6. Where part of the land expropriated was abandoned by the Crown, *held* that the owners were entitled to compensation for the use and occupation of the land for the period held by the Crown, but that they could not claim any damages for injurious affection or severance of the land, inasmuch as the severed portion did not form a unit of the land expropriated, and was, in fact, severed by a highway, apart from the fact that the abandoned land was sufficient for a shipyard at Sorel.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

E. Lafleur, K.C., *E. H. Godin*, K.C., and *F. Lefebvre*, K.C., for plaintiff; *D. R. Murphy*, K.C., *A. Perrault*, K.C., and *P. St. Germain*, K.C., for defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby certain lands at Sorel, P.Q., were taken and expropriated, by the Crown, for the purposes of "The Sorel Government Shipyard," by depositing, on December

18, 1915, a plan and description of such lands in the office of the registrar of deeds for the City of Sorel, P.Q., in which registration division the lands are situate.

Under such plan and description, as set forth in the information, the lands taken were composed of:—Area: Parcel No. 1, eastern part of lot 82, 98,000 sq. ft.; 2, eastern part of lot 84, 114,400 sq. ft.; 3, lot No. 85, 280,000 sq. ft.; 4, south-east part of 86, 32,300 sq. ft.; making in all, 524,700 sq. ft., together with wharves and all *constructions* on such land erected both by the Crown and the suppliants.

During the pendency of the trial, namely, on January 24, 1919, the Crown, under the provisions of s. 23 of the Expropriation Act, abandoned the whole of parcel No. 1, eastern part of lot 82, 98,000 sq. ft., together with an area of lot 85 of 45,163 sq. ft., making in all 143,163 sq. ft., which, being deducted from the total area of 524,700 sq. ft., leaves, as admitted by the parties, a total area expropriated of 381,527 sq. ft.

The Crown, by the information, offers the sum of $30,000 for the total area expropriated in 1915, and the defendants claim by their plea the sum of $378,400, made up as follows:—Land, $272,630.40; buildings, $19,500; wharves, $40,823; erections, jack screws, etc., $1,046.60; total, $334,000; adding 10%, $33,400; preparation of case, costs of plans, experts' services, expert witnesses and counsel, $11,000; grand total, $378,400.

The pleadings, either on behalf of the plaintiff or the defendants, have not been amended since the abandonment.

The sum of $1,046.60 has not been proven and has been abandoned by counsel for the defendants.

As a preliminary plea to the present proceedings, by information under the Expropriation Act, the defendants set up the agreement of September 5, 1898, whereby, among other things, the defendants promised to sell and the then Minister of Public Works promised to buy the property in question upon the payment of a sum to be established by arbitration—and they contend that the Exchequer Court is not the proper forum to hear and determine this matter, but that it should be submitted to a tribunal of arbitration.

As between subject and subject, under art. 1434 of the Code

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of Civil Procedure, the submission must state the names and additions of the parties and arbitrators and the delay within which the award of the arbitrators must be given. If this agreement or promise of sale on the one hand, and promise to buy on the other, can be treated as a submission, it fails to be valid under the provisions of the Code. Then under art. 1437 of the Code, "if the delay is not fixed, either of the parties may revoke the submission when he pleases"—and that is what was done in the present case. If the subject has the right to avail himself of these provisions, why would the Crown not have the same privilege?

Under the English common law a submission to arbitration was always revocable at any time before the award was made. *Gauthier* v. *The King* (1915), 33 D.L.R. 88, 15 Can. Ex. 444; (1917), 40 D.L.R. 353, 56 Can. S.C.R. 176.

Then the King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

Chitty on Prerogatives (1820), at p. 244, dealing with actions "by the King and Crown," says:—

> In the first place, though his subjects are, in many instances, under the necessity of suing in particular courts, the King has the undoubted privilege of suing in any court he pleases. . . . The Crown possesses also the power of causing suits in other courts to be removed into the Court of Exchequer, where the revenue is concerned in the event of the proceeding, or the action touches the profit of the King, however remotely, and though the King be not a party thereto.

Moreover, there is the important question as to whether the Minister of Public Works could, under the circumstances, and without valid authority, bind the Crown. Unless authorized by order-in-council or by statute, a Minister of the Crown cannot bind his government. The Minister of Public Works, in the matter in question, has obviously no power to enter into such an agreement as set forth in ex. No. 24, without proper authority, and without the same he cannot bind the Crown in that respect. The question is so elementary that I shall confine myself in that respect to citing a few cases establishing that proposition, although the authorities are very numerous: *Quebec Skating Club* v. *The Queen* (1893), 3 Can. Ex. 387; *Jacques-Cartier Bank* v. *The Queen* (1895), 25 Can. S.C.R. 84; and *The King* v. *The Vancouver Lumber Co.* (1914), 41 D.L.R. 617, 17 Can. Ex. 329, affirmed on appeal to the Supreme Court of Canada on the 4th December, 1914.

Therefore the plea to the legality of the present proceedings in *that respect* is set aside.

Coming now to the question of compensation.

The property in question is situate at St. Joseph de Sorel, P.Q., on the south-east side of almost the mouth of the Richelieu River, where it meets with the St. Lawrence, at about 1,000 ft. from the St. Lawrence. It originally formed part of the seigniory granted to Monsieur de Saurel, on October 29, 1672, where he had built, in 1665, a fort for the protection of the inhabitants from the incursion of the Indians. Then the seigniory was, under the English regime, in 1781, bought for the Government by Sir Frederick Haldimand, the then Governor and Commander-in-Chief: Tenure Seigneuriale, Pieces & Documents, 272; Bouchette (*ubi supra*); Archives Canadiennes—1759, 1791, Short & Doughty, 539.

From Bouchette's "Description Topographique de la Province du Bas Canada," published in 1815, we find that while the "*magasins, casernes et batiments du Gouvernement*" were on the south-east side of the river, that the lots in question, on the west side of the river, were even at that early date used as a shipyard. See pp. 224 and 227. The predecessors in title of the present defendants, their father and uncle, and the Molsons before Confederation, were also using the property as such. Witness Beauchemin says that the McCarthys, to his knowledge, were building at Sorel, from 1858 to 1870 or 1872. They were at Sorel when he arrived there in 1856—and adds, he does not know how long before his arrival they had been building there. Therefore, it may be almost said that these lands were, from time immemorial, used as private shipyards.

While this property is a shipyard with many obvious advantages, it is not to my mind the paragon shipyard which seems to exist in the minds of some of the witnesses called for the owners, who, actuated with the desire of proving overmuch, prove nothing which would have the effect of leading the court to a fair assessment of compensation herein.

Up to the time of the expropriation it was a shipyard with a somewhat limited capacity, where no very large vessels were ever constructed. Among the largest vessels built there were the "Acadia," 225 feet long, the "Fielding," and on lot 82 the "Quebec," of a length of 288 ft. The main works of the yard really

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consisted mostly in yearly repairs to the several crafts wintering in the River Richelieu, and the construction of comparatively small boats and tugs. To build vessels up to 400 ft., the ways now in existence would be of no use. New ways would have to be built diagonally, and some of the buildings removed to allow of it, as established by the evidence.

On behalf of the defendants five witnesses were heard, who respectively valued the land alone as follows, viz.: witness Fraser, at 60 cents; witness Swan, at 50 cents; witness Noble, lots 84 and 85 at 75 cents, and lot 86 at 56 cents; witness Bishop, at 50 cents and witness St. George at 74 cents.

On behalf of the Crown, witness Giroux valued the same lands at 2½ cents and witness Couture at 2½ to 3 cents.

How can we resolve this equation and reconcile such gap and difference in this valuation, if not by analyzing on the one hand the basis of such opinion, and on the other by the comparison of the prices paid in sales of properties in the neighbourhood—a most cogent manner to arrive at the real market value of such property.

Let us now consider upon what basis these several valuations were arrived at. Witness Fraser, when valuing the land at 60 cents (a valuation which would give for the 524,700 ft.—$314,820), says the way he arrived at that price is by considering that he would have to pay that sum for the land at any other site that had labour and deep water. He values, he says, the shipyard on its earning capacity. While on some occasions property has a special value attached to the locality within which it is situate, the fallacy of valuing it on its earning capacity is too obvious.

The land is looked upon merely as so much land, entirely apart from the *personality* of its owner. It might well be that two rival tradesmen held adjacent lots of land on the same street, similar in all respects, upon which they maintained their respective shops. One of them, by reason of shrewdness, foresight and good fortune, might be deriving a large return from his business and would doubtless be unwilling to sell his land, and thus break up his established trade, for a sum considerably in excess of its market value—while the owner of the adjacent store, who found himself losing money from day to day, might be glad to dispose of his property at considerable sacrifice. If, however, the two stores were taken by eminent domain, the *measure of compensation would be the same in each case.* . . . The productive value of land, or the value of the land to its owner, based on the income he is able to derive from his use of it, is not the measure of compensation and is not material except so far as it throws light upon the market value. In other words, what

is sometimes called the *value in use* is everywhere repudiated as the test. So also the compensation cannot be measured by the value of the property to the party condemning it, or its need for that particular property: Nichols on Eminent Domain (1909), pp. 662, 663. Market value, and market value alone, is the universal test.

It would indeed be fallacious to increase or decrease the market value of a property by reason of the large or small business carried on upon the same by a particular individual, or to arrive at a conclusion upon the conjecture or surmise of such a consideration. *Pastoral Finance Ass'n* v. *The Minister*, [1914] A.C. 1083; *Lake Erie & N. R. Co.* v. *Schooley* (1916), 30 D.L.R. 289, 53 Can. S.C.R. 416.

Indeed, the "earning capacity" of a property depends mater - ally, if not exclusively, upon the industry, business energy, capacity of the individual, and upon the capi al at his disposal, who carries on his trade or business upon the property. It might, however, apply to a lesser degree in respect of a farm used for agricultural purposes. This property for years back has returned to its owners, under leases, $1,600 a year for a while, and in latter years $1,200. Should this be the exclusive test? This witness proceeded upon a wrong basis, and his evidence is of no avail to a court desirous of arriving at a just and fair market value of these lands.

Witness Swan says he does not know the value of property at Sorel; but to get at his valuation, he adds up all the *va ues* and finds that the land in question is worth 50 cents a foot. He assume: the McCarthy property has railway communication, while the spur runs only on government property.

Witness Noble, who values lots 84 and 85 at 75 cents, and lot 86 at 56 cents, bases his price on what a shipyard can do and can produce. The same observations made as to witness Fraser will equally apply to this witness, who would in the result make as part of the market value the prospective profits which might be derived from the property. He takes into consideration he fact that the land is sheltered and that there is no trouble from ice. This last point is, however, qualified in the evidence.

Witness Bishop, who values the land at 50 cents, lived most of his life 'n the United States. He examined the McCarthy property on January 7, 1919, and since the month of April, 1917, has been engaged in purchasing and designing the construction of hipyards at Portland, Tacoma, New Jersey, Savannah, Georgia, New

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Orleans, Port Huron, Michigan and in British Columbia. He arrived at his valuation by taking into consideration the amounts that were paid for land either upon rental basis or purchases at these several places. The danger of such basis is that while the value of land at the places above mentioned might be worth that amount, he entirely overlooks the market price of property at Sorel.

Witness St. George, who values the land alone at 74 cents a foot, has a way of his own in arriving at that conclusion. He tells us that in arriving at that valuation, he is not basing himself at all upon the market price of real estate in that vicinity—stating it has nothing to do with it. But he takes the adjoining government property to the north of the McCarthy property, forming the corner at the meeting of the Richelieu and the St. Lawrence, which he says is "very low land," *not a very suitable* site for a shipyard, and calculating the cost of putting this adjoining property in the same condition as that of the defendants, he arrives at his estimate of 74 cents, notwithstanding that he considers he would have on that property, to build crib-work, wharves on the St. Lawrence to protect it, to prevent the ice breaking in and damaging the vessels moored in front, besides piling, filling and dredging. He says the figures he has made with respect to this government property are higher than they would have been had he taken the Sincennes-McNaughton property as the object of comparison. This mode of arriving at the value of property at Sorel would be rather amusing if it were not so illogical. Were the court to adopt this witness's figures and allow 74 cents a foot, which for the land alone would amount to $388,398, perhaps from no one more than from this witness, when off the witness stand, would it readily evoke an exclamation of astonishment. There is no parity between the two properties. It is of no help or assistance. Why was not such parallel established between the defendants' property and the several pieces of land going up the River Richelieu? It would have been more consonant, and from the McCarthy property travelling south-east up the river there are a number of properties available for shipyards, both below and above the bridge. Witnesses might be competent to pass upon the desirability and the selection of a site for the purposes of a shipyard, and choose its equipment and plant, and yet might prove wanting in the neces-

sary knowledge of the local market value of the land required for the same. The engineering and mechanical knowledge does not necessarily carry within its sphere the knowledge to properly appreciate the local market value of real estate, approached with the consideration of proper elements freed and untrammelled from the consideration of the value of land in other localities that have no common basis of comparison.

On behalf of the Crown, two witnesses, Giroux and Couture, were heard in respect of the value of the land, the former placing a value of 2½ cents per square foot, and the latter 2½ to 3 cents a square foot. These two witnesses, to arrive at this conclusion, compare the property in question with properties similarly situated at Quebec, Levis, Lauzon and Sorel. Indeed, the prices paid at Sorel in the several cases mentioned by them is, in a number of cases, most apposite and most cogent evidence. Among the sales at Sorel, mentioned by witness Giroux, is that of lot 81, to Sincennes-McNaughton, composed of 4 arpents and 33 perches, on January 17, 1905, and immediately adjoining lot 82, for $3,000—around 2 cents a foot. Lot 56, above the bridge, of an area of 8 arpents and 88 perches, sold on June 7, 1918, for $3,100—used as shipyard—which is less than 1 cent. Then lots 76 and 81, composed of 10 arpents, were offered to witness, on the 8th or 9th December, 1918, for $30,000, which is equal to about 8 cents a foot. Witness Larocque also offered this property to Dr. McCarthy, a couple of years ago, for $30,000 or $35,000, reserving, however, the right to winter and moor his vessels in the front.

Witness Couture, while valuing the defendants' property at so much a foot, as above mentioned, valued it as a whole at $22,000, and in that price he includes everything, not having the intention, he says, to make the government pay for the wharves it (the government) has built. I think, upon this argument, he is somewhat astray, because while the government has built some wharves, the defendants or their predecessors in title, had also built some which are still in existence and which go to increase the value of the property. This witness says he based his valuation upon, first, its annual revenue; second, upon sales in the neighbourhood and elsewhere of similarly situated properties. And, among others, he cites the following sales, at Sorel: On May 9, 1883, the defendants, the McCarthy estate, sold to the St. Lawrence Pulp &

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Paper Co., 229,804 feet in superfices, part of lot 86, shewn on plan ex. No. 1, for $4,500—about 2 cents a foot. Then he takes in consideration the offer, which he saw advertising the sale of the Canada Steamship Co.'s property at 3½ cents a foot. Other sales mentioned by this witness are that of June 22, 1881, by Allan to Sincennes-McNaughton, of lots 76 and 81, containing 233,610 sq. ft., for $4,500, a little less than 2 cents a foot. On May 29, 1918, the Leclerc Shipbuilding Co. purchased at less than a cent a foot lot 56, having an area of 368,060 feet, for $3,100, including a house, with some reservation in respect of the same. On May 26, 1918, the Leclerc Shipbuilding Co. leased from H. Paul part of lot 55, containing 149,149 ft., actually occupied with the construction of vessels, with a frontage of 500 ft. on the Richelieu, at an annual rental of $300. If that lease is capitalized at 5½%, it would be equal to 3⅔ cents a foot. The evidence of these two witnesses for the Crown upon the value of land, especially when based upon sales of similarly-situated properties at Sorel, is most cogent. However, while the owner's evidence is most exaggerated, I find that the Crown's evidence, based upon such sales in the neighbourhood, is the best and the only safe starting point—yet I also find due consideration has not been given to the comparison of the McCarthy property with these Sorel properties. For instance, witness Giroux says that the Sincennes-McNaughton property is, like the McCarthy property, worth 2½ cents a foot. I fear he overlooks the clear and obvious fact that the McCarthy property is higher, its topography is better, and the lands are improved, while the same cannot be said of the other properties.

We have here to deal with a good shipyard, having a limited capacity as to the size of vessels which can be built there. The land, the soil itself, has been improved. The soil has been hardened (*durci*), solidified from year to year by the refuse (*dechets*) thrown upon the ground, says witness Giroux, speaking of the McCarthy property. Witness Boucher says that the nature of the soil is muddy (*vaseux*), but from year to year the ground has been improved by (*machefer*) clinkers and cinders being spread upon the surface. Witness Noble, who examined the shipyard in 1914, says this soil is of hard sand, and he finds the land has been built up, stiffened, piled and graded. Witness Badeux also says the surface has improved with age and usage. Moreover, the last

witness, among others, has actually worked in materially improving this property, especially as compared with the Sincennes-McNaughton property, by running in several hundred piles in the land for the purpose of the ways; but he says that at present the heads of the piles are brought up to the surface every spring from the effects of frost and he had to cut them yearly.

A great deal has also been said about the exceptional safety of the shipyards as against the ice; but it has, however, in exceptional cases been subjected to such a contingency on a few occasions. Witness Boucher, whose business has had to do, for the last 18 years, with the construction and repairs upon this shipyard, says that in the spring of 1903, in April, at the time of the debacle—the ice shove—in the St. Lawrence, the waters rose higher than those of the Richelieu. The ice ran into the entrance of the river and caused considerable damage. Then witness Beauchemin says that every spring, the waters rise and cover a certain portion of the shipyard, and the wharves being low, some of them are covered by water. He further says, he knows of only two inundations or floods at Sorel and that was in 1865 and 1896, lasting from four to five days. He denies or does not remember the flood of 1903. However, under the rule of presumption, "*Magis creditur duobus testibus affirmantibus quam mille negantibus*," it must be found that, besides the yearly spring floods, the place was subjected to these bad inundations followed by serious damages.

Another very important fact to be considered, in respect of the prices paid on sales at Sorel, is, as admitted by defendants' witness Beauchemin, that these lots, on the water front, at St. Joseph de Sorel, between the McCarthy properties and he bridge, can also be turned into shipyards—they are all adaptable, but not prepared. Even above the bridge, the evidence shews there are shipyards in operation to-day.

Therefore, in endeavouring to arrive at a just and fair compensation, one must guard from being carried away by these exaggerated valuations testified to, and to weigh with judicious modifications the plaintiff's evidence. To allow the exaggerated amounts testified to in the evidence of the defence, based upon such erratic grounds, "would be"—in the language of Sir Samuel Evans in *Re S. S. Kim*, Lloyd's Prize Cases 1917—"to allow one's

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eyes to be filled by the dust of theory and technicalities and to be blind to the realities of the case." The court has to steer a judicial course between the optimist and the pessimist.

This property must be assessed, as of 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, potentialities or value it may obtain within the reasonably near future—provided such capabilities can be foreseen at the date of the expropriation. Such capabilities or adaptability are, after all, but an element in the general value and form part of the market value: *Sidney* v. *North E. R. Co.*, [1914] 3 K.B. 629.

The owners after the expropriation should be neither richer nor poorer than before. It is intended that they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the thing to them, not by what will be its value to the party expropriating it: Cripps on Compensation, 5th ed., 103.

From 1874 to 1890 the defendants derived a revenue from the whole property under lease, of the sum of $1,600, and thence of the sum of $1,200, as set forth in the evidence. Care must be taken to distinguish, as already said, between income from the property and income from the business conducted upon the property. And when the property is vested for the use to which the land is best adapted, for which it had been used for years and for which it is expropriated, it is certainly a safe working test of value which cannot be overlooked in arriving at the value of the property: Nichols, p. 172. In this case the evidence has somewhat qualified the circumstances under which it was leased at the low rents mentioned. However, low rent and the incidents likely to determine the lease must be regarded: Halsbury, vol. 6, p. 37 *et seq.*; Browne & Allan on Compensation, 99. After all, it is the commercial value of the land that is sought and not the capitalized value of the rental: *Morgan* v. *London & N. W. R.*, [1896] 2 Q.B. 469.

The defendants, somewhere around the years 1897 or 1898, under special circumstances, offered to the government for $19,000 this property, the area of which is described in plan ex. 25. Subsequently thereto, during the year 1912, as appears in the order-in-council filed here as ex. G, another price of $150,000 is asked by the owners.

An offer by the owner may at times be made with the object of avoiding controversy, to save the expense of litigation, when in want of money, and under such circumstances it would not be a determining test of the actual value: Nichols, p. 1195. And the case of *Falconer* v. *The Queen* (1889), 2 Can. Ex. 82, is also authority for the proposition that where a claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the court, while declining to limit the claim to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses.

At the date of the expropriation, namely, on December 18, 1915, the war was at its most momentous period, and if it had an effect upon property in Canada, it was certainly to its detriment, and it was a cause of depreciation which extended in respect of the class of property we are dealing with to the end of 1916 or the spring of 1917. Witness Brown, heard in behalf of the owners, said the Sorel shipyard had been declining and that there was not as much work done there by the government as in the past. As established by witness Duguide, after the war broke out there was quite a demand for the construction of submarine chasers, but that industry was concentrated at Quebec and Montreal—none at Sorel, while it might have affected it in the supply of some ancillary materials. The "Lusitania" was sunk in 1915, and the unrestricted destruction by submarines was resorted to in 1917. In the fall of 1916, came a demand for larger vessels and enquiry for steel carrying vessels. None were constructed at Sorel. In the spring of 1917, when the shipping destruction began on a large scale, the Munition Board was instructed to enquire on behalf of the Imperial authorities as to shipbuilding in Canada. This enquiry gave a stimulus, a spurt in this country in the demand for steel and wooden vessels. The real demand did not start before the spring of 1917. The demand in 1916 amounted to mere enquiries, with perhaps the starting in the construction of a few vessels. This witness Duguide contends that there was a small number of vessels built at the Sorel shipyard, but a large amount of repairs were made there.

Having said so much, and taking into consideration all these circumstances, and more especially the prices paid for lands, and

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lands almost similarly situated, at Sorel, although not improved and piled as the present shipyard, I am of opinion of allowing five cents a foot for the land taken. The prices paid at Sorel afford the best and most cogent test and the safest starting point for the present enquiry into the market value of this property. The best method of ascertainng the market value of property is to test it by sales in the neighbourhood. *Dodge* v. *The King* (1906), 38 Can. S.C.R. 149; *Fitzpatrick* v. *Town of New Liskeard* (1909), 13 O.W.R. 806, and numerous other cases decided by the Supreme Court of Canada.

The total area expropriated is 381,537 sq. ft., which, at 5 cents a foot, will amount to $19,076.85.

The value of the buildings upon these lands has been fixed by agreement at the sum of $18,250, with, however, reservation by counsel for plaintiff, to adduce evidence as to the value of the property as a whole, *en bloc*.

This leaves the question of the wharves still to be considered. Here the witnesses are very far apart. On behalf of the owners, witness Brown places upon the three wharves a value of $33,887.07; witness Fraser confirms witness Brown's valuation; witness Swan values them at $40,773; witness Noble at $65,000, and witness St. George at $34,104. On behalf of the Crown, witness Badeau values them at $19,797.75; witness Giroux at $8,997.86—allowing nothing for the approaches—and witness Heroux at $16,354.10.

Witness Badeau is a ship carpenter who has been working at Sorel, on the land in question, since 1874. He has worked at these wharves. His valuation is for the price of new wharves, from which he deducted one-quarter of the total price. He further states that while the lumber in the McCarthy wharves was nicer (*plus beau*), he adds that to-day they are gone (*ils sont finis*). Since 1874, he says, we repaired them, but they have deteriorated. Witness Giroux exhibited in court some decayed pieces which he swore he had taken from these wharves. It is perhaps well to mention, *en passant*, that witness Brown, who places upon these wharves a value of $33,887, says that the life of such wharves is of about 30 to 40 years—30 to 35 years. If the wharves were already old in 1874—25% of their value already gone at that date according to witness Badeau—they would, according to witness Brown's own view, be too old in 1915 to have any value, yet he values

otherwise at $33,887, making no allowance whatsoever for depreciation.

I am of opinion it is unnecessary to say any more upon this point, and taking into consideration all that has been testified to by the witnesses upon that subject, and the deduction that should be made for depreciation, I will accept the valuation of witness Heroux at the sum of $16,354.10.

As already mentioned, during the pendency of the trial the Crown has abandoned, under the provisions of s. 23 of the Expropriation Act, the whole of lot 82, containing 98,000 sq. ft., and part of lot 85, containing 45,163 sq. ft., making in all an area of 143,163 sq. ft.

The defendants are making claim, as a result of the abandonment, for the value of the possession and usage by the Crown of the whole 143,163 sq. ft., between the date of the expropriation and the date of the abandonment. They make no claim for depreciation or damage arising out of the abandonment with respect to lot 85; but they claim damages for such depreciation to lot 82, resulting, as alleged in the argument, from the severance of lot 82 from the rest of the defendants' property.

On behalf of the defendants, witnesses Swan, Fraser, and J. M. McCarthy were heard with respect to the claim in connection with the abandonment, while the Crown offered no evidence in that respect.

Witness Swan testified that the damages arise from the fact of not maintaining lot 82 as part of the whole shipyard. He contends that the lot is now deprived of the railway access, in that the railway had access to part of the yard connected with a tram. If lot 82 is detached, it thereby loses access to the railway and is deprived of the use of the machine shops already in the yard. He further contends that on the 400 ft. of lot 82 there is not sufficient room to build machine shops and construct vessels. He admits, however, the upper part of lot 82 is owned by the defendants. He considers the cutting off of the access to the railway as the more important reason of the two. If shops were built at the back of lot 82, it would mean duplicating the plant. It is not hurt with respect to skilled labour. He reckons the damages on the basis of 50% decrease in the value of the land, and for the compensation in respect of the occupation, he would capitalize the value of the

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land and allow yearly rent at 6% upon the same. On cross-examination he says that lot 82, for the last 15 years, was used for mooring vessels on the front, and for storing materials in connection with the shipyard. Part of 82, back of the 400 ft. from the river is vacant. Lot 82 cannot in future be independently used as a shipyard, but it could be used for building small boats.

Witness Fraser contends that lot 82 is now worth less by reason of being separated from the larger part of the yard. He valued the land, as originally taken, at 60 cents, and says that as the result of the abandonment the land of lot 82 is now only worth 36 cents a foot. He would value the compensation for the occupation of the lands on the same basis as the previous witness, at 6% or 8%, adding it was to his knowledge that 8% had been allowed under such circumstances. He says that, as part of the shipyard, it had a share of the water front, and direct railway connection, and contends the cost of a new siding or spur should be set off as against the value of the property. To make a shipyard of it, the building of a carpenter's shop would be needed. On cross-examination he says lot 82 would be "all right for a small proposition."

Having so reviewed the short evidence upon this subject, brings us to the consideration of the merits of the claim.

As compensation for the loss of occupation of these 143,163 sq. feet, composed of lot 82 and part of lot 85, I will allow the compensation on the basis mentioned by me at trial. These 143,163 sq. feet, at 5 cents a foot, would amount to $7,158.15. In addition to this, I am somewhat perplexed as to what sum I should allow to the defendants as compensation for their being deprived of the use and occupation of this piece of property. In renting property the owner should get more than 5% upon the value of the land, since out of such revenue he has to find a fair revenue over and above taxes, etc., and other known incidentals. It is often contended that the landlord should at least receive from the tenant 10% on the value of the property leased to allow him a fair return, free of taxes, etc. I am of opinion that if 8% were allowed on $7,158.15 from December 18, 1915, to January 24, 1919, namely, 3 years and 38 days, making the sum of $1,777.57, that it would represent a fair and just compensation to the defendants for the loss of use and occupation of their premises during the period in question.

Coming to the question of damage by way of injurious affection, or *severance*, as put by counsel—which, coupled with the use and occupation above-mentioned, come within sub-s. 4 of s. 23 of the Expropriation Act—I shall now have to consider and take into account the fact of such abandonment or revesting in connection with all the other circumstances of the case, in estimating or assessing the amount to be fixed for the defendants claiming compensation for the land taken.

That part of lot 82, as described in the information and originally expropriated, is separated from the other lots or premises expropriated, by a street which has been in existence for over a century. It is found in existence on a plan in Bouchette's Description Topographique de la Province du Bas Canada, published in 1815, and mentioned as "Chemin de la Traverse," and on the plans filed at trial as Montcalm St. Lot 82 has always been severed by the street from the lots 84, 85 and 86, and the frontage of 82 cannot be taken, as mentioned by some of the witnesses, as part of a consecutive frontage with these other lots, because it would thereby obstruct the street. It could never be used as a whole with the other lots, placing a vessel partly on 82 and partly on the other lots. While there was bare unity of ownership in title, there was, so to speak, individuality in the lot 82 thus separated from the other lots by the highway, and the frontage on the river always is limited to the actual size without possibility of enlarging it by uniting it with the other lots.

Lot 82 cannot consistently be made a unit with the other lots for the purpose of building vessels or moorage on the front; because it is physically separated by the highway from the rest of the property. It can be used in connection with the shipyard for storage, etc., as used in the past by the Crown, just as much as any other parcel of land in the vicinity might be used as a lumber yard for storage purposes. But that does not make it a unit with the yard in such a manner as if separated therefrom it would be damaged. See upon this subject the two leading cases of *Cowper Essex* v. *Local Board of Acton* (1889), 14 App. Cas. 153, and *Holditch* v. *C. N. O. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536.

Moreover, the shipyard as a whole was not, and is not, composed exclusively of lands belonging to the defendants at the date of the expropriation, but was, and is, composed in a large measure

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of both government lands and defendants' lands, with part of the plant and buildings on government property.

This lot 82 was never connected with the railway. In fact, the lots 84, 85 and 86 were really never connected with the railway; the railway spur or siding runs only on that part of the shipyard which belongs to the government, and did so before the expropriation. What induced the witnesses to testify in the manner they did was apparently because the yard, as a whole, had railway connection; but it only had it because the railway ran on government property, but not on any part of the defendants' land in question herein.

The damages claimed as flowing from the abandonment, and as put by the statute "in connection with all the other circumstances of the case," is entirely a question of fact, and under the circumstances of the case I fail to see any other compensation allowable but that in respect of the use and occupation of such lands as above set forth.

The expropriated part of lot 82 has been all through the evidence and during the trial spoken of as having a frontage, on the River Richelieu, of 400 ft.; but if measurements are taken from the plans filed of record, both by the plaintiff and defendants, it will be seen that it has not quite 300 ft. frontage. On its extreme southern side it may have a depth of about 400 ft. and on the extreme northern side slightly over 300 ft. However, at the back of that part expropriated and coloured red on some of the plans, the defendants own, as part of lot 82, another area of the same width and of a depth of about 300 ft.

In 1865, the steamboat "Quebec," 288 ft. in length, was built upon lot 82, upon which there are now two wharves, an old and a new one. The plant used by the government shipyard, at Sorel, is partly on government land and partly on the McCarthy land. So that if the government at any time, had put an end to their tenancy, the McCarthy shipyard would have been left with an incomplete plant or with less plant. This plant, which belonged to the defendants before the expropriation, is sold to and taken by the government and paid for.

Lot 82 by itself, including the part originally expropriated and that part at the back, is of itself large enough for the purpose of a shipyard at Sorel, especially when it is considered that the size of

the vessels that are being and can be built there is limited. It is of a large enough area for a Sorel shipyard when it is considered that in the past the works of this shipyard consisted for a small portion in the building of small vessels and chiefly in repairs.

All of these considerations, coupled with the very important fact that lot 82 is separated from the balance of the shipyard by the highway, led me forcibly to the conclusion that no damage resulted to lot 82 from the fact that lots 84, 85 and 86 have been expropriated and lot 82 abandoned. I have no doubt that the maintenance and development of a large shipyard at Sorel by the government, in all probability will increase as we go on, and would turn out to be of special, general advantage and benefit to lot 82, which should perhaps be taken into account by way of set off under the provisions of s. 50 of the Exchequer Court Act.

Therefore, in the wording of sub-s. 4 of s. 23, of the Expropriation Act, taking into account the fact of such abandonment or revesting of part of lot 82, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to the defendants, I have fixed the total amount of compensation in that respect at the sum of $1,777.57.

Recapitulation of the amounts allowed, viz.:—For lands taken, $19,076.85; for the buildings, $18,250; for the wharves, $16,354.10; from the abandonment, $1,777.57; total, $55,458.52.

The business carried on upon the premises ever since 1874 was not so carried on by the owners, who for a number of years were endeavouring to part with their property. It is not a case where 10% can be allowed for compulsory taking.

Therefore, judgment will be rendered as follows:—

1. The lands and real property expropriated herein are hereby declared vested in the Crown from the date of the expropriation. 2. The compensation for the lands and real property so expropriated, with all damages arising out of or resulting from the expropriation and the abandonment, as above mentioned, is hereby fixed at the total sum of $55,458.52, with interest on the sum of $53,680.95 from December 18, 1915, to the date hereof, and on the sum of $1,777.57 from January 24, 1919, to the date hereof. 3. The defendants are entitled to recover from and be paid by the plaintiff the said sum of $55,458.52, with interest as

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above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, rents and incumbrances whatsoever, the whole in full satisfaction for the land and real property taken and for all damages resulting from the said expropriation, as fully above set forth. 4. The defendants are entitled to their costs of the action.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. May 23, 1919.

VENDOR AND PURCHASER (§ I B—5)—AGREEMENT PROVIDING FOR POSSESSION BY PURCHASER ON PAYMENT OF INSTALMENTS—FAILURE TO PAY—ORDER GIVING VENDOR POSSESSION—VENDOR ACCOUNTING UNDER CONTRACT.

An agreement for sale of land specifically provided that the right of the purchaser to occupy and enjoy the lands was upon the express condition that he would not make default in payment of the purchase price: default was made upon an intermediate instalment, long before the time provided for the completion of the agreement. The court held that an order, giving possession to the vendor was a proper one under the circumstances. The order was very much in the interest of the purchaser, as all his rights, other than possession under the contract were preserved, and the land made to fulfil its earning capacities, the vendor supplying labour and capital, but under an obligation to account under the contract which was still subsisting.

[*Krom* v. *Kaiser* (1915), 21 D.L.R. 700; *Greene* v. *Appleton* (1915), 25 D.L.R. 333; *Hill* v. *Spraid* (1909), 2 Alta. L.R. 148; *Armstrong* v. *Auger* (1891), 21 O.R. 98, referred to.]

Statement.

APPEAL from the order of Hyndman, J., ordering the defendants to deliver possession to the plaintiff of certain land. Affirmed.

G. B. O'Connor, K.C., for appellants.

H. H. Robertson, K.C., and *H. V. Fieldhouse*, for respondent.

The judgment of the court was delivered by

Simmons, J.

SIMMONS, J.:—This is an appeal from the order of Hyndman, J., ordering the defendants to deliver possession to the plaintiff of section 17 and the south half of section 20, township 44, range 6, west fourth M., containing 960 acres on or before 3 weeks from the date of the order, and further ordering that the plaintiff make an accounting of the farming of said land during the summer of 1919 and up to the first of December, 1919.

The lands were purchased by the defendants under an agreement in writing dated April 25, 1918, the purchase-price was $40,320, payable $1,000 in cash and $3,000 principal and interest at 7% per annum on all the unpaid principal to be paid on Novem-

ber 1, 1918, and the balance and interest to be paid by the defendant, paying to the plaintiff one-half of the crop produced in each year till the whole was paid.

The agreement specifically provided that the defendants should have the right to occupy and enjoy the same until default be made in payment of the said sum of money or any part thereof on the days and times mentioned.

The agreement also provided that time was to be of the essence of the agreement.

The defendants made default in the instalment of principal of $3,000 and interest $1,422.20 due and payable on November 1, 1918.

On January 10, 1919, the plaintiff began an action alleging the default in payment and claimed: (a) specific performance of the agreement, (b) possession, (c) an account of what was due the plaintiff under the agreement, (d) sale of the lands if the default was not remedied and judgment personally against defendants for any deficiency, (e) alternately foreclosure of the estate and interest of the defendants.

One of the defendants by separate defence pleaded infancy and incapacity to either affirm or repudiate the contract.

All the defendants set up the following defences in their pleadings: (a) waver by the plaintiff of prompt payment of the moneys claimed to be due, (b) alternatively substitution of a new agreement in lieu of the agreement sued upon, (c) Statute of Frauds.

At the trial, the following facts were established: (1) The default by the defendants to make the payments due on November 1, 1918. (2) The plaintiff was not the registered owner, but was a purchaser under agreements for sale which were in good standing. (3) That there were reservations of minerals in favour of the Canadian Pacific Railway which might be a cloud on title. (4) That the defendants were unable to make the payments and unable to purchase seed to sow the land in the spring of 1919. (5) No variation in the contract or waiver of the right of plaintiff to enforce payment on its due date was established.

The defendant tendered no evidence other than as to condition of title.

The trial judge reserved judgment on the claim for specific

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performance and the question of title, and gave an order for possession as above set out.

The appeal is based upon the ground that judgment for possession should not have been granted in the absence of a decree for specific performance.

Krom v. *Kaiser* (1915), 21 D.L.R. 700, *Greene* v. *Appleton* (1915), 25 D.L.R. 333, are relied upon, but I do not think they are applicable.

In the cases relied upon by counsel, the time had arrived for final completion involving the concurrent obligations upon vendor and purchaser of furnishing title upon the one hand and paying up in full the purchase price upon the other hand.

In the case under consideration default was made by the purchaser upon an intermediate payment, long before the time contemplated by the parties, and provided for in the agreement, for completion.

In *Hill* v. *Spraid* (1909), 2 Alta. L.R. 148, Stuart, J., held that even where the agreement provided for the purchaser entering into possession the vendor would have the right to retake possession upon non-payment of an instalment, and that it does not follow that re-taking of possession rescinds the contract, but only that he is to retain possession as security for payment of the price.

The agreement under consideration specifically provided that the right of the purchaser to occupy and enjoy the lands was upon the express condition that he would not make default in payment of the purchase-price.

The purchaser is not asking for a rescission, but insists upon the right to keep alive the contract.

If the purchaser took the position that there was some defect of title apparent which would shew inability in the vendor to make title when the time for completion should arrive, the purchaser would be entitled to set this up as ground for rescission. During the intermediate life of a contract such as this, extending over a term of years, the purchaser cannot excuse himself from performance unless he can shew that such performance would prejudice him. If the encumbrances placed upon the land by the vendor were greater in amount than the payments due or accruing due from the purchaser, a material consideration would arise as to whether a vendor should be let into possession on account of

default of purchaser. No such consideration arises here, as the amounts owing by the vendor are much less than the payments due and accruing due from this purchaser.

Armstrong v. *Auger* (1891), 21 O.R. 98, illustrates this principle, of equitable relief which the court will afford to a purchaser whose interest may be endangered by the fact that there are encumbrances upon the vendor's title, and in such case the court will order the purchase-moneys paid into court or otherwise preserved to be available if necessary to protect title.

The order seems to be a proper one to make and is indeed one which seems to be very much in the interest of the purchaser as all his rights other than possession under the contract are preserved in the meantime and the land is to be made to fulfil its earning capabilities, where the vendor is supplying the labour and capital, but under the obligation to account for the same under the contract which under the order is a contract still subsisting with the mutual obligations of the parties in material respects undetermined.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Latchford, Sutherland and Kelly, JJ. December 20, 1918.

COMPANIES (§ III—31)—CREATION—POWERS—DURATION—POWER OF MUNICIPALITY TO PREVENT EXERCISE OF POWERS—UNQUALIFIED CONSENT GIVEN—PROPER CONSTRUCTION OF.

When parliament creates a corporation, authorizes it to carry on an undertaking and clothes it with powers which, in the opinion of parliament, are necessary or proper for the purpose of the undertaking, and fixes no limitation to the duration of such powers, they continue (unless a contrary intention appears in the Act), so long as the corporation retains its corporate existence, and the same interpretation applies to incorporation by letters patent. Where the letters patent enable a municipal council to prevent the exercise of the company's powers on the public streets, by withholding consent to their user, or to qualify such consent by fixing a time limit, and there is no time limit fixed, qualifying the consent given to the company, it authorizes the company to exercise its powers in respect to the streets so long as the powers exist. Upon the proper construction of the agreement, between the parties, the consent of the town corporation was unlimited as to time.

[*Temiskaming Telephone Co.* v. *Town of Cobalt*, 43 D.L.R. 724, reversed.]

Statement.

APPEAL by the plaintiff company from the judgment of Middleton, J. (1918), 43 D.L.R. 724, 42 O.L.R. 385. Reversed.

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I. F. Hellmuth, K.C., for the appellant company.

H. H. Dewart, K.C., for the defendant town corporation, respondent.

MULOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J., 43 D.L.R. 724, 42 O.L.R. 385, and the sole question is, whether the plaintiff company is entitled to maintain its telephone lines on the public streets of the town of Cobalt. By letters patent granted by the Lieutenant-Governor in Council, under the Ontario Companies Act, the plaintiff company was incorporated as a telephone company, "with power to carry on within the district of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain, and operate a line or lines of telephone along the sides of, or across, or under any public highways, roads, streets, bridges, waters, watercourses, or other places, subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and to such terms, for such times, and at such rates and charges, as to such councils shall be granted, limited, and fixed, for such purposes respectively."

The town of Cobalt is situate within the district of Nipissing, but had not been incorporated when letters patent issued; and, without municipal consent, the company erected telephone lines on streets then in the said district and now in the said town. It also acquired from a certain other telephone company, the Haileybury and Cobalt Telephone Company, telephone lines erected by that company on streets in the said district (now in Cobalt), and now claims the right to maintain and operate all of those lines on the public streets of Cobalt.

Authorised by by-law of its municipal council, the Corporation of the Town of Cobalt, on the 19th June, 1912, entered into an agreement with the plaintiff company, which agreement is in the words following:—

"This indenture, made in duplicate this 19th day of June in the year of our Lord one thousand nine hundred and twelve, between the Temiskaming Telephone Company Limited, hereinafter called 'the company,' of the first part, and the Municipal Corporation

of the Town of Cobalt, hereinafter called 'the town,' of the second part, witnesseth that:—

"Whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange, and has expended a considerable sum to that end, and intends making further expenditure for that purpose, and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town:—

"Now the parties hereto, in consideration of the premises, for themselves, their successors and assigns, do mutually covenant and agree as follows:—

"1. The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company.

"2. The company will indemnify and save harmless the said town, its officers and servants, from all manner of loss, damage, injuries, suits, claims and demands on account of the said telephone system either in the erection or operation thereof.

"3. The company shall not remove, cut, or trim any shade-tree within the town, without the consent of the town engineer or other officer appointed by the council, and without reasonable notice to the adjoining owner or tenant, if resident, and shall be responsible for all damage through such removal, cutting, or trimming.

"4. The company shall maintain an all-night telephone service in connection with its exchange in said town, and shall operate and maintain its system in accordance with such of the provisions of the Ontario Telephone Act and amendments thereto as apply to it.

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"5. The company will have its rates ratified by the Ontario Railway and Municipal Board and will make no change in its rates without the consent of the said Board.

"6. The company agrees to permit the town to use one gain on every pole erected and one duct in all underground conduits laid in the town for the use of the fire alarm system of the town or of any police patrol system the town may install, and the company agrees to keep the same in repair and supply all necessary material for such repair, free of charge.

"7. The town agrees that it will not, during the period of 5 years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place, any poles, ducts, or wires for the purpose of carrying on a telephone business.

"8. The company agrees every year during said period to give the town credit on any amount due the company by the town, either for rental of telephones contracted for by the town or for the upkeep of police patrol or fire alarm systems installed by the town, for a sum being 3 per cent. of the amount received by the company during such year for the gross rental of telephones within such town.

"9. That the said company shall not during the term of said franchise charge more than $40 per year for a business wall telephone and $20 per year for a private wall telephone in said municipality.

"10. The company hereby agrees to use its utmost endeavours to obtain a connection between its system at Cobalt and the long distance telephone system of the Temiskaming and Northern Ontario Railway and the Bell Telephone Company of Canada Limited; this covenant to be without prejudice to the right of the town to compel the company to do so under the Municipal Act, 1912.

"11. In as far as this agreement varies the agreement entered into between the parties hereto and dated August 15th, 1910, the terms of such last mentioned agreement so varied shall cease to have any effect."

(The respective seals of the company and the municipal corporation and the signatures of the vice-president and secretary-treasurer of the company and the mayor and clerk of the town were duly affixed.)

The council's authority to pass the by-law authorising this agreement is derived from an Act of the Legislature of Ontario, being 6 Edw. VII. ch. 34 (Municipal Amendment Act of 1906), sec. 20, which enacts that the councils of cities, towns, villages and townships, may pass by-laws "for permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality."

The Corporation of the Town of Cobalt, contending that the agreement authorised the company to maintain its lines on the streets for 5 years only, was proceeding to remove the same from the streets, but was restrained by injunction; and we are now called upon to construe the agreement above set forth.

By the first clause of the agreement the town "consents to the company exercising "its powers" by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town," etc. The "powers" here referred to are those given to the company by its letters patent, some of which are above set forth. The letters patent imposed no time-limit within which such powers might be exercised, and therefore they continue until terminated by competent authority. These powers the town consented to the company exercising on the streets of Cobalt; and such consent, being unqualified, must be construed as not limited as to time.

The Legislature having, by the Ontario Companies Act, delegated to the Lieutenant-Governor in Council authority by letters patent to create corporations and to endow them with certain powers, the granting of such letters patent is a legislative act, and the same construction must be placed on the language used in the letters patent as would be placed on the same language if in a private Act incorporating the company and creating its powers. When Parliament creates a corporation, authorises it to carry on an undertaking, and clothes it with powers which, in the opinion of Parliament, are necessary or proper for the purpose of

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the undertaking, and fixes no limitation to the duration of such powers, they continue (unless a contrary intention appears in the Act) forever, which is another way of saying so long as the corporation retains its corporate existence, and the same interpretation applies to incorporation by letters patent. Here the letters patent enabled the municipal councils to prevent the exercise of the company's powers on the public streets by withholding consent to their user, or to qualify such consent, amongst other respects, by fixing a time-limit. There being no time-limit qualifying the consent given the company, it authorises the company to exercise its powers in respect of the streets so long as the powers exist.

In the first clause of the agreement, in clear and unambiguous language, consent is given to the company to exercise "its powers" on the public streets without any limitation as to time, that is, for all time; and I am unable to find in any part of the agreement anything repugnant to or raising any doubt as to this being its plain intent and meaning.

In addition to this consent, the defendant corporation, by clause 7, agrees, for a period of 5 years, not to give, except to the Temiskaming and Northern Ontario Railway Commission, any license or permission to use the streets for poles, ducts, or wires for the purpose of carrying on a telephone business. There is no conflict between these two clauses, and full effect can be given to both of them, the company being entitled by clause 1 to use the streets for all time, and by clause 7 to freedom for 5 years from any rival except the Railway Commission.

It was argued that the 5-year limit mentioned in clause 8 also limited to the same period the consent given by clause 1. I am unable to assent to this view. The two clauses are wholly independent of each other. Clause 8 simply provides that during each year of the period of 5 years the company shall credit on any indebtedness of the town a sum equal to 3 per cent. of its gross revenue in such year. At the end of the 5 years, the company is relieved from such obligation; but the clause is not open to the construction that, because the company is not bound to continue such credit after the 5 years, therefore the consent given by clause 1 is also to terminate then. If such was the intention of the parties, it would doubtless have been so stated in the agreement.

It has not been and it is not the privilege of the Court to make a new bargain for the parties, by reading into the agreement a term which the parties themselves did not incorporate in it. It was also argued that the words "during the term of said franchise," used in clause 9, meant "the period of 5 years," and had the effect of limiting to 5 years the consent mentioned in clause 1. When the parties were framing clause 8, and intended its provisions to continue for 5 years only, they manifested such intention by using apt words, "during such period" (that is, the period of 5 years mentioned in clause 7.) If that same period of 5 years had been intended to apply to the provisions of clause 9, one might reasonably have expected to find the like or similar language used in its application there, and not the words "during the term of said franchise," which mean something very different.

The word "franchise" here referred to can have but one meaning, namely, the franchise created by the letters patent, including the powers in perpetuity thereby conferred on the company. It acquired no powers from the Corporation of Cobalt, which could neither enlarge nor diminish any of the company's powers—their only source being the Lieutenant-Governor in Council. The dominant idea suggested by the words "during the term of said franchise" is that of a period of time co-extensive with the existence of the company. During such period, not the limited period of 5 years, the Cobalt telephone users are to enjoy protection against higher rates. How are they after 5 years to enjoy this advantage if the consent ends in 5 years, and the company must then cease business in Cobalt? This provision in clause 9, entitling the citizens of Cobalt to the use of telephones, at rates not higher than those set forth in the clause, during the lifetime of the franchise, makes it abundantly clear, if it otherwise admitted of any doubt, that the consent given by clause 1 to maintain telephone lines on the streets was also intended to continue during the lifetime of the company's franchise.

For these reasons, I am of opinion that the Corporation of the Town of Cobalt is not entitled to cause the company's poles etc. to be removed from its streets, and that this appeal should be allowed with costs, and that the judgment below should be set aside with costs, and in lieu thereof that judgment should be entered declaring the plaintiff company entitled to maintain and

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operate its telephone system on the public streets of the town, and restraining the defendant corporation from interfering with such right; the defendant corporation to pay the plaintiff company's costs of the action.

SUTHERLAND, J., agreed with Mulock, C.J.Ex.

KELLY, J.:—By a judgment of Mr. Justice Middleton of the 21st March, 1918, he dismissed the action brought by the plaintiff company to establish its right to maintain and operate its telephone system in the town of Cobalt. The appeal is from that judgment.

The town of Cobalt is situate in the township of Coleman, formerly in the district of Nipissing, now in the district of Temiskaming. Instructions were given on the 16th May, 1904, for the survey of that township; the survey was made and the plan thereof is dated the 1st October, 1904. The township was not organised, however, until the 14th April, 1906. On the 5th July, 1905, the plaintiff company was incorporated. By an order in council of the 19th January, 1906, the "townsite," as shewn upon the survey, was vested in the Temiskaming and Northern Ontario Railway Commission. On the 1st December, 1906, the Town of Cobalt was incorporated. On the 4th April, 1905, the Haileybury and Cobalt Telephone Company was incorporated, but it went into liquidation, and its assets were sold to the plaintiff company on the 15th April, 1906, telephone lines having prior thereto been constructed by both of these companies across portions of the land now included in the town.

The above facts I have taken from the reasons for judgment of the trial Judge.

By its charter of incorporation, the plaintiff company was given power "to carry on within the district of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain, and operate a line or lines of telephone along the sides of, or across, or under any public highways, roads, streets, bridges, waters, watercourses, or other places, subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and

operated, and to such terms, for such times, and at such rates and charges, as by said councils shall be granted, limited, and fixed, for such purposes respectively."

The part of the district of Nipissing in which the township of Coleman is situated became a part of the district of Temiskaming subsequent to the incorporation of the company.

After the Town of Cobalt was incorporated, additional telephone lines were constructed within the town-limits, but without the consent or approval of the municipality or the council thereof. In June, 1912, an agreement was entered into between the plaintiff and defendant, and authorised by by-law No. 202 of the town, by which the town consented to the plaintiff exercising certain of its powers within the limits of the town. Upon this agreement also the plaintiff now relies.

There had been an earlier agreement of the 2nd April, 1910, which is not of importance here except as indicating the attitude of the defendant at that time in respect of any possible rights of the plaintiff or the assertion of such rights. One of its provisions is that the company "grants, permits, and allows" the defendant (the Corporation of the Town of Cobalt) to string the wires of the electric fire alarm system and to place fire alarm boxes in connection with the system on the telephone poles of the company in the town; but it expressly provides that the agreement shall not be construed in any way as an admission by the corporation (the town) that the company "has any right, privilege, or franchise of any kind whatsoever to erect the telephone poles of the said company in the streets of the town of Cobalt or to string wires or other apparatus thereon."

The agreement of the 19th June, 1912, recites that "whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange, and has expended a considerable sum to that end, and intends making further expenditure for that purpose, and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town."

The parts of this agreement to which the plaintiff now attaches special importance are clauses 1 and 7:—

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"(1) The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company."

"(7) The town agrees that it will not, during the period of 5 years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place, any poles, ducts, or wires for the purpose of carrying on a telephone business."

There are other provisions as well which are urged as helpful in interpreting the real meaning of the agreement as a whole and particularly of clause 1.

The company, being a creature of statute, has not and had not inherent powers, but only such as were conferred upon it by its charter of incorporation and the legislation which authorised the issue of the charter. These powers are not exercisable regardless of the rights of the municipalities or places in which the company desires to carry on the business which the charter clothed it with power to carry on.

Particularly is that so when, as in the present case, it is expressly declared that the charter-powers are subject to the consent being first obtained of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and also to the control of these councils.

There is a clear distinction between the "powers" which were vested in the company by its charter, and the "right" to exercise these powers.

I am of opinion that this company had not the right to exercise the powers conferred upon it within the municipality into which it

extended its operations, unless with the consent previously obtained from the council of that municipality: without that consent, such operations were unauthorised.

So far, therefore, as the plaintiff relies alone upon the provision of its charter for the right to exercise its powers in what is now the town of Cobalt, it cannot succeed.

From anything that appears in the material before us, the necessary consent had not been obtained down to the 19th June, 1912.

In determining what rights, if any, the agreement conferred upon the plaintiff two important considerations arise: (1) as to the power the municipal council then had to give consent or permission to the company maintaining and operating its lines within the municipality; and (2) if the municipal council possessed such power, then as to the extent to which such consent or permission was given.

The council of the municipality had no inherent power to grant the permission or give the consent which would confer upon the company the right to exercise its charter-powers within the municipality, but depended for that power upon express legislative enactment.

By sec. 559 of the Municipal Act, R.S.O. 1897, ch. 223, by-laws may be passed by the councils of cities, towns, and villages (4) "for regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits." This was re-enacted in the Municipal Act of 1903, 3 Edw. VII. ch. 19, as sec. 559 (4), and was repealed in 1906 by 6 Edw. VII. ch. 34, sec. 20, which enacts that councils of cities, towns, villages, and townships may pass by-laws for "permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality."

Sections 330 and 331 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, deal with the granting by the councils of municipal corporations of monopolies. Section 330 provides as follows:—

"Subject to the provisions of sections 331 and 332 of this Act no council shall have the power to give any person an exclusive right of exercising, within the municipality, any trade or calling, or to impose a special tax on any person exercising the same, or to

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require a license to be taken for exercising the same, unless authorised or required by statute so to do; but the council may direct a fee, not exceeding $1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling."

Section 331, sub-sec. (1):—

"The council of every city, town and village may pass by-laws, granting from time to time, to any telephone company, upon such terms and conditions as may be thought expedient, the exclusive right within the municipality, for a period not exceeding 5 years at any one time, to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same, poles, ducts and wires for the purpose of carrying on a telephone business, and may on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed, nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

"(2) Nothing in the preceding sub-section contained, or done by virtue thereof, shall limit or prejudicially affect any rights of any telephone company with respect to the use of streets or lanes for the purposes aforesaid, which existed on the 27th day of May, 1894, nor shall the preceding sub-section or any by-law passed or agreement made before the said date, prevent any municipal council from granting to any person permission to use streets or lanes for the purpose of a private telephone line for the use of such person, his servants, clerks or agents, or persons communicating with them."

(Sub-section 3 of sec. 331 and sec. 332 are not material here.)

When the agreement of the 19th June, 1912, was made, these two sections (330 and 331) and sec. 20 of 6 Edw. VII. ch. 34 were in force. Section 331 was repealed by the Ontario Telephone Act, 2 Geo. V. ch. 38, sec. 39, and by sub-sec. 1 of sec. 8 of that Act it was enacted:—

"The council of every municipality may in the case of a county or a township with the approval of the Ontario Railway and Municipal Board, and in the case of any other municipality with

the assent of the municipal electors, pass by-laws for granting to a telephone company, upon such terms and conditions as may be deemed expedient, the right to use any of the highways, squares, or lanes in the municipality for placing in, upon, over or under the poles, cables, ducts and other wires for the purpose of its business."

Section 20 of 6 Edw. VII. ch. 34 is wider in its effect than the section for which it was substituted, and authorises councils to pass by-laws to "permit" as well as to "regulate," and it puts no limit upon the time during which the right given by the council by such by-laws shall extend.

The respondent's argument proceeded along the line that the general terms of clause 1 of the agreement are qualified, as to the time for which its consent was given, by the terms of clause 7, assisted by the provisions in clause 9.

These two clauses (1 and 7) deal with separate and independent matters, and are not necessarily to be read together, except in so far as clause 7 gives to the appellant the added advantage of an exclusive right within the town for 5 years. Standing by itself, clause 1 puts no limit upon the time for which the town's consent was given, and the evident purpose of clause 7 was not to cut down that time to 5 years, but to confer upon the company the exclusive right for 5 years which the municipal council had the right to grant under the above referred to section, 331.

Had clause 7 not been introduced into the agreement, there could have been no question of the time; and, if it was intended that the company's right to carry on its operations within the town should be limited to 5 years, it should have been so expressed.

Reading the whole agreement, I am unable to say that it limits the operations to 5 years, though it is quite clear that it limits the company's exclusive right to that time.

The learned Judge was of opinion that sec. 331 is not merely an exception to the general provisions of sec. 330, against the granting of a monopoly, but is far more radical. With great respect, I am unable to agree with that view. Nor do I agree with the proposition of counsel that the language of clause 8 of the agreement and the use of the words "term of said franchise" in clause 9 have such application to the general language of clause 1 as

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necessarily to limit the time for which the consent of the town was given.

My opinion is that, while the exclusive right given by clause 7 was limited to 5 years, the municipal council had authority to pass the by-law for giving the consent which the respondent assumed to give by clause 1 of the agreement, and that the time for which such consent was given was not, as contended by the respondent, limited to 5 years, the 5 years mentioned in clause 7 applying only to an exclusive right for that time.

The appeal should be allowed and the judgment below set aside, both with costs; and judgment should be entered for the plaintiff (with costs) in accordance with the above findings and for $300 damages; if either party be dissatisfied with this amount, the matter may be spoken to.

Riddell, J.

RIDDELL, J. (dissenting):—This is an appeal by the plaintiff company from the judgment of Mr. Justice Middleton, 43 D.L.R. 724, 42 O.L.R. 385.

The learned trial Judge has set out all the material facts (with one exception, shortly to be mentioned).

It seems to have been urged at the trial that the company had some rights on the streets before and dehors the agreement with the town; but that was not urged before us, the appellant company avowedly resting its whole case on the agreement.

In my view, the company could not successfully contend for any such rights, in view of the provisions of its charter.

The rights then of the parties are admitted to depend on the agreement.

On the argument there was much discussion as to the power of the town to make the agreement: in my view, that need not be decided. If the agreement was *ultra vires*, the plaintiff company has no rights; it must rely on the agreement or it is out of Court. Admitting the validity of the agreement, it remains to interpret it—and for this purpose I think clause 9 should be borne in mind:—

"9. That the said company shall not during the term of said franchise charge more than $40 per year for a business wall telephone and $20 per year for a private wall telephone in said municipality."

The "said franchise" can refer only to the right given by clause 1 to the plaintiff company, of "exercising its powers by constructing, maintaining, and operating its lines of telephone,"

etc.; that this franchise has a "term" is expressly stated by clause 9. "Term" is not properly applicable to anything in perpetuity, but the word imports termination at some time, primarily of course after a fixed number of years, but not improperly on the occurrence of death of the termor.

Even without this clause, I should have come to the same conclusion as my brother Middleton; but this clause seems to me to be conclusive.

I would dismiss the appeal with costs.

LATCHFORD, J., agreed with Riddell, J. *Appeal allowed.*

ED. NOTE.—Since the above case went to press the decision has been reversed by the Supreme Court of Canada, and the judgment of Middleton, J., restored. The case will be reported in an early issue of the D.L.R.

Kelly, J.

Latchford, J.

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Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A. and MacDonald, J. ad hoc. April 12, 1919.

TRIAL (§ V B—275)—CRIMINAL—RETIREMENT OF JURY—IMPROPER CONDUCT OF CONSTABLE IN CHARGE—DISCRETION OF JUDGE AS TO DISCHARGE OF JURY—SEC. 959 (3) CRIM. CODE.

Where a judge is trying a criminal case with a jury and it is brought to his attention before the jury have returned their verdict, that the constable in charge of the jury, has been present in the room with them for a considerable time while they were considering the verdict, the judge, if of the opinion that the disobedience of the constable might lead to a miscarriage of justice may, under s. 959 (3) of the Criminal Code, discharge the jury, or if he be of opinion that the accused cannot be prejudiced thereby he may allow the jury to bring in their verdict as though the directions of the section had been followed.

APPEAL by way of stated case in an action for theft under s. 384 Crim. Code. Affirmed. Statement.

P. E. MacKenzie, K.C., for the Crown.

T. A. Lynd, for the accused.

The judgment of the court was delivered by

LAMONT, J.A.:—The case as stated by the Chief Justice is as follows:— Lamont, J.A.

The accused was tried by me with a jury at Saskatoon on the 5th and 6th of February last and convicted on a charge of theft from a railway car under s. 384 of the Criminal Code.

It was brought to my attention before the jury returned their verdict that the constable in charge of the jury had been present in the room with them for a considerable time while they were considering their verdict. The constable did not interfere with the jury in any way, by conversation or otherwise, but was merely present during a part of their deliberations.

At the request of counsel for the accused, I have reserved the following question for the opinion of the Court of Appeal.

Should I have discharged the jury under the above circumstances before taking their verdict, and tried the accused over again?

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S. 959 reads as follows:—

959. If the jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings.

3. If such disobedience is discovered before the verdict of the jury is returned, the court, if it is of opinion that such disobedience might lead to a miscarriage of justice, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

The contention made on behalf of the accused was that the jury were not kept in a *private place* so long as the officer in charge remained in the same room, and the following cases were cited: *Rex* v. *O'Connell* (1845), 1 Cox. C.C. 410; *Rex* v. *Willmont* (1914), 30 T.L.R. 499; *Goby* v. *Wetherill*, [1915] 2 K.B. 674.

The last case was a civil case in which the facts were identical with the case at bar. The town sergeant, to whom the jury had been entrusted, remained in the room for some substantial time while the jurors were deliberating.

In giving judgment Bailhache, J., said (p. 675):—

The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the court or not, is present for a substantial time during their deliberations, then the verdict is vitiated. I regret having to come to this conclusion, for I daresay that no harm was done.

And Shearman, J., said:—

It is a cardinal principle of the jury system that a jury must deliberate in private. In the present case, during a substantial part of the time when the jury were deliberating, a stranger was present, namely, the town sergeant, and I cannot regard that as an immaterial or unimportant fact. I agree, therefore, that the appeal must be allowed.

This case would be a strong authority in favour of the accused, if the statute under which it was decided had been the same as our Criminal Code. But sub-s. 2 of 959, above quoted, expressly provides that disobedience to the directions of the section shall not affect the validity of the proceedings. In the face of this statutory declaration, the authorities cited on behalf of the accused seem to me to be beside the question. The disobedience of the constable was discovered before the jury returned their verdict. In such a case sub-s. 3 governs. If the trial judge be of opinion that the disobedience might lead to a miscarriage of justice, he

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may discharge the jury. If the trial judge be of opinion that the accused cannot be prejudiced thereby, he may allow the jury to bring in their verdict as though the directions of the section had been followed. The Chief Justice in this case was evidently of opinion that, as the constable did not speak to the jurors, or in any way seek to influence their verdict during the time that he was in the room, his mere presence there could not lead to any miscarriage of justice. I agree with that conclusion, and would answer the question reserved in the negative.

Judgment accordingly.

MONTGOMERY v. HUNTER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. May 23, 1919.

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INTERPLEADER (§ II—20)—ORDER DIRECTING AN ISSUE—NECESSARY REQUIREMENTS OF—JUDGE SHOULD SETTLE ISSUES BETWEEN PARTIES.

In an interpleader matter the judge, by order, directed an issue "whether the stock transfer in question in this action (*Montgomery* v. *Hunter*, administratrix) is the property of the said Montgomery as against the said Hunter." *Held* that this form of issue was wrong for two reasons: (1) It was the traditional form adopted in the case of a contest between an execution creditor and a claimant to goods seized under execution. It was not appropriate to a contest between two claimants to goods, where neither of their respective titles depended upon some title overriding the title of a third person. (2) There was nothing on the face of it to shew the nature of the claim of either party or the grounds upon which either sought to invalidate the claim of the other.

The Master or judge should in cases of interpleader settle the issues between the parties, being careful to make them specific and so as to cover all the points really in question. If he finds that he cannot conveniently settle the issues himself at the time the application is before him, he may direct that the parties should exchange pleadings, and thereby settle the issues.

[*Elves* v. *Pratt*, 32 D.L.R. 670; *Stapley* v. *C.P.R.* (1912), 6 D.L.R. 97, referred to.]

Statement.

APPEAL by plaintiff from the orders of Scott, J., and Walsh, J., in an interpleader issue, order of Scott, J., set aside, order of Walsh, J., varied.

S. W. Field, for plaintiff.

H. H. Parlee, K.C., for defendant.

The judgment of the court was delivered by

Beck, J.

BECK, J.:—This is an interpleader matter. Walsh, J., by order directed an issue "whether the stock transfer in question in this action (*Montgomery* v. *Hunter*, administratrix) is the property of the said Bessie Montgomery as against the said Josephine Hunter."

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The order provided for the examination for discovery of both parties. In the course of the examination of the plaintiff in the issue she was asked to produce a number of documents or parts of documents, which in the course of her examination she either directly or indirectly admitted were in her custody, power or control. She refused to do so. An application to compel her to do so was made to Scott, J., who made the order asked. From that order the plaintiff in the issue appeals on the ground that Scott, J., erred in holding that the plaintiff was bound to produce documents which she declared to be irrelevant and immaterial and should have examined the documents with the view of ascertaining whether or not the extracts produced by the plaintiff were the only material documents.

The order of Scott, J., *as taken out* is much too wide in its terms. It requires the plaintiff to answer any and all questions in any wise relating or referring to any dealings or transactions between her and the deceased in her lifetime and to bring with her and produce at such examination all letters, correspondence, documents and paper writings which she refused to produce upon such examination, together with all other letters, correspondence, documents and paper writings relating to or in any wise connected with any dealings or transactions between her and the deceased during the years 1917 and 1918.

Counsel for both parties virtually agree that Scott, J., ought to have inspected the various documents in order to judge which, if any of them, ought to have been produced in accordance with the decisions of this court in *Stapley* v. *C. P. R.* (1912), 6 D.L.R. 97, 180; 5 Alta. L. R. 341. There was an attempt to agree upon a variation of the order from this point of view, but counsel failed to agree upon the extent to which the documents should be deemed to be relevant.

After the appeal from the order of Scott, J., was launched, the plaintiff made an application to vary the order of Walsh, J., by providing that pleadings should be directed for the purpose of defining the issues between the parties. By consent this motion was adjourned to be heard by this Division at the same time as the appeal from the order of Scott, J.

For the most part the difficulty in the case which has been the occasion of this appeal arises from the indefiniteness of the issue directed.

In *Elves* v. *Pratt* (1916), 32 D.L.R. 670, 11 Alta. L.R. 134, in giving the judgment of this Division I made some remarks upon the desirability of the masters and judge in chambers, when directing issues, making them specific and, in appropriate cases, distributive and multiple. That was a sheriff's interpleader issue, a form of issue which is so much the most common that practitioners have a tendency to follow the old forms in such cases in cases arising otherwise. In former times the sending of issues for trial before a jury was very common. In modern practice the practice of directing an issue or issues to be tried by a judge with or without a jury is prevalent.

In Seton on Decrees, 6th ed., pp. 378 *et seq.*, are forms of issue to try such questions as:—

Whether E. is the heir at law of the testatrix.

Whether J. is the eldest or only son of M. the wife of P. by the said P. lawfully begotten.

(1) Whether the bond and warrant of attorney, etc., was obtained from the plaintiff by any fraudulent representation by the obligees or any of them.

(2) Whether the same was obtained by any untrue representation.

(3) Whether the same was obtained by any fraudulent concealment or suppression by the obligees or either of them.

(4) Whether the bond, etc., was given to secure any debt or liability, other than the whole or part of the balance due from P. to the firm in the pleadings mentioned.

Whether M. at the time of the indentures, etc., was of sound mind, understanding and capacity to execute the said deeds.

So in the present case the issue ought not to have been put: "Whether the stock transfer in question in this action is the property of the said Bessie Montgomery as against the said Josephine Hunter." This form of issue in such a case is wrong for two reasons: (1) It is the traditional form adopted in the case of a contest between an execution creditor and a claimant to goods seized under execution. That is why the form includes the words "as against the" defendant to the issue. It is not appropriate to a contest between two claimants to goods or some specific interest in goods, where neither of their respective titles depends upon some title over-riding the title of a third party. Even in the case of a sheriff's interpleader I think it would in many cases be wise to abandon the traditional form and state a question raising specifically the real point in question; for instance, the validity of a chattel mortgage. (2) The

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form of issue is far too indefinite. There is nothing on the face of it to shew the nature of the claim of either party or the grounds upon which either seeks to invalidate the claim of the other.

In the present case I think a convenient form of issue would have been: "(1) Whether there was a completed gift of 100 shares in the Clover Bar Coal Co., Ltd., from J. F. Hunter, deceased, to Bessie Montgomery by virtue of the execution and delivery of certain transfers of said shares dated, etc.," to which might have been added further questions upon the defences proposed to be relied upon by the defendant.

In other words, the master or judge in such cases should direct the trial of one or more questions, the answers to which would determine the one or the several questions really in issue between the parties. He should, however, not permit them to multiply the issues by raising all possible points that can be thought of, but should direct only such issues as on proper material he is satisfied there is just ground for either party raising. See *Brown* v. *McClintock* (1873), L.R. 6 H.L. 434 at 463.

Some of the rules referring to the settlement of issues are rules 224, 228, 229, 498.

I think as I have said that in the majority of cases the master or judge should in cases of interpleader settle the issues between the parties, being careful to make them specific and so as to cover all the points really in question, but I see no reason why if he finds he cannot conveniently settle the issues himself at the time the application is before him, he should not direct that the parties should exchange pleadings and thereby settle the issues. The very purpose of pleadings is to settle the issues between the parties. R. 228 authorizes a judge to define the issues of fact if the pleadings do not sufficiently define them. This is seldom done because the same end can be achieved by ordering particulars.

Again where by inadvertance or otherwise an issue in the sense of a question sent for trial turns out to be not sufficiently specific, I see no reason why it should not be supplemented by particulars. Our r. 256 clearly covers such a case; it says: "A

further and better statement of the nature of the claim or defence and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered upon such terms as to costs and otherwise as may seem just."

I think it is wholly unsatisfactory to deal with the matter of this appeal until we know with definitiveness what are the real specific issues between the parties and that consequently we should direct both parties either to give particulars or to exchange pleadings, the plaintiff—claiming as we understand by way of gift, by means of a transfer of the shares in question, should state, I think, the date of the transfer and the date and circumstances of the delivery of the transfer; the defendant ought to give the grounds upon which he proposes to defeat the plaintiff's claim and these grounds should be stated specifically, *e.g.*, a denial of the transfer, a denial of the delivery, the point of law that the delivery such as it was, is not such a delivery as to perfect the gift so as to make it irrevocable; it would no doubt be a possible defence to such a claim that there was duress, undue influence or fraud practised by the donee upon the donor, which induced the gift, but we are agreed, rejecting the argument of counsel for the defendant, that it would be no defence to such a claim raising as it does, a question of gift or no gift, to set up that the gift was fraudulent and void as against creditors. To attack the gift on that ground in the first place assumes the validity of the gift as between the parties, and the attaching party must be a creditor having some process attaching the shares or representing not only himself but all other creditors. With the proper parties before the court there is no reason why such an issue should not in an appropriate case be directed.

The propriety of having the issues clearly defined before question of discovery or inspection are determined is quite obvious and is dealt with in r. 371.

I think that what ought to be done in the present case is this: to set aside the order of Scott, J., to vary the order of Walsh, J., by referring it to the master or a judge in chambers to settle the issue or issues between the parties by the stating of specific questions; to permit, when that has been done, the

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examinations for discovery to proceed, with the intimation now given, that if on the continuance of the examination of the plaintiff the same or similar questions as to production or discovery arises, they should on motion be dealt with in the manner pointed out in the case of *Stapley* v. *C.P.R.*, *supra*.

As to the costs of the appeal, I think that, inasmuch as the appellant succeeds substantially, they should go to the plaintiff in the issue as costs in the cause, in any event, and that, inasmuch as there seems to have been much uncertainty and confusion over what was the proper practice to meet the circumstances of the case, the costs of the several motions below should be costs in the cause.

There is another remark which I wish to add with regard to the practice where issues are directed. In such cases the order ought to provide that the issue or issues directed by the order are to be prepared by the plaintiff and delivered to the defendant within a stated time, and that the defendant is to return it within a stated time. The defendant should return the issue either approved or disapproved. In the latter case, the issue is settled by the master or a judge. The issue as approved or settled is engrossed and filed and a copy of it is what is to be supplied to the trial judge together with any particulars which may have been given (r. 185); for the issue, if properly prepared, will contain "the statement in writing of the claim and demand of the plaintiff and of the defence of the defendant" and is therefore a pleading (r. 2, (14)).

Judgment accordingly.

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THEATRE AMUSEMENT CO. v. REID AND DRACKETT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. April 12, 1919.

LANDLORD AND TENANT (§III D—110)—DISTRESS FOR RENT—CONDITIONAL SALE AGREEMENT—SEIZURE AND SALE OF GOODS BY LANDLORD.

Sec. 4 of the Act respecting distress for rent and extra judicial seizures, R.S.S. c. 51, does not impair the right of a landlord to distrain on goods on the premises in the possession of the tenant under a conditional sale agreement. It only restricts the landlord's right as to the extent of the interest in the goods which he can sell. There is nothing in the Act which takes away the right of the landlord to distrain upon and seize and impound the goods for the purpose of selling that interest.

[*Re Calgary Brewing & Malting Co.*, 25 D.L.R. 859, referred to.]

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THEATRE AMUSEMENT CO. v. REID.

Haultain, C.J.S.

APPEAL by defendant from the trial judgment in an action for damages for wrongful conversion. Reversed.

C. E. Gregory, K.C., for appellants.

H. J. Schull, for respondent.

HAULTAIN, C.J.S.:—Owing to the sale by order of the court of the goods concerned at an early stage of this litigation, the action is narrowed down to an action for damages alleged to have been the result of the wrongful conversion of the goods by the defendants.

The conversion is alleged to have taken place as follows: The plaintiff sold certain goods to one Findlay and took a lien note from Findlay to secure the balance due on the transaction. Under the terms of the lien note the property in the goods remained in the plaintiff. The goods were in a building in Moose Jaw known as the Rex Theatre, which formed part of the premises held by Findlay under lease from the defendant Reid. Findlay's rent having fallen into arrears, Reid distrained on the goods by his bailiff, the defendant Brackett, on September 24, 1917. On September 29, the plaintiff demanded possession of the goods from Drackett, and Drackett refused to deliver them up. The goods were subsequently seized by the sheriff, and sold under an order of the court under circumstances which it is not necessary to relate. Some litigation in the form of interpleader proceedings arose with regard to the distribution of the proceeds of the sale of the goods, and the plaintiff's lien was postponed to, among other claims, the execution of one Cora Squires, which had issued under a consent judgment obtained by Squires against Findlay after the alleged conversion had taken place. The fund resulting from the sale of the goods was not sufficient to pay the whole of the amount due to the plaintiff under its lien note.

The plaintiff contends that the refusal of the defendants to deliver up the goods constituted a wrongful conversion, and that, if the goods had been delivered up when demanded, the retaking of the goods under the lien note would have cured certain defects in the note by reason of which the note was held to be invalid as against execution creditors, among whom was Cora Squires. The plaintiff claimed as damages resulting from

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the conversion the amount which it would have received out of the fund if the lien note had been valid as against execution creditors, and certain costs occasioned by the interpleader proceedings.

On the trial of the action, the trial judge found that there had been a wrongful conversion and that the plaintiff was entitled to the damages claimed. The defendants now appeal.

In my opinion, the foregoing statement of facts, even if borne out by the evidence, does not disclose a wrongful conversion by the defendants. S. 4 of An Act respecting Distress for Rent and Extra Judicial Seizures, R.S.S. c. 51, restricts the common law right of a landlord to distrain for rent on the goods and chattels of persons other than the tenant. The section as it applies to this case reads as follows:—

> A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises; but this restriction shall not apply . . . to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition.

In my opinion, this section of the Act leaves unimpaired the right of the landlord to distrain on goods on the premises in the possession of the tenant under a conditional sale agreement and only restricts the landlord's rights as to the extent of the interest in the goods which he can sell. In order to complete a distress the goods must be seized and impounded. While the interest of the conditional purchaser is the only thing which can be sold, there is, in my opinion, nothing in the section which takes away the right of the landlord to distrain upon and seize and impound the goods for the purpose of selling that interest. If the above opinion is correct, the defendants were quite justified in refusing to deliver up the goods to the plaintiff and there was no wrongful conversion. See *Re Calgary Brewing & Malting Co., Ltd.: Miquelon, Landlord*, (1915), 25 D.L.R. 859.

If I am wrong in that view of the effect of s. 4, and there was a wrongful conversion, then I am of opinion that the damages are too remote. The defendants had no knowledge or reasonable means of knowledge of the defect in the plaintiff's note. They had no reasonable grounds for anticipating that

Squires would obtain a judgment by consent against Findlay and issue execution thereon, or that there would be a seizure by the sheriff and interpleader proceedings following thereon, or that the goods would be sold under an order of the court, or that, by reason of the defect in the lien note, the plaintiff's security would be postponed to executions.

Under all these circumstances, the loss sustained was not the immediate or natural and probable consequence of the act complained of. On either of the above grounds the action must fail.

In coming to a conclusion on the first point dealt with, I assumed the facts to be as stated by the plaintiff in its statement of claim, which put the plaintiff in the best possible position to establish a wrongful conversion. If it were necessary to the decision of the appeal, I should hold that the plaintiff must also fail on the evidence. There was not a proper distraint or seizure or impounding proved. The defendants were not in possession of the goods either in law or in fact at the time the demand for their possession was made by the plaintiff. The goods were at that time in the possession or custody of the police, under proceedings taken before the police magistrate, and it was not within the power of the defendants to deliver them to the plaintiff even if they had been willing to do so.

The appeal is, therefore, allowed with costs, and the judgment below set aside and judgment ordered to be entered dismissing the action with costs.

Lamont, J.A.

LAMONT, J.A.:—This is an action for damages for conversion. In May, 1917, one W. B. Findlay leased from the defendant Reid the premises known as the Rex Theatre, Moose Jaw. In the same month, Findlay purchased from the plaintiff company a quantity of opera chairs and other goods and fixtures for the theatre for $3,450, paying $1,650 cash, and giving a lien note thereon for the balance. The registration of the lien note was defective.

In September Findlay became financially embarrassed; rent amounting to $833 was over-due, as were also the wages of the help whom he employed to operate the theatre. On September 24 a seizure was made on the goods and chattels in the theatre by the police, apparently on behalf of the help whose wages were

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unpaid, but it is not clear how long the police kept possession. On the same day, but a little later than the police seizure, the defendant Reid made a seizure through his bailiff, the defendant Drackett, of the goods and chattels covered by the plaintiff's lien note. On September 29 the plaintiff's bailiff, Burdon, went to the theatre to take possession of the same goods. He found the place locked up. He then went to Drackett's office and told Drackett the plaintiff had a prior claim and should have possession, but Drackett would not acknowledge the priority of the plaintiff's claim. Plaintiff's solicitors on the same day wrote to Reid's solicitors making a formal demand for possession of the goods covered by the plaintiff's lien. Reid's solicitors replied that they would not see their client before the following Monday, but stated that it was their intention to advise him to immediately issue a writ to have it declared that the plaintiffs' lien was invalid. On October 3, the sheriff seized the same goods under an execution against the goods of Findlay obtained by some of the employees for wages. An interpleader issue was directed, but in the meantime the goods were sold under an order of the court for $2,300, which sum was paid into court and distributed in accordance with the judgment of this court in *Theatre Amusement Co.* v. *Squires* (1918), 43 D.L.R. 496. In that case it was held that as there had been no proper registration of the plaintiff's lien note, the claims of the execution creditors against the goods were entitled to priority over the plaintiffs'. The plaintiffs now bring this action for conversion. Their contention is that they were entitled to possession of the goods covered by the lien note; that Reid refused to give them possession; that, had they obtained possession, their possession would have prevented the execution creditors of Findlay from realizing anything out of the goods, and that, therefore, they had been damnified.

In the court below, the plaintiffs obtained judgment for the balance unpaid on their lien note. The defendants now appeal.

There was considerable argument before us as to whether there was any proper demand made by the plaintiffs for possession of the goods, or any refusal on Reid's part before the sheriff seized under the execution; also, as to whether or not

Drackett was in possession from the time he seized until the sheriff made his seizure.

Assuming all these in the plaintiffs' favour, I am of opinion the action must fail, for the reason that the landlord was entitled to seize and sell the interest of his tenant in any goods on the premises which were in the possession of the tenant under a contract of purchase.

At common law, generally speaking, all goods found on the demised premises, whether belonging to the tenant or a stranger, might be seized by the landlord and held as a distress for rent. *Lyons* v. *Elliott* (1876), 1 Q.B.D. 210.

The fact that the goods distrained upon belonged to some person other than the tenant, did not give the owner thereof a right to their possession as against the landlord.

The modern rule is stated in Bell's Landlord and Tenant (1904), at p. 289, as follows:—

> The general rule is that all goods and chattels which are upon the demised premises at the time of the distress, whether they are the property of the tenant or of a stranger, may be distrained for rent in arrear, unless they are either absolutely or conditionally privileged or exempted from distress by some statute or other rule of law.

The right of a landlord to distrain the goods of a person other than a tenant has been interfered with in this province by An Act Respecting Distress for Rent and Extra Judicial Seizure, being R.S.S. c. 51.

S. 4 of that Act in part is as follows:—

> A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises; but this restriction shall not apply . . . to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase. . . .

It will be observed, in the first place, that the statute restricts a landlord from distraining on the goods of third parties, but then it goes on to declare that this restriction shall not apply to the tenant's interest in goods on the premises under a conditional sales agreement. This is precisely the present case. When the landlord sued, the goods in question were on the premises and in the tenant's possession under an agreement to purchase the same.

The restrictions above set out not applying to Findlay's

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interest in the goods covered by the plaintiffs' lien note, the landlord's right, so far as that interest is concerned, is the same as it was before the statute was passed; that is, he is entitled to distrain and sell Findlay's interest. He did distrain, and would have sold that interest but for the plaintiff's injunction restraining him from so doing, as was admitted in argument. Wherein, then, did he overstep his right? The plaintiffs say, in refusing to give up possession when they demanded it; they having reserved to themselves not only the property in the goods, but also the right of possession. The answer to that contention I think is this: Prior to the passing of the statute, the ownership of the goods distrained and the right to their immediate possession would not have entitled the plaintiffs to possession as against the landlord. The statute has bettered their position by limiting the landlord's right to distrain and sell, to the interest of the tenant in the goods. But how can the landlord distrain on the tenant's interest unless he makes a distraint on the goods themselves? He can only sell the tenant's interest, but that is, in effect, selling the goods subject to the plaintiffs' rights. This, in my opinion, gives him the right to keep possession of the goods until the sale of the tenant's interest.

This view seems to me to be supported by *Carroll* v. *Beard* (1895), 27 O.R. 349. In that case the landlord distrained for the goods held under a conditional sale agreement and advertised the same for sale. The plaintiffs brought an action, and obtained an interim injunction restraining the defendant from selling the goods seized except subject to the interest of the plaintiffs as unpaid vendors. In giving judgment, MacMahon, J., p. 355, said:—

> And, as under 57 Viet. c. 43 the landlord shall distrain only the interest of the tenant in any goods on the premises under a contract by which he is to become the owner thereof upon the performance of any condition, the landlord could not sell the absolute property in the goods, even if any rent were due, as to which there is no evidence.
>
> There must be an order perpetually restraining the defendants from selling the property except subject to the rights of the plaintiffs as unpaid vendors.

This judgment was affirmed on appeal. It is true that the plaintiffs in that case did not seek to establish a right to take

the goods out of the possession of the landlord, but simply that he sell them subject to their rights as vendors. But even had they sought that right, the judgment, in my opinion, must have been the same. The landlord's clear right to distrain and sell the tenant's interest must be given effect to, and I cannot see how that could be done if the plaintiffs had the right to take the goods away. Further, I fail to see that the unpaid vendors would be prejudiced by allowing the landlord to keep the goods in his possession until the interest therein of his tenant is sold.

In the case at bar, the plaintiff claims that they were prejudiced because the possession of the landlord enabled execution creditors to come in. I think this is a mistaken view. The execution creditors were entitled to claim against the goods in priority to the plaintiffs, not because of the landlord's possession, but by reason of the negligence of the plaintiffs in not properly registering their lien.

Where the statute provides that an unpaid vendor will lose his priority in favour of execution creditors unless he registers his lien agreement in accordance with the provisions of the Act in that regard, he cannot neglect to comply with those provisions and then hold the landlord liable for results which would not have followed but for his own failure to comply with statutory provisions, which compliance would have protected his interest.

S. 1 of the Act respecting Lien Notes and Conditional Sales of Goods provides that a vendor under a conditional sale is not permitted to set up his right of property or right of possession as against any purchaser or mortgagee of or from the buyer in good faith for valuable consideration, or against judgments, executions or attachments against the purchaser, unless the sale agreement is in writing and registered as provided in the Act. On this section counsel for the plaintiffs based an argument that the vendor has impliedly the right to set up his ownership and right of possession against every person (including a landlord), not protected by that section.

The section does not give to a vendor any right which would not be his without the statute. On the contrary, the object of the section is to restrict the vendor's rights. A vendor may set

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up his right of property against other persons, not by virtue of any right given to him by the section, but by virtue of his ownership of the article. But he can not set up such ownership against one whose claim on the goods is by law superior to that of ownership, as is the case of a landlord distraining on the interest of his tenant in goods purchased on a conditional sale agreement, although the ownership of the goods still remains in the vendor.

As the defendant Reid was in my opinion entitled to distrain upon his tenant's interest in the goods seized, and to hold such goods until he had sold that interest, there was no wrongful refusal on his part to give up possession. An action for conversion, therefore, will not lie.

The appeal should be allowed with costs; the judgment in the court below set aside, and judgment entered for the defendants with costs.

Elwood, J.A.

ELWOOD, J.A., concurred with Haultain, C.J.S.

Appeal allowed.

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Ex. C.

CAROW TOWING Co. v. The "ED. McWILLIAMS."

Exchequer Court of Canada, Hodgins, Loc. J. in Adm. March 5, 1919.

TOWAGE (§ I—1)—LIEN FOR—MORTGAGE—PRIORITIES—LEX LOCI—PLACE OF CONTRACT—ACCEPTANCE BY TELEPHONE.

Under British and Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mortgage existing upon it at the time the claim arose.

2. Where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending off a telegram from that place. The contract having been accepted in Canada was governed by Canadian law.

[*Kane* v. *The John Irwin* (1912), 1 D.L.R. 447; *The Santa Maria* (1917), 36 D.L.R., referred to.]

Statement.

ACTION for towage by the plaintiffs against the ship "Ed. McWilliams," a British ship registered at Amherstburg, Ontario.

The plaintiffs are a partnership, with their head office at Cheboygan, Michigan, in the United States of America.

The contract of towage on which the claim herein was based, was arrived at as follows: telegram from Sault Ste. Marie, Ontario, by the Lake Superior Paper Co., to plaintiffs at Cheboygan, Michigan, and reply from plaintiffs to the paper company. No contract was made by these telegrams. Subse-

quently a long distance telephone call was sent by the plaintiff, William Martin, at Cheboygan, to Capt. Thos. R. Climie's house at Sault Ste. Marie, where it was answered by Capt. Climie, who by telephone discussed and agreed to the terms of the towage contract.

The subsequent towage service was in accordance with the contract, and consisted in towing the "Ed. McWilliams," a dump barge, from Sault Ste. Marie to Calcite, Michigan, light, and back to Sault Ste. Marie loaded with limestone. The claim $434.38 was admitted to be correct.

At the time of the towage contract and of said towage service, the "Ed. McWilliams" was subject to two registered mortgages, both of which are still subsisting. The amount of these mortgages greatly exceeds the value of the ship.

No appearance having been entered, the plaintiffs, after some time had elapsed, applied for leave to proceed *ex parte*, and to set down the action for trial, in the usual way, and to prove their case by affidavit evidence, the court ordering that notice of trial should be served upon the owner and the mortgagees of said ship.

An appearance was subsequently entered by the owners, and by one of the mortgagees of said ship as intervenor. A statement of facts was agreed to and signed on behalf of the plaintiffs and the intervenor.

W. S. Maguire, for plaintiffs.

J. G. Irving, for owner and mortgagee intervening.

Hodgins, L.J.A.

HODGINS, L.J.A.:—Action for towage by the American tug "Charlie O. Smith" of the barge "Ed. McWilliams," from Sault Ste. Marie, Ont., light, to Calcite, Mich., U.S.A., and back from there, laden, to the point of departure. The amount is not in dispute.

A mortgagee, Simpson, intervenes and claims that the lien of the plaintiffs, if any exists, is subordinate to his mortgage claim. He shews that there is also a second mortgage for a large amount and it is not disputed that unless the plaintiffs are entitled to a maritime lien ranking ahead of these mortgages, a sale would result in no benefit to them.

The dispute therefore resolves itself into the question: Does

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towage give rise to a maritime lien ousting the mortgages, or merely to a statutory claim with the right to seize and sell the vessel subject to the charges then existing against it? In arguing this, the plaintiffs assert that American and not Canadian law applies.

The contract was led up to by telegrams, one despatched from Sault Ste. Marie, Ont., to Cheboygan, Mich., and the other a reply thereto. In consequence of these telegrams, the plaintiffs telephoned from Cheboygan to Capt. Climie at the Canadian Soo and he there accepted their offer or made his terms with them. I think the contract was one made in Ontario, for, when Capt. Climie went to his telephone, he then and there received an offer or discussed terms which, when accepted formed the contract. In other words, the plaintiffs at Cheboygan, Mich., by using the long distance telephone, were able to reach Captain Climie in Ontario just as if they had telegraphed to him and he had received the telegram at the Soo. His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario. See *Weyburn Townsite Co.* v. *Honsburger* (1919), 15 O.W.N. 428.

The contract provided for the despatch of the tug from Michigan to Ontario and involved taking the barge in tow to Calcite in Michigan. It also necessitated towing the barge back, laden with a cargo, and delivering her safely at Sault Ste. Marie, Ont. Both the beginning and the end of the enterprise were in this province, and the successful completion of it is an essential feature which must be proved before the money is due: *The "Edward Hawkins"* (1862), Lush 515; *The "Minnehaha"* (1861), 15 Moo. P.C. 133, 15 E.R. 444; *The "Queen of Australia,"* 4 Asp. M.C. 274, N.

The fact, if it be a fact that the plaintiffs were to be paid for all the time which would elapse till the tug returned to Cheboygan, makes no difference as to where the performance of the contract ended.

Under these circumstances, what law should be applied? The place of the making of the contract, of its initial and final steps in performance was Canada, and entry into the United States was only for the purpose of securing a cargo. It is true

that the moving of that cargo was commercially the *raison d'etre* of the contract, but in law what should be looked at for this purpose are the various incidents that go to make up not only the formation and performance of the contract, but the situation of the parties, its working out, where and how that is to be done, and the possible remedies in case of default.

I think these parties must have intended Ontario law to apply if the whole situation is looked at. The hiring was done here, the tug was to tow in waters half of which were Canadian, to return into Canada and deliver its tow and be paid there. Indeed, the successful completion of the towage contract could only be done by the delivery of the barge into the Canadian port, where, if the hire was not paid, suit would naturally be brought and proceedings *in rem* begun. So that the chief elements generally regarded in this connection point to the application of our own law. See *Hamlyn* v. *Talisker* [1894] A.C. 202; *Superior* v. *La Cloche* [1902] A.C. 446.

Applying Canadian maritime law, it is clear that where the owners do not appear or contest the claim, the remedy is limited to the *res*. The same result follows when the intervenors are the mortgagees, for they cannot be made liable for any part of the demand. Sir F. H. Jeune, Knt., says, in *The "Dictator"* [1892] P. 304 at 321: "A mortgagee has no interest in or connection with the action beyond his interest in the *res*, nor could he by any process be fixed with any further liability."

No evidence was given suggesting that the plaintiffs were looking to the owners merely, and the presumption is therefore that the ship is liable. The exact terms of the contract are not disclosed. The cases cited to shew that there is a conclusive presumption against the ship's liability when the contract is made in its home port (to which may be added *Kane* v. *The "John Irwin"* (1912), 1 D.L.R. 447), relate to necessaries and repairs and are not fundamentally applicable to a contract for towage.

The question is thus squarely up for decision, namely, does a towage claim give a maritime lien upon the *res* superior or prior to the mortgages existing upon it at the time the claim arose?

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In several old cases towage is classed with other claims which carry with them maritime liens. These are *The "Isabella"* (1838), 3 Hag. Adm. 427; *The "Constancia"* (1846), 10 Jur. 845; *The "St. Lawrence"* (1880), 5 P.D. 250. And to them may be added *The "Athabaska,"* 5 C.L.T. 600. Cassels Digest S.C.C. 1875-1893, p. 522.

But in none of these cases is the point distinctly raised, but rather is tacitly assumed in favour of the lien. This is probably because the towage in these cases was really a continuation of or so connected with the other claims as to form a part of the operation in which a maritime lien properly attached. The only decision upon the exact point is to be found in *Westrup* v. *Great Yarmouth Steam Carrying Co.* (1889), 43 Ch.D. 241, a judgment of Kay, J., in which he discusses the cases I have mentioned, saying that in them there is no distinct argument nor any distinct decision that a maritime lien was created by towage simply.

That trial judge followed the expressions of opinion by Lord Bramwell in the House of Lords, and of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal in the *Heinrich-Bjorn* case (1885), 10 P.D. 44; (1886), 11 App. Cas. 270; and held that the weight of authority was against there being a maritime lien for ordinary towage.

This decision has not been accepted by Williams and Bruce, who, after the decision in 10 P.D. had been given, but before the appeal was disposed of, say that "no authority is stated for this proposition, and it is apprehended that the Court of Appeal did not intend to overrule the decision in *The 'Constancia,' supra,* which has been unquestioned for nearly 40 years." I find, however, that most learned authors regard it as disposing of the question. It has not been doubted for 30 years, so that its authority stands high. Abbott and Roscoe both quote it as established, and in Halsbury's laws of England it is so dealt with. Howell in his Canadian work on "Admiralty" does the same; Mayers leaves the matter in doubt. I find that Stewart, L.J.A., in Prince Edward Island in *The "Santa Maria"* (1917), 36 D.L.R. 619, 16 Can. Ex. 481, has recently held against the proposition that a maritime lien for towage exists. American

authorities differ on this point from the English and Canadian. Their State laws generally give a maritime lien, and it is then recognized by the U. S. Admiralty Courts.

I prefer to follow the English and Canadian decisions and authorities and must therefore decide against the plaintiffs' claim and in favour of the contention that the mortgagees rank first in priority. *The Pacific* (1864), Br. & L. 243; *The Aneroid* (1877), 2 P.D. 189. In *The "Colonsay"* (1885), 5 Asp. M.C. 545, Brett, J., held that when the mortgage claims exceeded the value of the ship, the lien claimed for necessaries was completely ousted. That state of affairs exists here, but as one of the mortgages is to a bank and the circumstances may change, the dismissal of the plaintiffs' claim against the ship will be without prejudice to any future action if the mortgages are paid off or sufficiently reduced. The plaintiffs may, of course, if the mortgagees agree, have an order for sale subject to the mortgages. The view I have taken renders it unnecessary to deal with the other matters argued.

The dismissal as against the ship will be without costs down to the appearance fyled by the mortgagee, but the mortgagee will be entitled to his costs since then. *The "Eastern Belle"* (1875), 3 Asp. M.C. 19.

No order allowing intervention was applied for or made, but it seems that where mortgagees or others who are clearly entitled to intervene desire to do so, the proper practice is to allow them to fyle an appearance without more. As the owners have entered an appearance, there may be a judgment against them for $434.38, with interest and costs of action, including those payable to the mortgagees.

Judgment accordingly.

ABELL v. VILLAGE OF WOODBRIDGE and COUNTY OF YORK. (Annotated.)

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Middleton, J. January 27, 1919.

HIGHWAYS (§ II A—20)—DEDICATED BY OWNER—MUNICIPAL ACT—COMMON AND PUBLIC—EASEMENTS.

S. 433 of the Municipal Act (1913, 3 & 4 Geo. V., c. 43, Ont)., provides that "the soil and freehold of every highway shall be vested in the corporation of the municipality or municipalities," and by s. 432, "all roads dedicated by the owner of the land to public use" are declared to "be common and public highways." The effect of this legislation and of the repeal of 3 Edw. VII. c. 19, which was concurrent with it, is to remove any easement or reservation to which the vesting of the highway was subject, and to vest absolutely and without qualification the soil and freehold in the municipal corporations.

[*Abell* v. *Village of Woodbridge*, 37 D.L.R. 352, 39 O.L.R. 382, reversed.]

Statement.

AN appeal by the defendants from the judgment of Masten, J., (1917) 37 D.L.R. 352, 39 O.L.R. 382. Reversed.

The case was again spoken to, when the court informed counsel of the result of inquiries into the earlier history of the case, especially affecting the question of lost grant.

O. L. Lewis, K.C., and *C. W. Plaxton*, for the appellant, the Corporation of the County of York.

W. A. Skeans, for the appellant, the Corporation of the Village of Woodbridge.

J. H. Moss, K.C., and *W. Lawr*, for the plaintiff, the respondent.

Meredith,C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the Village of Woodbridge and the Corporation of the County of York, from the judgment dated the 13th April, 1917, which was directed to be entered by Masten, J., after the trial before him sitting without a jury at Toronto on the 25th and 26th January and 16th February of the same year, 37 D.L.R. 352.

The contest is as to the right of respondent to maintain a raceway in connection with his mill property under the surface of a highway called Pine street, in the village of Woodbridge.

At the trial, there was nothing to shew the origin of the highway, and my brother Masten presumed a lost grant of an easement to which the highway was subject.

Since the argument, by the courtesy of Mr. Irwin, the Clerk of the Peace for the County of York, the Court has been put in possession of documentary evidence from which the origin of the highway is satisfactorily shewn.

The inference I would draw from these documents is that

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what is now Pine street was originally a road leading to the mill of a man named Burr, a predecessor in title of the respondent, and that the raceway crossed this road. In the progress of time the road became, by reason of its use by the public, with the permission of the owner of the mill property, a public highway by dedication, and the road as dedicated was subject to the right of the mill-owner to maintain the raceway. It is unnecessary to determine whether this right was an easement, or the land occupied by the raceway was the property of the mill-owner, subject to the public right of passage over it.

As the law stood down to the passing of the Municipal Act, 1913 (3 & 4 Geo. V. c. 43), Pine street was vested in the Corporation of Woodbridge, subject to the right of the mill-owner to maintain the raceway.

The law applicable before the passing of that Act was the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 601, which provided that:—

> Every public road, street, bridge or other highway in a city, township, town or village—except . . . 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.

It was held by a Divisional Court in *Roche* v. *Ryan* (1891), 22 O.R. 107, that the effect of this section (then s. 527 of R.S.O. 1887, c. 184) was to vest not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the road, street, bridge or highway, and that case was followed in *Cotton* v. *City of Vancouver* (1906), 12 B.C.R. 497.

An important change was made in the law by the Municipal Act, 1913, 3 & 4 Geo. V. c. 43. It provided, by s. 433, that "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;" and, by s. 432, "all roads dedicated by the owner of the land to public use" are declared to "be common and public highways."*

I see no escape from the conclusion that the effect of this legislation and of the repeal of 3 Edw. VII. c. 19, which was concurrent with it, is to remove the qualification to which under

*Sections 432 and 433 of the Municipal Act, 1913, are re-enacted in ss. 432 and 433 of the Municipal Act, R.S.O., 1914, ch. 192.

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that Act the vesting of the highways was subject, and to vest, absolutely and without qualification, the soil and freehold of them in the municipal corporations; and it follows that the respondent's action therefore fails. As the ground upon which our judgment rests was not taken at the trial or suggested upon the argument before us, while I would allow the appeal, reverse the judgment of my brother Masten, and substitute for it judgment dismissing the action, I would leave the parties to bear their own costs throughout.

It should be mentioned that, since the argument, the parties were informed of the point upon which the case turns, and that they put in written arguments as to it.

Since the foregoing was written, I have had an opportunity of reading the opinion of my brother Middleton.

While I agree with him that the construction I have placed on s. 433 of the present Municipal Act may work hardship in some cases, I am unable to see my way to cutting down the plain and unambiguous language of the section. To do so would be, as it appears to me, not to interpret but to legislate, and to demonstrate once more that "hard cases make bad law."

Maclaren, Magee, Hodgins, JJ.A.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with Meredith, C.J.O.

Middleton, J.

MIDDLETON, J. (dissenting):—In this case I have the misfortune of finding myself unable to accept the conclusion arrived at by my Lord the Chief Justice.

I agree with him that the proper inference to be drawn from the evidence now before the court is that BURR, the predecessor in title of the plaintiff, dedicated the road in question as a public highway, and that the dedication was subject to his right as owner of the mill to maintain a raceway across the highway.

It is well settled law that where there is a dedication by the owner of lands the public must accept the dedication in the terms in which it is given. The owner is under no obligation to dedicate, and he can dedicate subject to such terms and reservations as he chooses to impose, and if the public accept the use of the highway, it is accepted subject to the terms and conditions imposed, and there is no injustice in holding them to the terms on which the benefit was conferred. If authority is needed for this, see *Cooper* v. *Walker* (1862), 2 B. & S. 773, 121 E.R. 1259. I do not under-

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stand that my Lord in any way differs from this view of the law.

Until the statute of 1913, there were found provisions in the Municipal Act with reference to the title to highways which were regarded as difficult of interpretation, and in some sense conflicting. These provisions entirely differ from the common law, under which the public merely had the right to pass and repass along the way, the soil remaining the property of the freeholders dedicating, the presumption being that the adjoining owners were entitled "*ad medium filum.*" The nature of the statutory provisions, and the theories put forward as to their effect, may be gathered from *Roche* v. *Ryan*, 22 O.R. 107, and from Mr. Biggar's annotations on ss. 599, 600, and 601 of the Municipal Act, R.S.O. 1897, c. 223: Municipal Manual (1900).

In the revision of 1913, an attempt was made to get rid of all these difficulties, and to declare that the title to all highways should be vested in the municipality. This undoubtedly had the effect of vesting in the municipality the title to roads that theretofore had been vested in His Majesty. I cannot think that it was the intention of the legislature otherwise to interfere with existing rights or in any way to enlarge the effect of any earlier dedication of the highway.

Under dedication, by formal conveyance or presumed from permitted user, the municipalities, before the passing of that Act, had acquired title to many roads subject to reservations in favour of owners of the adjoining lands, these reservations being in many instances of great value, and I fail to find in this statute anything which would indicate an intention on the part of the legislature to destroy these valuable property rights. Full effect can be given to the words of the statute as it now stands by confining their operation to vesting in the municipality the title which had been conveyed subject to all existing reservations.

That there must be some limitation to the broad meaning attributed to the words by those entertaining the contrary view, is obvious. Highways pass over streams and railways. It certainly never was the intention of the legislature in any way to interfere with the title to the beds of those streams or the rights of navigation or floating of logs, or the rights of the railway companies.

In this case it is quite probable that the reservation of the right to maintain the raceway across the highway is not of any

great value. If the municipality desires to end this right, it is open to it to expropriate; and, while I would confirm the judgment below, I would vary it by providing that it shall not become operative for a period of six months, to enable the municipality in the meantime, if it so desires, to expropriate the right or easement which I think exists.

Appeal allowed (MIDDLETON, J., *dissenting*).

ANNOTATION.

Private rights in Highways antecedent to Dedication.

By A. D. ARMOUR.

Highways under English law were of two kinds, those in which the title to the soil remained in the Crown, subject to the public right of travel on the "King's Highway," and others, in which the ownership of the soil remained in some private owner who had, or was presumed to have, dedicated the land as a public highway. But this was never a dedication of all the soil, but a setting aside of the land as it were for a particular and paramount purpose. And it is to be observed that in neither of these cases did the public acquire anything more than a right to travel; subject to that right the ownership in the soil remained untouched. This being so, the owner of the soil could use it in any way he pleased, provided that he did not interfere with the public right. Such a freedom on the part of the owner could clearly result in the acquisition of private rights by others, either by grant or prescription, and many cases of private rights in highways, either antecedent to dedication, or subsequent and subject to the private right, are to be found in the reports.

To appreciate the effect of legislation and judicial decisions in this connection, it is necessary to understand clearly that at common law, the existence of a highway gives no ownership in the soil. The public have a mere right to travel, and the right cannot be exercised for any other purpose. Ownership presupposes the right to use the object of possession in any way pleasing to the owner, whereas in the case of a highway, the ownership in the soil of which remains in the owner of adjoining lands, a traveller cannot shoot game, flying or straying over the highway from the adjoining lands, without being guilty of a trespass. *Harrison* v. *Rutland*, [1893] 1 Q.B. 142. There being no ownership in the users of the highway, therefore it follows that they have a mere right which they may or may not exercise, as they see fit; something which has no physical existence, but is purely an abstract thing in its nature. The existence of this abstract right is not inconsistent with the ownership of the soil or freehold. It may also be subject to or co-existent with other rights acquired by private persons. In the case of highways, the title to which remained in the Crown, such rights could not have arisen except by grant. In the case of land dedicated by a private owner, many rights might have been acquired prior to dedication and might co-exist with the public right of travel. A private individual for instance may have his own right of way over the same land as that subject to the public right, and he need not justify his user of the land as one of the public, but may assert his

Annotation. private right. *Allen* v. *Ormond* (1806), 8 East 4, 103 E.R. 245. There may also be private rights co-existent with the public right of travel, both over and under the surface of the highway, as for instance, the right to maintain an arch and passageway over a highway, or a mining lease of lands under the highway. If these private rights are acquired prior to the acquisitions of the public right of travel, it is clear that under the English law, the dedication is subject to the antecedent rights. In the case of dedication, the owner cannot dedicate more than he has, and can only grant a right to use the land as a highway subject to any pre-existing rights. *R.* v. *Chorley* (1848), 12 Q.B. 515, 116 E.R. 960; *Duncan* v. *Louch* (1845), 6 Q.B. 904 at p. 915, 115 E.R. 341. That was supposed to be the law in this province until the recent case of *Abell* v. *Village of Woodbridge and County of York* (1917), 37 D.L.R. 352, 39 O.L.R. 382, reversed in the principal case, construing s. 433 of the Municipal Act of 1913 (3 & 4 Geo. V. c. 43). The law of this province governing ownership in the soil of highways before the passing of that Act was contained in 3 Edw. VII., c. 19, s. 601, which provided that "every public road, street, bridge or other highway in a city, township, town or village, except . . . 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." The effect of this enactment was stated in *Abell* v. *Village of Woodbridge*, 37 D.L.R. 352, and on appeal *ante* p. 513, to be that "not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the highway" was vested in the municipality. These words are not very clear, as the surface is part of the freehold, and it is presumed that what was meant was that the soil of the land over which the public right to travel existed, was vested, as well as the right to use the surface. The word "reserved" used in the Act is unsatisfactory, as a reservation can only be made of something issuing out of the land. Giving the word its strict legal significance therefore, easements and licenses would not come within the Act. It seems to have been taken for granted, however, that the words "rights reserved" extended to easements, and licenses as well as *profits à prendre*.* If this is so, the statute merely vested the soil of the highway in the municipality, and affirmed the common law rule as to rights acquired in the soil prior to dedication. That enactment has been substantially altered in form in the Ontario Municipal Act of 1913 (3 & 4 Geo. V., c. 43, s. 433), which provides that "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 the Act"; and by s. 432, all roads dedicated by the owners of land to public use are declared to be common and public highways. It will be noticed that the affirmation of the common law rule saving antecedent rights has been omitted from this enactment. But the mere silence of an Act of Parliament is not sufficient to take away a common law right, very clear words are needed to have such an effect, and any interference with a common law right is strictly construed by the courts. The words "subject to any rights reserved by the person who laid out the highway" in the former Act, being only an affirmation of a part of the common law rule, it is submitted that their omission in the Act of 3 & 4 Geo. V. and the general repeal of the Act of 3 Edw. VII., do not destroy the common law right. The judgment in the *Abell* v. *Woodbridge* case states in part, however, that "there is no escape from the conclusion that the effect of this legislation and of the repeal of 3 Edw. VII., c. 19,

*See annotation, 40 D.L.R. 144.

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which was concurrent with it, is to remove the qualification to which under that Act the vesting of highways was subject, and to vest absolutely and without qualification the soil and freehold of them in the municipal corporation." If this decision is correct, once land becomes a highway, it can be subject to no other rights than those of the municipality as owner in fee. If the statute acted by way of expropriation of the lands that would be a fair statement of the law. But it is submitted that the statute does not create the highway. The public right of travel is gained either by dedication or by prescription. In the former case, the owner cannot dedicate more than he has, and the public right must be subject to the rights already existing. In the case of prescription, a grant must be presumed, and the public cannot acquire a greater right than the owner could have granted. The acquisition of such a public right to travel is a necessary condition precedent before the statute can operate. It is only when that condition has been fulfilled that the Act vests the soil and freehold in the municipality. But the ownership of the soil and the right to travel are two different things, the one being in the municipality, and the other being a public right. Nothing in the statute enlarges the public right. Nor is there anything more inconsistent in the vesting taking place under the statute subject to existing rights than there was in the case of a dedication at common law. Moreover, the necessary condition precedent being the generosity, neglect or indifference of the owner of the land, the statute cannot operate as a confiscation of the property of another person. It was not intended to operate by way of expropriation, but merely to give all the necessary control over the soil of the highway to the municipality. If it destroys all the rights to which the soil may be subject, then where the land is subject to an easement, the statute operates upon the dominant tenement, which is no part of the highway; a result not probably intended by the legislature. The decision will have a far-reaching effect. Highways being laid out in a mineral bearing county, now that minerals pass to the grantee of the crown unless reserved, would make it impossible for many owners to grant an effective mining lease, for wherever there was a highway, the statute would erect a subterranean wall more effective to interfere with mining than the loss of the lode. He will also affect the law as to public highways closed by a municipality under s. 472 of the Municipal Act. The case of *Johnson* v. *Boyle* (1853), 11 U.C.Q.B. 101, decided that where a private right was claimed, and the defendant pleaded that the land over which the way was claimed had been a public highway, and had been closed by the municipality, the court allowed a demurrer to the plea on the ground that the antecedent right of way might still be extant, notwithstanding the facts averred in the plea. Since that decision a provision has been enacted in the Municipal Act, which appears in R.S.O., c. 192, s. 473, as follows:—

"A by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from his land or place of residence over such highway or part of it, unless in addition to making compensation to such person, as provided by this Act, another convenient road or way of access to his land or place of residence is provided."

And by s. 492 of the Act, the owner of the land which abuts on the closed highway shall have the right to purchase the soil and freehold. If the *Abell* v. *Woodbridge* decision is correct any private right of way over the closed highway would be extinguished, and the municipality would be bound to furnish

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A. D. ARMOUR.

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MITCHELL v. TRACEY AND FIELDING.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. March 17, 1919.

1. INTOXICATING LIQUORS (§ III H—91)—WRIT OF PROHIBITION RESTRAINING MAGISTRATE—NOVA SCOTIA TEMPERANCE ACT—CRIMINAL CHARGE —APPEAL.

Application for a writ of prohibition to restrain a magistrate from proceeding with a prosecution for violation of the Nova Scotia Temperance Act arises out of a criminal charge, and no appeal lies from the judgment thereon.

2. APPEAL (§ I A—3)—PROHIBITION—COURT OF FINAL RESORT OF PROVINCE —SUPREME COURT ACT, R.S.C. c. 139, ss. 39 (c) AND 48 AS AMENDED BY 8 & 9 GEO. V. c. 7, s. 3.

There is no appeal to the Supreme Court of Canada from the court of final resort of any province except Quebec in a case of prohibition under the Supreme Court Act, R.S.C. c. 139, s. 39 (c), where the case does not come within some of the provisions of s. 48, as amended by 8 & 9 Geo. V. c. 7, s. 3.

[*Re McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259; *Desormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82; *Bouchard* v. *Sorgius* (1917), 38 D.L.R., 55 Can. S.C.R. 324, 29 Can. Cr. Cas. 245, followed; *Trusts Corporation* v. *Rundle* (1915), 26 D.L.R. 108, 52 Can. S.C.R. 114, distinguished.]

Statement. APPEAL from an order of the acting registrar refusing to affirm the jurisdiction of the court and approve the security.

The reasons given by the acting registrar for refusing the order are the following:—

ACTING REGISTRAR.—Application before me as acting registrar to affirm jurisdiction and approve of bond filed as security for costs. The applicant, a licensed vendor of liquor in Halifax under the Nova Scotia Temperance Act, was charged before a magistrate with unlawful selling of liquor contrary to the provisions of the Act. The charge was heard but judgment was stayed pending an application for a writ of prohibition to restrain the magistrate from convicting. The writ was refused and from such refusal the applicant seeks to appeal to this court.

Two questions are raised affecting the right to appeal to this court. The Supreme Court Act, s. 39 (c), allows an appeal in a case of *habeas corpus* or prohibition not arising out of a criminal charge. The first question then is whether or not the charge in this case was a "criminal charge" within the meaning of s. 39 (c).

This question came before the Supreme Court in the case of *Re McNutt* (1912), 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259. In that case the appellant, Mrs. McNutt, had applied for discharge of *habeas corpus* from imprisonment on conviction for an offence under the same Act as in this case, the N.S. Temperance Act. The case was heard by the 6 judges of the court. Three of them held that the application for the writ arose "out of a criminal charge"; one held that it did not, and one seriously doubted that it did; the remaining judge expressed no opinion on the point but quashed the appeal on another ground.

Sir Charles Fitzpatrick, one of the three who held that it was criminal, is no longer a member of the court. If this case, then, should come before the present bench of judges the position would be that two of them are on record as holding that the charge was criminal, practically two that it was not, and two whose views are entirely unknown. I consider, therefore, that the question is at large and my personal opinion being in accord with that of Duff, J., I would be prepared to affirm the jurisdiction so far as this first question is concerned.

The second question is one of greater difficulty for the applicant. At the last session of Parliament, s. 48 of the Supreme Court Act, which had previously been confined to appeals from Ontario, was extended to cover appeals from all the provinces except Quebec. It is necessary, therefore, to decide whether or not the case before us is governed by that section.

It is settled by authority that it is so governed. Not only has the court held, before the amendment, that an appeal in an Ontario case of mandamus must comply with the requirements of s. 48 (*Att'y-Gen'l* v. *Scully* (1902), 33 Can. S.C.R. 16), and also in the case of a municipal by-law (*Town of Aurora* v. *Village of Markham* (1902), 32 Can. S.C.R. 457), as to both of which the appeal is allowed by s. 39, but it has lately held that an appeal in a case of prohibition from the Province of Quebec must comply with the requirements of s. 46, the counterpart, for Quebec, of s. 48. (*Desormeaux* v. *Village of Ste. Thérèse* (1910), 43 Can. S.C.R. 82.

As the case before me does not come within the terms of s. 48, there is no appeal as of right, and the motion to affirm jurisdiction must be dismissed. No costs. If the jurisdiction was affirmed the bond filed is sufficient.

C. H. MASTERS.

The applicant appeals from this decision to the Supreme Court.

Power, K.C., for appellant; *Bethune*, for respondent.

Davies, C.J.

DAVIES, C.J.:—As to the meaning of the language "not arising out of a criminal charge" in sub-s. (*c*) of s. 39 of the Supreme Court Act, I adhere to the opinion I expressed in *Re McNutt*, 10 D.L.R. 834.

And as to the appellant's right of appeal to this court *de plano* as taken in this appeal and which right the appellant sought to have affirmed by the assistant registrar, I am of opinion that this officer was right in refusing to affirm our jurisdiction to hear the appeal.

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That jurisdiction is defined and limited by s. 48 of the Supreme Court Act and appellant failed to bring himself within its provisions, *Aurora* v. *Markham*, 32 Can. S.C.R. 457. Ss. 37, 38 and 39 must be read and construed together with s. 48 and subject to it.

Davies, C.J.

In the present case there is no amount involved in the appeal or other ground which could possibly give a right of appeal under that section.

Idington, J.

IDINGTON, J.:—I do not think this appeal should be allowed inasmuch as the amendment of the Supreme Court Act contained in 8 & 9 Geo. V. c. 7, seems to forbid it.

As to leave to appeal the application is too late for this court to grant and can only be given now by the court sought to be appealed from.

Anglin, J.

ANGLIN, J.:—I have seen no reason to change the view which I expressed in *Re McNutt*, 10 D.L.R. 834, as to the construction of the phrase "not arising out of a criminal charge" in s. 39 (*c*) of the Supreme Court Act.

Section 48 of the Supreme Court Act, made applicable by the legislation of 1918 to all the provinces other than Quebec, is, in my opinion, conclusive against a right of appeal *de plano* in this case. Ss. 37, 38 and 39 are subject to s. 48, just as they are subject in Quebec appeals to s. 46. *Desormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82; *Bouchard* v. *Sorgius* (1917), 38 D.L.R. 59, 55 Can. S.C.R. 324, 29 Can. Cr. Cas. 245. That would be so without the introductory words "except as hereinafter otherwise provided" found in each of these sections. But the presence of that phrase leaves no room for argument.

In *Trusts Corporation* v. *Rundle* (1915), 26 D.L.R. 108, 52 Can. S.C.R. 114, very much relied upon by Mr. Power, s. 48 was not and could not have been invoked, the amount involved in the appeal being over $1,000, viz., $1,068.27, expenditure allowed in the Surrogate Court and disallowed by the Court of Appeal, and $100 of the guardian's remuneration fixed by the Surrogate Court, likewise disallowed.

The appeal from the order of the acting registrar fails on both grounds and should be dismissed with costs.

The application for special leave to appeal is too late. *Goodison Thresher Co.* v. *Corp. of McNab* (1910), 42 Can. S.C.R. 694.

BRODEUR, J.:—This is a motion by way of appeal from an order of the registrar declaring that the court has no jurisdiction to hear this case.

The court below refused a writ of prohibition in a prosecution against the appellant for selling liquor contrary to the N.S. Temperance Act and he now wants to appeal to this court. One of the objections made to his right to appeal is that s. 48 of the Supreme Court Act, as amended in 1918, precludes him from entering this appeal.

By s. 39 of the Supreme Court Act an appeal to the Supreme Court in cases of prohibition is given but that appeal is limited and controlled by s. 48 of the same Act which declares that no appeal will lie unless the judgment *a quo* relates to title to real estate, affects the validity of a patent, puts in controversy a matter exceeding $1,000, or relates to an annuity.

None of these conditions are to be found in that judgment.

Applying the decisions rendered by this court in *Att'y-Gen'l* v. *Scully*, 33 Can. S.C.R. 16; *Desormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82; and in *Bouchard* v. *Sorgius*, 38 D.L.R. 59, 55 Can. S.C.R. 324, I am strongly of the view that the appellant has no right to ask this court to adjudicate on his writ of prohibition.

Another ground urged against this appeal is that under s. 39 the appeal lies in proceedings for a writ of prohibition "not arising out of a criminal charge" and that the writ of prohibition in this case has reference to a criminal charge.

The statute, in violation of which the appellant has been prosecuted, is a provincial statute; and in deciding the point raised we might curtail the legislative powers of the provinces without giving an opportunity to the provinces to be heard.

In view of the conclusions I have reached on the first point above mentioned, I do not see any reason for me to express my views upon the second point.

The appellant asks also in the alternative that he should be granted leave to appeal.

It was decided in *Goodison* v. *McNab*, 42 Can. S.C.R. 694, that after the expiration of 60 days from the pronouncing of the judgment *a quo* this court is without jurisdiction to grant special leave.

The motion should be dismissed with costs.

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Mignault, J.

MIGNAULT, J.:—Two questions arise under this appeal from the decision of the acting registrar refusing to affirm jurisdiction in favour of the appellant: (1) Do the appellant's proceedings for a writ of prohibition arise out of a "criminal charge?" (2) Assuming that this first question be answered in the negative, has the appellant a right of appeal to this court, in view of the provisions of s. 48 of the Supreme Court Act?

1. In the case of *Re McNutt*, 10 D.L.R. 834, in which six judges sat, three judges, Fitzpatrick, C.J., Davies and Anglin, JJ., expressed the opinion that a trial and conviction for keeping liquor for sale contrary to the provisions of the same Act, the N.S. Temperance Act, were proceedings on a "criminal charge" within the meaning of s. 39 (*c*) of the Supreme Court Act. Duff, J., was of the opinion that the proceedings did not arise out of a "criminal charge," within the meaning of that sub-section, and Idington, J., and Brodeur, J., expressed no opinion on this point. The learned acting registrar, therefore, considered the question as being an open one, although he rejected the motion of the appellant to affirm jurisdiction upon the second ground above referred to.

Under the circumstances, I think it is incumbent on me to express my opinion upon both these questions which were fully argued by the counsel for the appellant.

It is almost unnecessary to say that the jurisdiction of this court is statutory, that is to say, that it must appear in any case brought before this court that the statute properly construed confers jurisdiction, and if this is not shewn jurisdiction is negatived.

The Supreme Court Act refers several times to "criminal charges" and to "criminal cases," and the answer to the question I am considering depends upon the construction to be placed upon these words. I will refer very briefly to some of the provisions of the Act.

In the first place, the introductory s. 35 states that this court has "civil and criminal jurisdiction" within and throughout Canada.

As the words "civil" and "criminal" are here employed in contradistinction to each other, they must certainly be understood as being used *lato sensu*, and, therefore, "criminal" matters comprise all matters which can come under the general term according to the well-known test that

the proper definition of the word "crime" is an offence for which the law awards punishment. *Per* Littledale, J., in *Mann* v. *Owen* (1829), 9 B. & C. 595, 109 E.R. 222, at p. 602.

When, therefore, in the next section, s. 36, we find the general right of appeal granted by s. 35 restricted by the proviso that no appeal lies from a judgment "in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge," the ordinary rules of construction would give to the word "criminal" the same meaning as in s. 35, and, therefore, I would say that it is here used in the wide sense, according to the test I have indicated above.

Sub-s. (*b*) of s. 36 further states, as a part of the same proviso, that "there shall be no appeal in a criminal case except as provided in the Criminal Code."

This is a reference to art. 1024 of the Criminal Code by the terms of which the right of appeal is restricted to convictions for indictable offences affirmed on an appeal taken under art. 1013 of the Code, to the Court of Appeal, where the latter court is not unanimous in affirming the conviction. Whatever restricted meaning, therefore, might be given to the words "criminal case" in sub-s. (*b*) by reason of the reference to the Criminal Code, cannot, in my opinion, affect the construction of the words "criminal charge" as used in sub-s. (*a*).

Coming then to the words "criminal charge" in sub-s. (*c*) of s. 39, where it is said that an appeal shall lie to the Supreme Court

from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge,

there can be no doubt whatever that the words "criminal charge" must receive the same construction as in sub-s. (*a*) of s. 36, and, therefore, my opinion is that they are used in the wide sense as allowing an appeal in matters of prohibition merely when they arise out of "civil" as distinguished from "criminal" proceedings.

We next find the words "criminal case," already met with in sub-s. (*b*) of s. 36, in s. 62 which says that

every judge of the court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the court or judges of the several provinces for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

It is to be observed that the words "criminal case," which

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otherwise would be of general application, are qualified here by the addition of the words, "under any Act of the Parliament of Canada."

It would not appear to me that because we have an express qualification here, we should read that qualification into the previous sections where the expression "criminal" is used without any qualifying words. On the contrary, I find that when it was desired to qualify or restrict the generality of the term "criminal," parliament has used apt words to express the qualification, and I know of no rule of construction that would authorize me to imply that qualification in cases where it is not expressed.

In s. 67 (4) there is a provision that this section—which governs the removal of cases from the provincial courts to the Supreme Court where the constitutionality of an Act of Parliament or of a legislature is in question—"shall apply only to cases of a civil nature." The word "civil" is here used *lato sensu* and excludes anything that can come under the description of "criminal" matters, which seems to me to harmonize with the restriction expressed in sub-s. (*a*) of s. 36, and in sub-s. (*c*) of s. 39.

The only remaining provision of the Supreme Court Act where the word "criminal" is used is s. 75 with reference to security for costs which is not required, *inter alia*, as to appeals "in criminal cases." These criminal cases are obviously those referred to in sub-s. (*b*) of s. 36, and in art. 1024 of the Criminal Code.

I would, therefore, conclude—and I also rely on the reasoning of Fitzpatrick, C.J., and of Davies and Anglin, JJ., in the *McNutt* case, 10 D.L.R. 834—that the words "criminal charge" in sub-s. (*a*) of s. 36, and in sub-s. (*c*) of s. 39, are used in a wide and not a restricted sense. No question whatever as to the power to legislate with respect to criminal law under the B.N.A. Act arises here, and no consideration of the respective powers of parliament and of the legislatures with regard to criminal or penal matters can be of any assistance in the construction of the sections of the Supreme Court Act to which I have referred and which undoubtedly, however wide may be their application, are *intra vires* of the Canadian parliament.

I, therefore, answer the first question in the affirmative, and consequently I hold that this court has no jurisdiction to pass on

the appeal which the appellant seeks to bring before it, for the proceedings he has taken arise out of a criminal charge.

2. There can be absolutely no doubt, under the previous decisions of this court, that even assuming that I could answer question 1 in the negative, the appellant cannot appeal to this court inasmuch as his case does not come within the ambit of s. 48. This section was amended in 1918 by 8 & 9 Geo. V., c. 7, and now applies to all the provinces, with the exception of Quebec. It is the counterpart of s. 46 with respect to Quebec appeals, and this court held in *Desormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82, and more recently in *Montreal Abattoire* v. *City of Montreal* (unreported, 14th November, 1918), that no appeal lies to the Supreme Court from a judgment of a court in the Province of Quebec in any case of proceedings for or upon a writ of prohibition, unless the matter in controversy falls within some of the classes of cases provided for by s. 46. Similarly an appeal in the case of proceedings for or upon a writ of prohibition in Nova Scotia does not lie to this court unless the matter in controversy, even though it were not excluded by sub-s. (*a*) of s. 36, or sub-s. (*c*) of s. 39, falls within some of the classes of cases provided for by s. 48, which, since the amendment of 1918, applies to that province. The second question should be answered in the negative.

I think, therefore, that the appeal from the decision of the acting registrar should be dismissed with costs.

The appellant asked that should this court be of opinion that he cannot appeal as of right, he be granted special leave to appeal under sub-s. (*e*) of s. 48.

I think the answer I have given to the first question would preclude me from granting leave to appeal in a case where, in my opinion, the right of appeal is expressly taken away by the statute. But for another reason the prayer of the appellant cannot be granted by this court inasmuch as more than sixty days have elapsed since the judgment *a quo* was rendered. *Goodison* v. *McNab*, 42 Can. S.C.R. 694. *Appeal dismissed.*

The appellant then applied to Mignault, J., in chambers for an order staying further proceedings in this court until an application could be made to the Judicial Committee of the Privy Council for leave to appeal to that Board. The order was refused for the following reasons:—

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MIGNAULT, J.:—In this matter I am of the opinion that, inasmuch as this court has declared that it has no jurisdiction to entertain the appeal of the appellant from the judgment of the Supreme Court of Nova Scotia, Crown side, herein, and has dismissed the appeal taken by the appellant from the decision of the acting registrar refusing to affirm jurisdiction, I cannot grant the stay of proceedings asked for by the appellant.

Moreover, the affidavit of the appellant does not shew whether he intends to take a direct appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Nova Scotia, or whether he purposes to apply to the Judicial Committee for leave to appeal from the judgment of this court dismissing his appeal from the decision of the acting registrar refusing to affirm jurisdiction, and, under these circumstances, I am of the opinion that a proper case has not been made out for granting a stay of proceedings.

The motion of the appellant is dismissed with costs.

Motion dismissed.

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Ex. C.

THE KING v. CROSBY.

Exchequer Court of Canada, Cassels, J. March 11, 1919.

1. EXPROPRIATION (§ III C—135)—MARKET VALUE—ESTIMATED PROFITS—BUSINESS NEVER UNDERTAKEN—INDEFINITE OFFERS—EVIDENCE OF VALUE—

An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property but which in fact had never been undertaken.

Offers to purchase property which are more or less indefinite and not so made as to be binding upon the persons making them are not to be regarded as satisfactory evidence of the value of such property in the opinion of the proposed purchasers.

INFORMATION to determine compensation for the expropriation of land by the Crown.

T. S. Rogers, K.C., and *T. F. Tobin*, K.C., for plaintiff.

H. McInnes, K.C., and *L. A. Lovett*, K.C., for defendants.

Cassels, J.

CASSELS, J.:—This case was tried before me in Halifax on September 23, 1918. There was a dispute as to the area of the land expropriated from the defendant. The Crown had tendered for the land as containing an area of 44,000 sq. ft., and for the water

lot 30,400 sq. ft. It was agreed at the trial that the parties would get together and ascertain the exact area.

On January 13, last, a memorandum signed by counsel was filed, which reads as follows:—

It is hereby agreed between the parties that the area of land expropriated from the defendant by the Crown for the purpose of the Halifax Ocean Terminals is 49,600 sq. ft., and that the area of water also expropriated from the defendant contains 30,400 sq. ft., a total of 80,000 sq. ft.

This makes an additional area of 5,600 sq. ft. of land, which at the allowance made by Mr. Clarke of 25 cents per square foot, would increase his allowance by the sum of $1,400.

The land in question is similar in character to that which formed the subject of litigation in *The King* v. *Wilson* (1914), 22 D.L.R. 585, 15 Can. Ex. 283, decided by me. One difference between the two properties is that the defendants' property is situate nearly a mile further from the centre of the city and towards the south than the Wilson property. Another material difference is the fact that in the *Wilson* case, a business was being carried on by Mr. Wilson on the property expropriated and an increased allowance was made to him for the loss of his business property. The appraisers in that case allowed him 30 cents per foot for the water lot, to compensate Wilson on account of this loss of an operating business. In the present case no business was carried on by the defendant in the premises in question. I will refer later to the evidence on this point.

The property in question which has been expropriated is a property bounded on the west by the easterly side of Pleasant St. It is said to have a frontage on Pleasant St. of 289 ft., and running down into the water to a considerable depth.

Situate on the property in question expropriated were two dwelling houses. The one on the north and nearest the esplanade is what is spoken of as the Ritchie house. The other situate between what is called the galvanized iron shed and the Ritchie dwelling house is what is known as the Neill house.

On the premises there was a considerable amount of crib-work, and also a wharf which was partly in existence at the time of the purchase by the defendant of the properties in question and subsequently extended.

The evidence furnished on the part of the defendants is of a

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very unsatisfactory character. No witnesses have been called to testify to the values except the evidence of the defendant, Adam B. Crosby.

The defendant Newman is a tenant of what is called the galvanized iron shed. His lease would expire on October 13, 1913. The expropriation was on February 13, 1913. Under the terms of his lease he was entitled, as compensation, to the sum of $300, and the payment of this sum to the defendant Newman does not seem to be questioned by any of the parties to the action, and I fix his compensation at this amount.

It is important to consider carefully the evidence of the defendant Adam B. Crosby. His method of arriving at the sum of $100,000 claimed by him, is based upon profits which he expected to to make were he to enter upon business in connection with these premises. I need merely refer to the cases of the *Pastoral Finance Association* v. *The Minister*, [1914] A.C. 1083, and *The Northern R. Co.* v. *Schooley*, 30 D.L.R. 289, to shew that the basis of valuation upon the probable profits of a business to be carried on on these premises in the future is an erroneous basis of arriving at the market value. I have to arrive to the best of my ability at the market value of the premises, to which would be added any loss to the defendant for his loss of business if he were carrying on business and turned out of the occupation of the premises by reason of the expropriation.

The date of the expropriation was February 13, 1913. The Crown have tendered the sum of $30,739. The defendant claims the sum of $100,000.

I quote from the evidence of Adam B. Crosby to shew that these premises at the time of the expropriation were not being used by Mr. Crosby for the purpose of carrying on a business. He is asked by his own counsel, as follows:—

Q. Will you kindly tell me what your occupation has been since the year 1908 or 1909? A. Well, my occupation has been broker, ship and fish broker, of Halifax, but I must say I have not been very actively engaged since 1909.

He explains his reasons as follows:—

Q. Why have you not been actively engaged in it since that time? A. Well I was elected for Parliament in 1908, and the sessions were very long, and I was in Ottawa most of the time in 1909, 1910 and 1911. In 1911 I did not get away from Parliament until in July.

Q. And since that time, 1911? A. Well, in 1911 I was very sick, in

1910 I was very sick, and in 1911 I was pretty sick, and after the election I was sick and was not practically in touch with things till 1913. I was pretty sick.

Further on in cross-examination he is asked by Mr. Tobin the following questions:—

Q. You never carried on active business there yourself (referring to the properties in question)? A. I never did in particular. In fact, the taking of that property, following my health being bad, practically put me out of business.

Q. And there has never been any active business carried on in that neighbourhood? A. I do not think in late years. They told me that years ago there used to be a great deal of business done there.

Apparently the defendant, Adam B. Crosby, bases his whole claim upon the fact that he would not sell for any price under the sum of $100,000.

It is important to ascertain what was paid for the properties, and I will quote from the evidence of the defendant in order to shew this. In cross-examination he puts it as follows. There were three properties purchased. The three comprising the properties expropriated and also a property upon the west side of Pleasant St. not expropriated but which has been rented for about $600 a year. He states that the first of the three properties purchased was the iron shed. It is referred to as an iron shed as it has been partially covered by corrugated iron. "I would say that this purchase was somewhere about 1904 or 1905." He is asked:—

Q. What did that include? A. That included the iron shed and this wharf and all south of that.

Q. It included the iron shed, the wharf, the water lot and all south? A. Yes.

Q. And did it include the property on the west side of Pleasant St.? A. That was all in one purchase.

It should be stated that these properties were purchased at auction. There was apparently a liquidation proceeding. I mention this fact as having been purchased at auction under liquidation proceedings, it may not be a real test of market value, although of course it has a bearing. He is asked:—

Q. What did you pay for that property? A. I paid for that property $4,600.

It had a frontage on Pleasant St. of about 118 ft., roughly speaking. In addition included in this purchase was the property on the west side of Pleasant St. not expropriated, and he puts the frontage on the west side as of about 125 ft.

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He is asked:—

Q. That had a large building on it; what was the depth of the lot on the west? A. Going back?

Q. Yes? A. I never measured that, but I am sure it is over 200 ft. deep.

Q. It had a very large building on it? A. A large stone building.

Q. What sort of stone was it? A. I think the front part was Amherst stone, but the other was local stone. I am not sure about that, but it looked to me like Amherst stone. I think the other was perhaps local stone, and the end was brick, and evidently put in temporarily.

It must be borne in mind that included in the $4,600 purchase was this property on the west side of Pleasant St., not in question in this suit.

He states:—

Q. You got all the cribwork to the east of the iron sheds? A. Yes.

This comprised the first of the three purchases. It was purchased in 1904 or 1905.

He is asked:—

Q. When did you buy the next property? A. The next property I bought was the Ritchie property.

Q. That was immediately south of the esplanade? A. In fact I was bargaining for those two properties.

Q. Tell me the next one you bought? A. I think I bought the Ritchie property about 1906 or 1907.

Q. That had a house on it? A. Yes.

Q. What is the frontage of that lot on Pleasant St.—about 60 ft., is it not? A. I think so.

Q. From whom did you buy that? A. From the Ritchie estate. Mr. Langford was the man sold it to me.

Q. How much did you pay for that? A. $2,400, I think; it might be $2,450, but between $2,400 and $2,500.

This completed the Ritchie purchase.

With respect to the third purchase he is asked:—

Q. When did you buy the next lot? A. The next one, I bargained for it some time along in 1907 or 1906. I bought that from Mr. McInnes.

Q. That property had a frontage of 82 ft. on Pleasant St.? A. Possibly.

Q. 82 by 300 is the exact measurement shewn by your deed; is that right? A. Oh, well, that would be right.

Q. What did you pay for that? A. $3,000, I think.

These three sums of $4,600, $2,400, and $3,000 are the exact amounts paid for the three properties and included, as I have stated, is the property on the west side, with a large stone building.

He further states:—

Q. You have told us what rental you got out of the building on the west side of the street before the expropriation, the old distillery itself? A. I got $600 a year.

Mr. Lovett, for the defendant, objected to evidence being given in regard to the property on the west side of Pleasant St. as it was not the property expropriated. I allowed the evidence subject to objection, but I am of opinion that it was rightly received for several reasons. One being that this property was included in the purchase of part of the expropriated property for which $4,600 was paid, and it is necessary to get some idea of how much of this $4,600 was paid for that portion of the property lying to the west.

He is asked:—

Q. How do you arrive at the value of $100,000? A. For my own business, in connection with my own business I value that property. I said here a moment ago that no man could buy it from me for less than $100,000, because I felt that would be the very least. I do not mean to say it is not worth more than that, but I mean to say I could make it a very valuable property to myself in my own business. It would be worth $8,000 to $10,000 to me in my own business.

This is only of course conjecture, as in point of fact he never carried on business on the property in question.

Mr. Crosby, in addition to his illness, was unfortunate in the loss of his financial man, Mr. Mason, who died in the year 1909. He is asked:—

Q. I suppose you kept books of the property shewing what the property cost and what it earned? A. I may say that after 1909 my financial man, Mr. Mason, died, and I must confess that after that time I had a very hard time. I had been looking for a man, but I had not really a bookkeeper that kept my affairs, and I would have been in much better position to come here if I had had one, because my books in 1909 went bad, and I had to pick up men off the street, you might say, to come in and do my business.

Q. You have no record of what the property cost, or what its earnings were, or what you spent on it? A. I can give you a good idea.

Referring to the Ritchie house, he states as follows:—

Q. Have you any documents in regard to it? A. You see I moved away from my office some three years ago, and it never occurred to me of this coming up, but I can give you a good idea of what it cost, and the man that built the L., for instance, that I put on the Ritchie building, that was built by Brookfield, and he can tell you what it cost, and other works and repairs on the Neill building and repairs on the shed.

Referring to the repairs on the shed, he says: "Nobody could tell that because I did it piece work, according as I—"

According as I had money, he intends to say.

Mr. Crosby has not called Mr. Brookfield nor has he called anyone in support of his evidence of market value. He is asked:—

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Q. Who built the wharf? A. Mosher; you can get him any time.

Q. What did you pay for the wharf? A. I think the addition I put on cost between $700 and $800—not $800 I do not think.

Q. That is what you paid Mosher? A. Yes. The cribwork was done differently.

Mosher was not called as a witness by the defendant Crosby. Craig states the cribwork was done differently.

Q. Who did that? A. Reid and Archibald.

Q. What did you pay them? A. Something like $500, and the truckage and that, that was done, and the filling, that was another thing.

Q. Who did that? A. Different ones.

Q. Have you any record of that? A. We had a record.

Q. Have you looked for it? A. Yes, I did, and I found my books—you know when I moved my books up I was not there.

The result is that the books were not forthcoming.

Q. Take the Ritchie house. What did you pay for the addition to that? A. $1,000 paid to Brookfield for the L., and then we put in plumbing and changed the plumbing.

Q. What did that cost? A. I think it cost something like two or three hundred dollars. That is the Ritchie property.

Q. Did you spend any more money on the Ritchie house, $2,000, and $200 plumbing? A. I do not remember whether there was any shingling done there or not.

This $2,000 is a mistake. It should be $1,000. If the $1,000 for the L, and the $200 for the plumbing are added to the sum paid for the Ritchie house it would make the total purchase price with the improvements the sum of $3,600.

In regard to the money spent upon the iron shed, he states that he put a whole iron roof on it new. But he cannot tell what it cost. He says that Harris would probably remember, "but I am not sure whether we had the whole property re-covered with iron on the top or not. I don't know."

Q. Can you tell me what you spent or can you not? A. No, I would not tell you definitely.

Q. Do you think you spent $500? A. I am sure I spent over $2,000.

Now, the total amounts of the expenditures made according to Crosby's evidence, including purchase price and improvements, amount to the sum of $14,400 inclusive of the property on the west side.

In regard to the statements as to the proposals for purchase made by different people, to my mind they are too vague and too indefinite to form the basis of any value in arriving at the market value of the property.

Nichols, in his book entitled The Law of Eminent Domain, 2nd ed., vol. 2, s. 254, p. 1195, states as follows:—

> An offer to purchase the land at a certain price, made by the party which subsequently took it by eminent domain, is inadmissible to shew market value. It does not presuppose a willing seller and a willing buyer, but is based upon the price which a corporation, intending to take the land at all events, is willing to pay to avoid the expense of litigation and the chance of an excessive verdict from an unsympathetic jury. An offer made by a private party encounters none of these objections, and, in determining value outside of judicial proceedings, the fact that an owner had received and rejected an offer of a certain sum would doubtless be looked upon as material. Nevertheless, it is felt by some courts that evidence of offers should not be received. It is, at most, a species of indirect evidence of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value. Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value, and they are unsatisfactory, easy of fabrication and even dangerous. While all these objections might not apply in every case it is thought best, by most courts, to reject evidence of offers altogether.

After the best consideration that I can give to the case, I am of opinion that the tender by the Crown of $30,739 with the addition of $1,400 for the extra 5,600 feet of land and 10% added for the forcible taking, is very adequate and fair compensation for the property expropriated.

I think the evidence of Mr. Clarke and the others shews that they intended to deal liberally with the defendant. The Crown adheres to the tender, and I think that the defendant should be thoroughly satisfied with the amount allowed.

There will be judgment for the defendant, Adam B. Crosby, for the amount of $35,352.90, and also for $300 in favour of defendant Newman, with interest on both amounts from the date of the expropriation.

I think the defendants are entitled to the costs of the action.

The question between Mr. and Mrs. Crosby as to what her rights will be in regard to dower, if not settled between the parties, will have to be referred, but I imagine that there will be no trouble in the defendants arriving at an agreement as to this.

Judgment accordingly.

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S. C.

RISLER v. ALBERTA NEWSPAPERS Ltd.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Simmons and McCarthy, JJ. May 2, 1919.

COMPANIES (§ VI D—339)—DOMINION WINDING-UP ACT—WINDING-UP ORDER—EXECUTION—VOID IF PUT IN FORCE WITHOUT LEAVE OF COURT.

Section 23 of the Dominion Winding-up Act (R.S.C. 1906, c. 144) does not make every attachment, sequestration, distress or execution against the assets of a company void after the making of a winding-up order but only that every process "put in force" thereafter is void if leave to put it in force has not been obtained under s. 22 of the Act.

APPEAL from an order of the master in chambers, Calgary, giving leave to the plaintiffs to proceed with their action notwithstanding the issue of a winding-up order. Affirmed.

Lougheed & Bennett, for appellants. *W. D. T. Lathwell*, for respondent Risler. *Short, Ross & Selwood*, for respondent Garnet.

Harvey, C.J.

HARVEY, C.J.:—The Dominion Winding-up Act appears to have been first enacted in 1862. S. 23 of the present Act is in the exact words of the original s. 21. The words are, to all intents, the same as those of the English Act, which were given an interpretation in 1864 in *Re Exhall Coal Mining Co.*, 4 DeG. J. & Sm. 377, 46 E.R. 964. That interpretation was one which practically added words of limitation to the section and held that an execution, etc., though declared by the section to be void was not void if issued by leave of the court and that such leave could be granted.

I concur entirely with the view expressed by Lindley and Bowen, L.JJ., that the construction is a forced one, but upon the principle which this court has followed frequently I think we are bound to adopt the construction given to the section by the English court 18 years before it was adopted by our parliament, especially as that construction has been uniformly placed on it ever since both in England and Canada.

The question becomes then only one of discretion. Inasmuch as by virtue of the provisions of our Companies Ordinance a remedy is given to the plaintiffs against the directors which can only be applied in a certain way which involves the need of a judgment and execution against the company with a return by the sheriff, which remedy will be lost unless the action, which cannot be begun against the directors until after the sheriff's return, be begun within a year after the director has ceased to be such. I think the discretion should be exercised by permitting the proceedings to be taken, but simply so far as is necessary to

accomplish the purpose indicated. In other words, the sheriff should not be permitted to levy under the writ of execution, but only to make the return to satisfy the Companies Ordinance.

I would, therefore, dismiss the appeal with costs.

BECK, J.:—This is an appeal from an order of Mr. Clarry, K.C., master in chambers at Calgary, referred to this court by Hyndman, J.

An action was begun by the plaintiff against the defendant company for wages alleged to be due on August 31, 1918. Judgment was entered in default on January 18, 1919.

On February 6, 1919, an order was made winding up the defendant company.

On a date subsequent to the issue of the winding-up order the judgment entered by the plaintiffs against the defendant company was set aside by order of Stuart, J.

By the terms of the order of the master in chambers, leave was given to the plaintiffs to proceed with their action against the defendant company notwithstanding the issue of the winding-up order. The appellant submits that the master erred in granting this order.

In substance, the appellant's argument is that this is not a case in which the court ought to give leave to proceed even to judgment under s. 22 of the Winding-up Act, especially in view of the principles laid down in the English cases; and of the fact that the admitted purpose of recovering judgment in the action is to look ultimately to the directors, inasmuch as that purpose cannot be achieved, because, as he contends, an execution issued on the judgment would be absolutely void under s. 23, and leave to proceed upon it cannot be given under s. 22—notwithstanding English decisions to that effect—and, therefore, the directors cannot be reached under s. 54 of the Companies Ordinance, c. 20 of 1901; and, in the result, no good purpose would be achieved by granting the leave which the plaintiff asks, and costs would be thrown away.

The two sections of the Dominion Winding-up Act chiefly in question are 22 and 23. S. 22:—

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

Section 23:—

> Every attachment, sequestration, distress or execution put in force

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against the estate or effects of the company after the making of the winding-up order shall be void.

Cassels, J., had to consider these two sections in *Richelieu & Ont. Nav. Co.* v. *Steamship Imperial* (1909), 12 Can. Ex. 243. I interpret these sections as he did.

Practically similar provisions are to be found in ss. 87 and 163 of the English Companies Act, 1862 (25-26 Vict. c. 89). This Act became the Companies (Consolidation) Act, 1908, and s. 87 of the earlier Act became s. 142 of the Act of 1908 and s. 163 became s. 211.

Buckley, in his work on Companies, says (8th ed., at p. 274; 9th ed., p. 329):—

> By s. 163 (now 211—our s. 23) where a company is being wound up by or under the supervision of the court, any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. But it was decided in *Re Exhall Mining Co.* 4 DeG. J. and S. 377, that s. 163 (211-23) is to be read with and is controlled by the 85th and 87th (142-22) and that the joint effect of these sections is to put the creditor who desires to proceed to execution after the winding-up order to the necessity of coming to the court and asking for leave to so proceed, and whether he shall be allowed to proceed or not is a question for the discretion of the court. It is difficult no doubt to see why the clear and precise provisions of s. 163 should be read as if a distress were a proceeding within s. 87, but the court is now bound by the decision and the many subsequent cases which have followed it.

The decisions following the *Exhall Mining* case will be found listed in Kant's Cases Judicially Noticed; Talbot & Fort, Cases Judicially Noticed, and in the prefatory note to the reprint of the case in 46 E.R. 964.

The Canadian, as well as the English cases, will be found collected in Mitchell's most useful work on Canadian Commercial Corporations, pp. 1476 *et seq.*

The Canadian cases follow the English decisions. The Canadian Act, being taken from the English Act, it must be interpreted in the light of the long standing English decisions upon it recognized at the time of its adoption certainly if they are still recognized as binding.

The effect of the various decisions is that s. 23 does not make every attachment, sequestration, distress or execution against the assets of a company void after the making of a winding-up order, but only that every such process "put in force" thereafter is void and that even the putting of it in force is "void," only if

leave to put it in force under s. 22 has not been obtained. "Void," therefore, has not the sense of absolutely void in all circumstances; and it is to be noticed that the Canadian Act is less emphatic than the English Act in which the words are "void to all intents."

In *Re Lake Winnipeg Transportation, Lumber and Trading Co., Paulson's claim* (1891), 7 Man. L.R. 602, Taylor, C.J., gave leave to employees of a company which was being wound up to sue for their wages for the express purpose of their ultimately recovering against the directors under a provision similar to that contained in our Companies Ordinance.

In *Pukulski* v. *Jardine* and *Perryman* v. *Jardine* (1912), 5 D.L.R. 242, 26 O.L.R. 323, an Ontario Divisional Court consisting of Boyd, C., Latchford and Middleton, JJ., held that the plaintiff's, who had been employees of a company in liquidation of which the defendant had been director during their employment within the restricted time mentioned in the Companies Act was rightly held liable against the objection that the sheriff's return to the execution against the company that it was unsatisfied could not properly have been made in the circumstances. The court, however, said:—

> (The sheriff) could discover nothing to be seized up to the 29th September; and this is the information which is communicated by his return. That return is not a proceeding against the insolvent company, within the meaning of the Act. . . . This sheriff's "return" of the execution is merely an intimation that it has not been and cannot be "put in force" and that it is and has proved to be abortive (*per* Boyd, C., p. 246).
>
> Then, does the Dominion Act quoted prevent the making of the return after the winding-up? I think clearly not. That statute aims at the ratable distribution of the assets of the company among its creditors: and so the winding-up supersedes the executions and prevents the creditor from further prosecuting his execution against the assets of the company. The sheriff would then be justified in returning the execution unsatisfied. He is not by the Ontario Act required to make a return *nulla bona*; and I think it would be sufficient if he made a special return stating: "I return the writ unsatisfied, because I am unable to take the assets of the company within my bailiwick in execution, by reason of the making of an order under the Dominion Winding-up Act for the winding-up of the company." This cannot be regarded as a "proceeding with the writ against the company"; which is the thing prohibited by the statute (s. 22). The Ontario statute, which imposes this liability upon the directors of the company, seeks to protect them from vexatious proceedings while the company has assets, to which the creditor may resort. As soon as these assets are withdrawn from and rendered unavailable to the process of the wage-earner, and the sheriff certifies that there are no assets which he can take, the obstacle is removed and the wage-earner is free to enforce his remedy (*per* Middleton, J.), p. 249.

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Beck, J.

The provision of the Ontario Companies Act referred to in the last mentioned case (7 Edw. VII. (1907), c. 34, s. 94) differs, in my opinion, in no substantial respect from the corresponding provision of our Companies Ordinance, s. 54, though some one or more of my colleagues think there is a difference in sense between the words of the former: "and the amount *due* on such execution shall be the amount recoverable with costs against the directors" and the words of the latter: "and the amount *unsatisfied* on such execution shall be the amount recoverable with costs from the directors."

I entirely agree with the Ontario decision to which I have specially referred. It is authority justifying leave to the plaintiff to proceed to judgment and execution and authorizing without leave a return by the sheriff that, by reason of the winding-up order, the execution is unsatisfied and thereupon justifying proceedings under s. 54 of the Companies Ordinance against the directors as to which reference may be made to *Guenard* v. *Coe* (1914), 16 D.L.R. 513, 17 D.L.R. 47, 7 Alta. L.R. 245.

In the event of such an action, it may be that, in some special circumstances, the court might, no doubt, stay it until it should be ascertained what amount of dividend would be paid by the liquidator in the winding-up proceedings on account of the plaintiff's claim so that the director should be called upon to pay only the deficit; but apart from the suggested temporary hardship upon the director, there would be no difficulty in working out protection for the director; for, upon payment, he would be entitled to be subrogated to the plaintiff's right as a creditor in the winding-up proceedings whether the creditor had himself filed his claim or had left the director to file either a final or contingent claim. I concur with the restrictions which the Chief Justice would place upon the plaintiff.

In the result, therefore, for the reasons I have indicated, I would affirm the order of the master with costs of the proceedings before Hyndman, J., and this decision.

Simmons, J.

SIMMONS, J., concurred with Beck, J.

McCarthy, J.

MCCARTHY, J., concurred with Harvey, C.J.

Appeal dismissed.

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ESQUIMALT & NANAIMO R. Co. v. DUNLOP. C. A.

British Columbia Court of Appeal, Martin, McPhillips and Eberts, JJ.A. April 1, 1919.

PARTIES (§ I B—57)—DECLARATORY JUDGMENT—OWNERSHIP OF LANDS—CROWN HAVING DIVESTED ITSELF OF ALL INTEREST—ATTORNEY-GENERAL AS PARTY—ASSENT OR APPLICATION NECESSARY—PROCEEDINGS BY PETITION—WHEN APPLICABLE.

In an action for a declaration as to the ownership of certain lands where the Crown in right of the province has divested itself of all right and title to the lands, and the contest is really one between the parties to the action, the Attorney-General cannot be made a party to the action without applying to be added or assenting thereto, although the action of the Crown in issuing the grants is being attacked.

Proceedings by petition of right only are applicable if it is sought to affect the Crown in its estate, and any declaratory judgment relative to the lands or the validity of the Crown grants would affect the estate of the Crown.

Statement. APPEALS by the defendant from the judgments of Macdonald, J. Reversed. See 41 D.L.R. 737.

Mayers, for appellants; *E. P. Davis* and *H. B. Robertson*, for respondent.

Martin, J.A. MARTIN, J.A., allows the appeal.

McPhillips, J.A. MCPHILLIPS, J.A.:—The question to be determined is one of importance—that is whether the attorney-general may be made a party to an action without applying to be added or assenting thereto—and from an order so directing this appeal is taken, Macdonald, J., having decided that the attorney-general should be made a party defendant. The action is for a declaration that the respondent is the owner of certain lands—being a portion of the railway subsidy lands covered by the statutory conveyance thereof, made in pursuance of 47 Vict. c. 14 (1883) statutes of British Columbia, to the Government of Canada and by the Government of Canada in pursuance of c. 6 (1884) statutes of Canada conveyed to the appellants—and that the Crown grants issued to the appellants in pursuance of the Vancouver Island Settlers Rights Act, 1904, and the Vancouver Island Settlers Rights Act, 1904, Amendment Act, 1917, are null and void.

This fact is at once apparent and that is that the Crown, in the right of the province, has divested itself of all right and title to the lands and the contest really may properly be said to be one between the respondent and the appellants. There is no evidence that the Crown in the right of the province is questioning the Crown grant in truth under s. 4 of the Vancouver Island

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Settlers Rights Act, 1904 (c. 54), it is provided that the rights granted to the settlers under the Act shall be "asserted by and be defended at the expense of the Crown." In view of the statutory mandate it is not surprising that we do not find the Crown questioning in any way the validity of the Crown grants. In the defence the appellants set up that the Crown grants can only be impeached in an action to which the Crown is a party. The judge, in his reasons for judgment when deciding that the attorney-general of the province should be a party defendant, says, p. 738:—

> It is true that the action of the Crown in issuing such grants is being attacked, but it is only sought as I take it to add the Crown as a party to the action for conformity and in order to remove the objection to the form of the action as now constituted.

The judge, in making the order, founded it upon the authority of *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, being a case where a declaratory judgment was sought against the Crown and the judge quotes what Cozens-Hardy, M.R., said at p. 417:—

> In my opinion the plaintiff may assert his rights in an action against the attorney-general and is not bound to proceed by petition of right.

Very able and elaborate arguments have been addressed to the court dealing with the question involved and it has been submitted by counsel for the appellants that it is a rule of universal application that the Crown cannot be made a party to an action save in certain cases of which the present action is not one—that is, in cases comprising penalties or forfeitures or where the subject is or may be liable to a charge—that in such cases the subject is not bound to await the action of the Crown but may anticipate and question any liability, this originating under an ancient statute, namely Henry VIII., c. 39, dealing with forfeitures, escheats, outlawry and attainder. Many cases were cited to substantiate this submission and, in my opinion, the submission is correct—and the cases may be said to be in the main revenue cases—as the *Dyson* case was. The case of *The Att'y-Gen'l* v. *Hallett* (1846), 15 M. & W. 97, 153 E.R. 777, illustrates the point—there the profit of the Crown came in question and the case was ordered to be removed into the office of Pleas of the Exchequer. Platt, B., at p. 109, said:—

> It has been said that in cases of ejectment the Crown has not been allowed to carry on the proceedings in this court. Is there not a very plain answer to

that, viz.:—that it is the prerogative of the Crown not to be sued by writ? And it would be one of the most absurd proceedings in the world for the Crown to command itself. It is the prerogative of the Crown not to be sued by writ and, therefore, another proceeding is adopted called a petition of right, upon which, if it is successful, the direction of the Crown is "that right shall be done."

The case last cited was approved in *Stanley* v. *Wild*, [1900] 1 Q.B. 256, 69 L.J.Q.B. 318. At p. 321, Vaughan Williams, L.J., said:—

> But inasmuch as an action of ejectment will not lie against the Crown the party must proceed by petition of right.

And A. L. Smith, L.J., at p. 321, said:—

> An authority of more recent date to the same effect (having referred to *Yates* v. *Dryden* (1641), Cro. Car. 589, 79 E.R. 1106) is *Att'y-Gen'l* v. *Barker* (1872), L.R. 7 Ex. 177, in which Kelly, C.B., said: "On principle and authority, I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the establishing of any customs belonging to a manor, by means of a suit instituted by the Crown itself and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant, and can only appear as a defendant." That, again, is a clear authority that the Crown is entitled *jure coronæ* to be actor in any litigation affecting its rights.

But it is to be observed that the Crown is not moving or asking to be a party in the present case—but without its consent has been made a party defendant. Can it be suggested that there is any authority for this? In my opinion, there is none—if the *Dyson* case is not applicable.

No question of title as affecting the Crown arises in the present case—no matter of profit or revenue of the Crown—the Crown has parted with all its rights and the question can only be one between the respective litigants other than the Crown, and it would seem incontrovertible that it is not a case for the Crown to be made a party in default of its moving the court to be added as a party. That the proper proceeding for the respondent to adopt would appear to be by way of petition of right if the Crown is to be affected or the Crown grants set aside is apparent by *Taylor* v. *Att'y-Gen'l* (1837), 8 Sim. 413, at 423, 424, 59 E.R. 164, an analogous case to the case at Bar. Then if it is a proper case for petition of right, it follows that it is not a case falling within the *Dyson* case. This, I think, is apparent from what Farwell, L.J., said at pp. 421, 422, in the *Dyson* case. In the present case it is only conceivable that the Crown is made a party because "the estate of the Crown is directly affected" (the words of

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Farwell, L.J., in the *Dyson* case at p. 421), and that being so, proceedings by petition of right only are applicable if it is sought to affect the Crown in that estate, and any declaratory judgment relative to the lands in question or the validity of the Crown grants would affect "the estate of the Crown." In *Eastern Trust Co.* v. *MacKenzie, Mann & Co.*, 22 D.L.R. 410, [1915] A.C. 750. Sir George Farwell, who as Farwell, L.J., took part in the judgment in the *Dyson* case, and whose language I have just quoted, at p. 417, said:—

> There is a well-established practice in England in certain cases where no petition of right will lie under which the Crown can be sued by the attorney-general and a declaratory order obtained as has been recently explained by the Court of Appeal in England in *Dyson* v. *Att'y-Gen'l*, [1911] 1 K.B. 410, and in *Burghes* v. *Att'y-Gen'l*, [1912] 1 Ch. 173.

It is to be noted that the language used by Sir George Farwell is "*in certain cases*," and it is pertinent to note that the *Dyson* case, as well as the *Burghes* case, has relation to revenue. The ratio of the *Dyson* case is, after all, limited and cannot be expanded into covering a case where, as here, there is called in question the validity of Crown grants—the estate of the Crown in the lands described therein, the validity of, if it is the resumption of title thereto, and its transfer of title to the appellants in its exercise of the statutory mandate of Parliament sovereign in its authority in the matter (see *McGregor* v. *Esquimalt & Nanaimo R. Co.*, [1907] A.C. 462), where it was held that the appellants' title (a title similar to that obtained by the appellants in the present case) supported by a Crown grant issued in pursuance of the Vancouver Island Settlers Rights Act, 1904, s. 3, including the mines and minerals superseded that of the respondents (Esquimalt and Nanaimo Railway, the respondents in this appeal), and that the B.C. Legislature had power to enact the Vancouver Island Settlers Rights Act, 1904.

What Sir Barnes Peacock said in delivering the judgment of their Lordships of the Privy Council in *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619, at p. 623, it would seem to me is conclusive upon the point in the present case where the Crown is being sued by the adding of the attorney-general as a defendant—in that case Her Majesty's Deputy Commissioner-General for Natal was being sued:—

It is unnecessary to determine whether the court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done. The suit was not a petition of right, and there was no order of Her Majesty that right should be done.

If the action had been against the Crown, either by name or title, or in substance, it is clear that the court would have had no jurisdiction to entertain it.

If the *Dyson* case is in the way at all it is displaced by this decision of the Privy Council. (Also see *Hosier Brothers* v. *Earl of Derby*, [1918] 2 K.B. 671, 675.)

The present case is distinguishable in any case from the *Dyson* case—here it is really the Crown which is being sued by the adding of the attorney-general as defendant and the remedy can only be by petition of right. The attorney-general cannot be said to be in any way acting, or with the power to act, as a principal in the subject-matter for adjudication, which would entitle a declaratory judgment being given (see *Graham* v. *Commissioners of Works*, [1901] 2 K.B. 781; *Dixon* v. *Farrer* (1886), 18 Q.B.D. 43; *Dunn* v. *Macdonald*, [1897] 1 Q.B. 555; *Macbeath* v. *Haldimand* (1786), 1 T.R. 172, 99 E.R. 1036; *Gidley* v. *Lord Palmerston* (1822), 3 Brod. & B. 275, 129 E.R. 1290; *Reg.* v. *Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *Grant* v. *Sec. of State for India* (1877), 2 C.P.D. 445).

Here we have an Act of Parliament and, as stated by Sir Henri Elzear Taschereau in delivering the judgment of their Lordships of the Privy Council in the *McGregor* case, p. 467:—

> It seems clear to them (their Lordships of the Privy Council) that the true construction of that clause (sec. 3 Vancouver Settlers Rights Act, 1904) is that it imposes upon the Crown the obligation—and does not merely confer the power—of issuing a grant to certain of the settlers therein mentioned of whom the appellant is one.

The counsel for the respondent strenuously submitted that under O. 25, r. 5 (M.R. 289), there was a right to a declaratory order, even as against the Crown, that is a declaratory order, which, within the terms thereof, would be a "binding declaration of right" without, as in this case it would be, the Crown assenting in any way to the jurisdiction. With this submission, I cannot agree, and it is to be noticed that the rule relied upon does not mention the Crown. Any such declaration is only possible where the Crown is proceeding by way of petition of right and has granted the *fiat*, that right be done, even then Parliament could

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issue its statutory mandate in denial of the judgment of the court, although it might be said that such a course is inconceivable where the *fiat* had issued, in support of the contention made. *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536, was cited, but that was a case in which the Crown was not a party. Of what value would any declaratory order be in the present case as against the Crown? None whatever, in my opinion. Therefore, why make the attorney-general a party defendant? It can only be with the purpose of embarrassing action upon the part of the Crown in carrying out the intentions of the legislature. In this view of the matter the language of Jelf, J., in *Att'y-Gen'l* v. *Scott* (1904), 20 T.L.R. 630, at 633, is exceedingly apposite:—

> As regards the counterclaim for a declaration as to the duty of the county council to repair the road to the extent mentioned therein, such counterclaim is not brought under the ægis of the attorney-general, and is, on the contrary, set up against him. It was sought to be supported under O. 25, r. 5, which, while not countenancing applications for declarations "in the air," yet does seem to sanction the granting of a declaration as to the future in cases where it is definite and useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose, and I think that is the case here, especially as the extent of the obligation of the county council may vary very considerably at different dates and under different circumstances.

The questions involved in the present case, as we have seen, are dealt with by legislative enactment, and there may be further legislation—and there may be further obligations imposed upon the Crown—which any declaratory order would be futile in affecting, but at the same time would be a matter of embarrassment and not perhaps comport with the dignity of the court if it should be that the obligation imposed upon the Crown were in antagonism to any such declaratory order.

It is true that the counsel for the respondent has stated at this bar in his argument that it is not asked that there should be any declaration as against the Crown—then why have the Crown a party defendant? Upon this view of the matter there remains, in my opinion, no possible reason or authority for the making of the order adding the attorney-general as a party defendant. Cozens-Hardy, M.R., in the *Dyson* case, at p. 417, said:—

> But then it is urged that in the present action no relief is sought except by declaration and that no such relief ought to be granted against the Crown, there being no precedent for any such action.

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This clearly brings out the fact that at least in the *Dyson* case relief to the extent of a declaration was asked, as against the Crown.

It may not be perhaps amiss in the present case to refer to the case of *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525, at 536. In that case Cockburn, C.J., said:—

> The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

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It follows that where there is legislation and an obligation is imposed upon the Crown, the statutory mandate must be carried into execution and a declaration to the contrary made by the court would be, in effect, an idle declaration—in the words of Jelf, J., "useless for any good purpose."

I am of the opinion that the order under appeal adding the attorney-general as a party defendant was erroneous and that the appeal should be allowed.

EBERTS, J.A., allowed the appeal. Eberts, J.A.

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MCPHILLIPS, J.A.:—The appeal raises the same question as that determined in *E. & N. R. Co.* v. *Wilson*. For the same reason as in that appeal expressed I would allow the appeal. McPhillips, J.A.

Appeals allowed.

Re TORONTO R. Co. and CITY OF TORONTO.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 20, 1918.

1. STREET RAILWAYS (§ III A—24)—ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD TO PUT ON ADDITIONAL CARS—FAILURE TO COMPLY—WAR CONDITIONS—ORDER TO RESCIND NOT APPLIED FOR UNDER ACT—LIABILITY.

   It is no answer to an order made by the Ontario Railway and Municipal Board to a street railway company to place additional cars upon its system, that the company had made all possible efforts to do so, but that owing to the war and other conditions compliance was impossible, where the company has not applied to the Board under s. 25 of the Railway and Municipal Board Act (R.S.O. 1914 c. 186) to rescind or vary the order or under s. 42 for an extension of time for compliance.

2. JUDGES (§ I—7)—DE FACTO—COLOURABLE TITLE—STATUS CANNOT BE ATTACKED IN COLLATERAL PROCEEDING.

   The status of a *de facto* judge having at least a colourable title to the office, cannot be attacked in a collateral proceeding, the proper proceeding to question his right to the office is by *quo warranto* information.

   [Review of authorities.]

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3. MUNICIPAL AND RAILWAY BOARD (§ I—1)—CONSTITUTION—POWERS AND DUTIES—NOT A COURT.

The Ontario Railway and Municipal Board although it has for some purposes, as part of its powers and duties, Judicial functions to perform, is not a Superior Court within the meaning of s. 96 of the British North America Act.

[*Winnipeg Electric R. Co.* v. *City of Winnipeg* (1916), 30 D.L.R. 159, distinguished.]

Statement.

AN appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 19th April, 1918, made under the authority of sec. 260*a* of the Ontario Railway Act, added by 8 Geo. V. ch. 30, sec. 4, requiring the appellant company to pay forthwith to the Corporation of the City of Toronto, the respondent, a penalty of $1,000 per day from the 27th March, 1918, to the 19th April, 1918, being $24,000 in all, for non-compliance, without proper excuse or justification, with an order of the Board, dated the 27th February, 1917, which required the appellant company to furnish and place in operation 100 additional cars not later than the 1st January, 1918, and 100 more not later than the 1st January, 1919.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

Irving S. Fairty and *C. M. Colquhoun*, for the respondent city corporation.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 19th April, 1918.

The order was made under the authority of the Act 8 Geo. V. ch. 30, sec. 4, adding to the Ontario Railway Act a new section, 260*a*, which provides that:—

"The Board, for the purpose of enforcing compliance with any order heretofore or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates, a penalty not exceeding $1,000 a day for non-compliance with any such order."

The order appealed from recites that an order of the Board, dated the 27th February, 1917, which required the appellant to furnish additional cars for its service, had not been complied with, and that "in the opinion of the Board there had not been proper

excuse or justification for such non-compliance," and that it appeared that "for the purpose of enforcing compliance with the said order the Board should order the" appellant "to pay to the" respondent "a penalty for non-compliance with the said order," and it is ordered that the appellant "do forthwith pay to the applicant" (i.e., the respondent) "a penalty of $1,000 per day from the 27th day of March, 1918, to the date hereof, both days inclusive, being the sum of $24,000 in all."

The order of the 27th day of February, 1917, required the appellant "to place in operation on its system 100 additional double truck motor cars not later than the 1st day of January, 1918, and a further additional 100 double truck motor cars not later than the 1st day of January, 1919."

The order also provides for the appellant, on request, informing the respondent from time to time "in and about the performance" of the order, and for the respondent's engineer or his authorised representative from time to time having access to the appellant's premises, works, and records, in order that the respondent may verify the information so given and may be fully advised as to the progress and efforts made in carrying out the order. All this for the purpose, as the order states, of assuring the faithful and punctual performance of the order.

The respondent does not admit that the only authority to make this order was the legislation to which I have referred, but contends that the Board had authority to make it under the general powers conferred on the Board by sec. 260 of the Ontario Railway Act.

That the appellant did not comply with the directions of the order of the 27th February, 1917, is admitted, but it is contended that it, in good faith, made all possible efforts to comply with those directions, but was unable to comply, owing to it being impossible, because of war and other conditions, to get the cars built for it, or to obtain the steel and the labour necessary for the building of them, if that work had been undertaken by the appellant itself.

It was, no doubt, shewn that these difficulties existed to some extent and were sufficient to have rendered the putting in service of 100 cars by the 1st day of January, 1918, difficult; but it is undoubted also that the appellant took no proper steps to obtain contracts for the supply of the cars to be delivered at the earliest

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date at which car-builders would have been willing to have delivered them; and it is clear, I think, from the statement of the appellant's general manager, that, if it had been practicable to have obtained the cars in time, the appellant would not have bought them, because of the very large sum that it would be necessary to expend in the purchase of them.

The position of matters to-day—as to the putting in service of the first 100 cars—is precisely the same as it was when the order of the 27th February, 1917, was made; and, in my opinion, the appellant has not done all that it could and should have done to ensure the putting in service of these cars at the earliest practicable moment.

The obviously proper course for the appellant to have taken was, when the difficulty of getting the cars in time presented itself, to have made an application to the Board to exercise the power it had under sec. 25 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, to rescind or vary the order it had made; but no such application was made, nor was an application made under sec. 42, which provides that:—

"When any work, act, matter or thing is, by any regulation, order or decision of the Board, required to be done, performed or completed within a specified time the Board may, if the circumstances of the case, in its opinion, so require, upon notice and hearing, or in its discretion upon *ex parte* application, extend the time so specified."

Why an application was not made under one or other of these sections, it is difficult to understand, but it is possible that it was because it was feared that the application would not be successful, and if unsuccessful there would have been no appeal from the Board's decision. Nor was it made after the order had been confirmed by 7 Geo. V. ch. 92, sec. 17, although by that section it was provided that nothing in it should interfere with the powers of the Board under sec. 25.

I am of opinion that, as long as the order of the 27th February, 1917, stands, what the appellant sets up as an answer to the application of the respondent to impose the penalty which the Board is empowered to impose, is no answer.

I am also of opinion that, if that question were open, in the

circumstances and upon the material before the Board, this Court cannot say that the conclusion of the Board, "that there had not been proper excuse or justification for non-compliance with the order of the Board," was erroneous and should be reversed.

It was suggested upon the argument that, as the power conferred upon the Board to impose a penalty was in terms given for the purpose of enforcing compliance with any order of the Board "heretofore or hereafter made," and as the time for compliance with the order of the 27th February, 1917, as to the first 100 cars, had expired, the order in appeal could not be and was not such an order.

Though reading the provision literally, and having regard only to its form, this objection might appear to be well-founded, the substance of the thing to be done was the putting in service of the additional cars, and an order made for the purpose of compelling that to be done is, in my opinion, such an order as it was contemplated might be made, although the time limited for putting the cars in service had elapsed.

The purpose of the legislation was in part at least to make effective the order of the 27th February, 1917, and to enable that to be done by imposing a penalty for non-compliance with it.

It was contended by counsel for the appellant, and an able and elaborate argument in support of the contention was presented by Mr. Robinson, that the order of the Board has no validity; that the Board is a "Superior Court" within the meaning of sec. 96 of the British North America Act, and its members, not having been appointed by the Governor-General, as he contended, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created.

The presumption undoubtedly is that *de facto* members of the Board were validly appointed, and it might be a sufficient answer to the contention to say that there is nothing to shew that they were not appointed by the Governor-General.

There is, however, an insuperable difficulty in the way of the appellant's success on this branch of the case.

That it is not open to attack, in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle

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and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

I have been unable to find any reported English case in which that procedure has been taken in respect to a Judge of a Superior Court, though it has been taken, or recognised as proper to be taken, in the case of a Judge of a County Court: *Regina* v. *Parham* (1849), 13 Q.B. 858, 116 E.R. 1491; in the case of a recorder: *Rex* v. *Mayor of Colchester* (1788), 2 T.R. 259, 100 E.R. 141; *Rex* v. *Sandys* (1733), 2 Barn. (K.B.) 301, 94 E.R. 514; and *Rex* v. *Marshall* (1817), 2 Chitty 370; and in the case of a coroner: *Regina* v. *Grimshaw* (1847), 10 Q.B. 747, 116 E.R. 284; *Regina* v. *Taylor* (1840), 11 Ad. & El. 949, 113 E.R. 675; *Rex* v. *Sayer* (1772), 5 T.R. 376, 101 E.R. 210 (note); and *Regina* v. *Diplock* (1869), L.R. 4 Q.B. 549; see also *Askew* v. *Manning* (1876), 38 U.C.Q.B. 345, 354, and *Chaplin* v. *Public School Board of Woodstock* (1889), 16 O.R. 728, and the cases there cited.

The reason for this dearth of authority as to a Judge of a Superior Court is, no doubt, that the question could hardly arise in Great Britain. That reason does not, however, exist in the case of Canada and of the United States of America, because the former is divided into Provinces and the latter into States having separate constitutions, and their powers are limited by them, as indeed are the powers conferred on the Parliament of Canada by the British North America Act, and those conferred upon Congress by the Constitution of the United States. The rule is founded on good sense, for it would be an intolerable state of things if, in the case of such a body as the Ontario Railway and Municipal Board, it should be held that the Board is a Superior Court, and the result would be that all of its acts were to be treated as invalid because the members of the Board were appointed by the Lieutenant-Governor in Council and not by the Governor-General.

In *The People* v. *Bangs* (1860), 24 Ill. 184, which was the case of an information in the nature of a *quo warranto* to try the right of Mark Bangs, who had been elected to the office of Judge of the twenty-third judicial circuit of the State of Illinois, to hold that office, it was held by the Supreme Court that the Act of the State Legislature by virtue of which Bangs claimed to hold the office was unconstitutional.

In delivering the judgment of the Court, the Chief Justice, referring to the Act, said (p. 187):—

"It gave Judge Bangs colour of office, no doubt, and, acting as he did under colour of office, his acts were as valid, of course, as if the law had been constitutional."

In *Campbell* v. *The Commonwealth* (1880), 96 Penn. St. 344, the question was raised as to the validity of a conviction for arson made by a Court consisting of the President Judge of the Courts of Fayette county and two persons who claimed to be Associate Judges, but whose election was alleged to be invalid on the ground that the people who elected them had no power to elect Associate Judges in that county.

It was held by the Supreme Court of the State that these two persons were Judges *de facto*, and as against all parties but the Commonwealth they were Judges *de jure*, and, having at least a colourable title to those offices, their title to them could not be questioned in any other form than by *quo warranto* at the suit of the Commonwealth.

In that case the Court followed a decision of the Federal District Court of Oregon in *In re Ah Lee* (1880), 5 Fed. Repr. 899, in which it was held that "a person in office by colour of right is an officer *de facto*, and his acts as such are valid and binding as to third persons; and an unconstitutional act is sufficient to give such colour to an appointment to office thereunder."

The question there was as to the constitutionality of an Act of the State Legislature, under the authority of which the Judges of the Court, before whom a prisoner had been tried, were appointed, and the question arose on his application for a writ of *habeas corpus*.

In *Cæsar Griffin's Case* (1869), Chase's Decisions (Johnson's Rep.) 364, the same conclusion was reached by Chief Justice Chase, sitting in the Federal Circuit Court for the District of Virginia.

Burt v. *Winona and St. Peter R. Co.* (1884), 31 Minn. 472, is a decision to the same effect, by the Supreme Court of Minnesota.

The same ruling was made by the Supreme Court of Errors of the State of Connecticut in *Brown* v. *O'Connell* (1870), 36 Conn. 432, and it was held by the Court that "to constitute an officer

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de facto it is not necessary that he have colour of appointment from some power having actual authority to make the appointment, but it is sufficient that he has had appointment from some power having colour of authority to make it."

The question in that case arose in an action on a recognizance entered into by the defendant before the person acting as Judge of a Police Court, the validity of whose appointment was attacked.

In stating his opinion, Butler, J., said (p. 449):—

"It is easy to suppose cases where an officer may be appointed by a body who suppose they have a right to appoint him, when in law they have not, and yet the officer will be such *de facto* and his acts cannot be collaterally impeached."

This case is referred to in Brice on Ultra Vires, 3rd ed., p. 614, as authority for the proposition that "a judicial officer appointed by the common council of a city in pursuance of an Act of the Legislature afterwards declared unconstitutional is an officer *de facto*, and a recognizance entered into before him is valid."

There are numerous other cases in the Courts of the United States of America to the same effect as those which I have mentioned. The rule to be deduced from the cases in the United States is stated in 23 Cyc. 621, as follows: "The right of a *de facto* Judge to hold his office is not open to question, nor are his acts subject to attack in a collateral proceeding; these being matters which can only be inquired into in a proceeding to which he is a party. . . . Nor can his title be determined in an action tried before him, nor in *certiorari* proceedings to review a conviction had before him, nor on an appeal by a person who has been tried and convicted before him;" and cases are referred to which support each of the propositions stated.

I refer also to the same volume, under the heading "*De Facto* Judges," pp. 618, 619, and 620, and also to what is said on pp. 512 and 513, under sub-head C. of division 5, under the heading, "Proceedings to Test Right to Office."

Where a Judge is disqualified by interest, the rule is different, and his right to sit may be questioned on an appeal from his decision, as was done in *Dimes* v. *Grand Junction Canal Co.* (1852), 17 Jur. 73, but that class of cases is quite distinguishable. In them there is no ground upon which the right to sit can be ques-

tioned by *quo warranto* proceedings, the Judge rightly occupies the office, and such proceedings would be wholly inapplicable; and, besides, in the other class of cases, if the act of the *de facto* officer could not be supported on the ground upon which the decisions in the cases I have referred to were based, his acts would be void, and no consent or acquiescence could give to them validity; while in the other case—the disqualification of a Judge on the ground of interest—his acts are only voidable, and therefore cannot be attacked where there was consent or acquiescence.

It is a further answer to this branch of the appellant's case, that it has been decided by an authority binding upon us that the Board is "not a Court, but an administrative body having, in connection with its primary duty, power to construe the agreements which it is called on to enforce, but no general power such as the Superior Courts possess of adjudicating upon questions of construction in the abstract:" *Re Town of Sandwich and Sandwich Windsor and Amherstburg R. Co.*, 2 O.W.N. 93, 98 (C.A.)

That statement is one of the reasons upon which the judgment of the Court was based, and it is therefore, as I have said, an authority binding on us.

I do not mean that I have any doubt as to the correctness of this ruling, for an independent examination has led me to the same conclusion; and, in my opinion, the body which was created under the authority of the Ontario Railway and Municipal Board Act is, to use the expressive language of Lord Watson, "in pith and substance" not a Court, but an administrative body, having, as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts.

I agree with the contention of Mr. Robinson that a body which is in "pith and substance" a Court is none the less a Court because it is not called by that name.

It is not without importance, however, that the body for the appointment of which the Act gave authority to the Lieutenant-Governor in Council is called "a Commission," and that it is not, in terms at all events, created a Court, but is given "all the powers of a Court of record." Although these words are general, they do not extend beyond giving to the Board those powers in respect to matters with which by the Act the Board is authorised to deal.

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The body which was held by the Court of Appeal of Manitoba in *Winnipeg Elec. R. Co.* v. *Winnipeg*, (1916), 30 D.L.R. 159, 26 Man. L.R. 587, to be a Court, was by the Act declared to be a Court of record, and that difference between the Act and the Act in question in this case, as well as other differences between them, was pointed out by the present Chief Justice of that Court (pp. 181, 182).

The Ontario Act R.S.O. 1914, ch. 186, is confined in its operation to railways, street railways, telegraph or telephone systems, and public utilities (sec. 21 (1)). A public utility is defined to mean and include "any waterworks, gasworks, electric heat, light and power works, and telegraph or telephone lines or any works supplying the general public with necessaries or conveniences" (sec. 3 (*a*)).

These things must be taken to mean such of them as are under the legislative authority of the Provincial Legislature.

Section 21 is designed to provide and does provide only for the enforcement of the obligations of these bodies to the public under the Act or under any other general or special Act, or under "any regulation, order or direction made thereunder," or under any agreement entered into by them, or under any stipulation or condition in a municipal by-law accepted or acted on by them, or in respect of the tolls to be charged as prescribed by lawful authority, and to deal with complaints that the tolls charged are in excess of such tolls, or are otherwise unlawful, unfair, or unjust.

Section 60 authorises the Board, when requested so to do, to act as arbitrator where there is a dispute between a railway, street railway, or public utility company and its employees; and sec. 61 directs the Board, when a strike or lock-out of the employees of any such company occurs, to endeavour by mediation to effect an amicable settlement of the controversy; and other powers are conferred upon the Board to investigate and make recommendations where the Board is of opinion that as a consequence of the strike or lock-out the general public is likely to suffer injury or inconvenience with respect to fuel, light, or power, the means of communication or transportation, or in any other respect, and the parties to the strike or lock-out will not consent to submit the matter in controversy to the Board.

Other powers are conferred upon the Board by the Ontario Railway Act, 6 Edw. VII. ch. 30, in respect of the gauge of

the railway (sec. 75); trains, cars, and appliances (secs. 76 to 82); frogs and packing (sec. 83); drainage (secs. 84 and 85); farm-crossings (sec. 86); fences, gates, and cattle-guards (sec. 87); bridges, tunnels, and other structures (secs. 88 and 89); highway-crossings (secs. 90 to 97); crossings and junctions (sec. 98); mines and minerals (secs. 99 to 104); operation of the railway (secs. 118 (1), 122 (2), 124 (3)); crossing draw or swing bridges (sec. 122); sleeping and parlour cars (sec. 127); stations (sec. 128); as to approval of by-laws passed by a company (sec. 153); as to the inspection of railways (secs. 162 to 167); as to by-laws fixing tolls (secs. 169 and 170); discriminating tolls (secs. 173, 175, and 176); guard-wires (sec. 194); amending or quashing by-laws authorising the construction of a railway or street railway on a highway (sec. 198); deviations from highways to right of way owned by the company (sec. 199); subsidised railways and hours of labour on them (sec. 225); duration of street railway franchises (sec. 02); duration of privileges to operate electric railways (sec. 08); fenders and brakes (secs. 209 to 211); lavatories (secs. 213 and 214); radial lines (secs. 218 and 220); examination of motormen (sec. 221); hours of labour (sec. 227); returns by companies (secs. 228 to 236); investigation of accidents (sec. 237); the transmission of power on the railway's right of way to works and plant of municipal corporation (sec.256).

Additional powers in respect of railways have been conferred upon the Board by subsequent legislation. Among these are powers as to equipment and service, conferred by what is now sec. 105 of the Ontario Railway Act (R.S.O. 1914, ch. 185), and was originally enacted by 10 Edw. VII. ch. 83, sec. 2; as to drainage, first enacted by 3 & 4 Geo. V. ch. 36, sec. 109, and now part of sec. 109 of the Revised Statute; as to canals, ditches, wires, etc., first enacted by 3 & 4 Geo. V. ch. 36, sec. 111, and now sec. 111 of the Revised Statute; as to express tolls, first enacted by 3 & 4 Geo. V. ch. 36, sec. 178 to sec. 185, and now sections of the same numbers in the Revised Statute; as to freight classification and tariffs, first enacted by 3 & 4 Geo. V. ch. 36, secs. 188 to 209, and now sections of the same numbers of the Revised Statute; as to traffic facilities by contiguous lines, first enacted by 2 Geo. V. ch. 35, secs. 1 to 8, and now sec. 212 of the Revised Statute; as to ordering repairs or improvements or additions to subsidised railways, 3 & 4 Geo. V.

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ch. 36, sec. 269, and now sec 269 of the Revised Statute; as to "pay as you enter" system, first enacted by 1 Geo. V. ch. 53, sec. 214*a*, and now sec. 256 of the Revised Statute. There have been various minor amendments of some of these sections, but it is not necessary for my purpose to enumerate them.

The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, contained a provision (sec. 63(1)) authorising the Board to make orders for the enforcement of municipal agreements under which a railway is operated on a highway. The section no longer appears in that Act, but is sec. 260 of R.S.O. 1914, ch. 185 (the Railway Act).

Powers as to municipal street railways were conferred upon the Lieutenant-Governor in Council by 3 Edw. VII. ch. 19, sec. 569 (1) to (3), and upon the Board by 10 Edw. VII. ch. 81, secs. 2 and 4, and the provisions of these sections form sec. 232 of the Revised Statute.

Powers as to the revision of assessments and powers as to certain municipal matters were conferred upon the Board by the Ontario Railway and Municipal Board Act, 1906. In the revision of the statutes these provisions were transferred to other Acts, and certain powers as to local improvements have also been given to the Board by subsequent legislation.

All of these multifarious duties and powers are of an administrative character, and the only authority which is conferred upon the Board of a strictly judicial character is that of construing contracts for the purpose of exercising the administrative powers which the Board possesses, and that moreover only with respect to undertakings of a public character, subject to the jurisdiction of the Legislature of Ontario, and to contracts by municipal bodies with the undertaker or those having the conduct or management of them.

It is not without significance, though not a conclusive circumstance, that the Provincial Railway Board has been recognised by the Parliament of Canada by 1 & 2 Geo. V. ch. 22, sec. 5, and that reciprocal arrangements for the constitution of a joint Board composed of members of the Dominion Railway Board and of the Provincial Board to determine questions arising where the lines of a Provincial railway are intersected by those of a Dominion railway are embodied in that legislation and in corresponding Provincial legislation (R.S.O. 1914, ch. 185, sec. 131).

In the recent case of *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405, *Dawkins* v. *Rokeby*, L.R. 8 Q.B. 255, and the other cases of that class cited by Mr. Robinson, are reviewed by Sankey, J., and the principle deduced from them was that "where a tribunal is a Court of justice, or a body acting in a manner similar to that in which a Court of justice acts, any statement made by a member thereof is absolutely privileged and no action can be brought thereon."

In the Scotch case of *Slack* v. *Barr* (1918), 82 J.P. 91, Lord Anderson, answering the argument that had been presented that this rule applies only to statements made . . . in Courts of justice, said p. 92:—

"As the rule of law is based on considerations of public policy, I am unable to see why these should not apply to all occasions on which evidence is given for public purposes before any public body, whether that body is purely judicial, or quasi-judicial, or exists merely for administrative purposes. If this view be sound, it would make the general rule applicable to such bodies as royal and parliamentary commissions, licensing courts, county and parish councils, and similar administrative bodies."

That there may be a judicial tribunal which is not a Court is shewn by the case of *Barratt* v. *Kearns*, [1905] 1 K.B. 504, in which it was held that a Commission appointed under statutory authority by the Bishop of Winchester, to inquire into the inadequate performance of the ecclesiastical duties of a benefice, was a judicial tribunal. A tribunal so constituted, though judicial, would not be a Court of justice, at all events in the sense in which the word "Courts" is used in sec. 96 of the British North America Act.

My conclusion is that the Board, although it has, for some purposes, and those but a small part of its powers and duties, judicial functions to perform, is not a Court.

If I am wrong in this, and the Board is a Court, I am of opinion that it is not a Superior Court within the meaning of sec. 96 of the British North America Act.

In the first place, it is not in terms declared to be a Court, but on the contrary is given the powers of a Court of record (R.S.O. 1914, ch. 186, sec. 5(4)); its members are to be appointed by the Lieutenant-Governor in Council (sec. 5(1)); their tenure of office is not during good behaviour; and there are a number of provisions

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which would be quite unnecessary if the Board were intended to be a Court, and others quite unnecessary if the Board were intended to be a Superior Court. Of the former class may be mentioned: the provision as to the use by the Board of the court-house and buildings for the administration of justice of the county or district in which the sittings of the Board or a member of it are held (sec. 15(1)); the provisions requiring sheriffs, deputy sheriffs, constables, and other peace officers to aid, assist, and obey the Board in the exercise of its jurisdiction whenever required to do so (sec. 31); the provision as to documents purporting to be signed by the Chairman and Secretary, or by either of them, being *primâ facie* evidence (sec. 33), and analogous provisions in sec. 34; the provision that a certified copy of an order or decision of the Board may be filed in the office of the Clerk of Records and Writs, and that it shall thereupon become and be enforceable as a judgment or order of the Supreme Court to the same effect, a practice analogous to that for enforcing an award (sec. 38); the provision that an order of the Board need not shew on its face that any proceeding or notice was had or given, or any circumstances existed, necessary to give it jurisdiction to make the order (sec. 44); the provision that no order, decision, or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process in any Court, save as provided by the Act, i.e., by appeal to a Divisional Court (sec. 48, sub-sec. 8, cl. (*b*)); and the provision as to the payment of witness-fees (sec. 54).

It was argued by Mr. Robinson that these provisions were not inconsistent with the intention and effect of the Act being to create a Superior Court, but that they were embodied in the Act *ex majori cautelâ*, to prevent any question being raised as to the Board not being a Superior Court, or at all events that the effect of them is to make the Board a Superior Court, whatever may have been the intention of the Legislature in that regard.

If there had been but one or two of these provisions, the argument would find some support in what was said by Sankey, J., in *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. at p. 412, but the number and character of the provisions to which I have referred lead me to the conclusion that the proper inference to be drawn from their presence in the Act is not that they were embodied

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in it for the purpose for which it is contended that they were enacted, but that they indicate that the purpose was to make it clear that the Board, if it should be held to be a Court, was not a Superior Court but an inferior Court, not subject however to have its proceedings reviewed in the manner in which those of an inferior Court may be reviewed.

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According to the rule which has been admittedly laid down, that in considering a question as to the constitutional validity of a provincial enactment, it is the duty of the Court "to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it" (*per* Strong, J., in *Severn* v. *The Queen* (1878), 2 Can. S.C.R. 70, 103), we ought, in my opinion, to hold that in the Ontario Railway and Municipal Board Act, 1906, the Legislature must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4(2), rather than that the Legislature created a Superior Court and usurped an authority which it did not possess, but which was vested in the Governor-General.

For all these reasons, and I base my opinion upon all of them, I would affirm the order appealed from and dismiss the appeal with costs.

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

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

Ferguson, J.A.

FERGUSON, J.A.:—The question, whether a Court or other tribunal is or is not a *Superior* Court within the meaning of the British North America Act, cannot, I think, be answered by reference only to the powers the Court or tribunal possesses to hear and determine or enforce the rights of litigants, but also by reference to the power of the Court or judicial body to adjudicate upon the rights and powers of other Courts and to control their acts and proceedings.

For, as I read the British North America Act, the designation *Superior* as applied to a Court, means a Court, other than County

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and District Courts, in which is vested the right and power to control, regulate, restrain, or review the acts and proceedings of some other Court.

It is not contended that any such powers are, by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, conferred upon the Board, and therefore the Board is not, in the sense I have indicated, a Court superior to some other Court.

For these and the reasons given by my Lord the Chief Justice in his opinion, which I have read, I agree with him that the appeal should be dismissed with costs. *Appeal dismissed.*

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MAGILL v. TOWNSHIP OF MOORE.

Supreme Court of Canada, Idington, Anglin, Brodeur and Mignault, JJ. and Masten, J., ad hoc. May 6, 1919.

1. APPEAL (§ II A—35)—FATAL ACCIDENTS ACT—ACTION FOR ENTIRE DAMAGES—APPORTIONMENT OF—AMOUNT IN CONTROVERSY—JURISDICTION OF COURT.

Under the Fatal Accidents Act (R.S.O. 1914 c. 151) the cause of action is single and is for the entire damages sustained by the whole class for whose benefit it may be recovered and an appeal to a divisional court is necessarily from the judgment as a whole notwithstanding that judgment appealed from has apportioned the amount between different members of the class.

2. APPEAL (§ VII M—536)—FACTS NOT IN DISPUTE—INFERENCES—RIGHT OF APPELLATE COURT TO DRAW.

Where the facts of a case are not in dispute and the action depends on inferences to be drawn from those facts an appellate court should draw its own inferences.

Statement.

APPEAL from the Ontario Appellate Division (1918), 44 D.L.R. 489, 43 O.L.R. 372; reversing the judgment of Clute, J., 41 D.L.R. 78, 41 O.L.R. 375, and dismissing an action for damages for death of plaintiff's son. Affirmed.

Logan, for appellant.

Towers, for respondent, the Township of Moore.

Weir, for respondent, the Moore Municipal Telephone Association.

Idington, J.

IDINGTON, J. (dissenting):—I agree so fully with the reasons assigned by the trial judge for his judgment, and those reasons assigned by the Chief Justice of Ontario for not disturbing said judgment, that I need not repeat same here.

It occurred to me, however, in considering this appeal that the acts of the respondent township relative to the additional wires it put up and of which its reeve speaks as a witness, deserved,

perhaps, more stress laid upon that phase of the case than has been directly done by either of said judges.

The reeve seems to put beyond doubt the fact that the lower wires were put there by the respondent township, as appears from the following:—

His Lordship: The wires were put on before the accident, and after the Board had made their report? A. Yes, the wires were put on after the Railway Board had made their report. There was a space, with pins there for the six wires.

Having regard to the jurisprudence which requires, in many cases, as a condition precedent to liability therefor, notice of want of repair of a highway, to be brought home to the municipal authorities, and the fact that the original construction in question was put there by an independent corporation for whose mere negligence the township could not readily be held responsible, it relieves one, when having to pass upon the question raised herein, of much of the inherent difficulty of the case to be able to consider the party accused from the point of view of having been an actor, rather than as one having a mere possible authority to interfere and hence having only a remote duty, if any, to see that another having acquired a legal right to invade the highway, keeps strictly within its license to do so.

And that is still more satisfactory (for the judge at all events) when having to pass upon the argument presented to us that the township is relieved by reason of the order of the Ontario Railway and Municipal Board authorising, under the Ontario Telephone Act, the township to take over and impliedly to continue the works in question.

To that argument there is the answer that what the Board had to deal with obviously was the financial aspect and all incidental thereto. Its exercise of authority by the order relied on goes no further. It enabled the township to acquire the work and proceed to carry on the business.

In course of doing so the primary obligation resting upon it, was not to invade the right of everyone to enter upon the highway wherever and whenever he saw fit. No one, save others in the common exercise of the same right, has the slightest authority to minimize the free and untrammelled use of the highway for the purpose of carrying any load he chooses, unless and only so far as statutory authority has expressly limited said right, by conferring

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on others a privilege, or restricting the use thereof by someone else, by reason of anything the legislature sees fit to prohibit.

Nothing of the latter kind is in question herein. The only thing involved here is the exercise of a privilege; and the question is whether it has been so exercised according to law.

Clearly the burden of asserting and proving that such an exercise of privileged rights has been done within the law conferring it, rests upon him asserting it.

And these principles are none the less obligatory because the township happens to be acting in a dual capacity as it were of guardian council of the public highway and of the public who travel thereon, and at the same time of trustee for others interested in claiming the exercise of the privilege.

I think the township failed absolutely in proving any such legal exercise of privilege and did an illegal act when it put on those wires constituting the lowering of the head-room under which deceased had to drive.

The cross-bar being there may have been a temptation which the careless man directing the placing of the wires could not resist, but did not in law enlarge the privilege.

If there is no rule laid down in the statutes conferring such a privilege, as to the correct means of its exercise, the law, of course, will imply that a reasonable regard for the rights of others must be observed. That was wholly neglected by him who was too stupid or too careless to consider what was necessary to preserve for him owning the field and entering it at the point in question his right of access to the highway.

I cannot understand why a man should blind himself with such sophistries as put forward by one of the witnesses testifying to the mode of construction adopted, of one height of head-room for a gate at a farm yard and another for that at a field liable to have as high loads carried in and out.

Curiously enough he recognized that a similar gate in same vicinity was furnished with a higher set of poles.

So much for the aspect of the matter if free from regulations having force by statute. When we apply these there does not seem to have been a vestige of right left in the township for adding to the wires already on as it did after the regulation of April 20, 1914, which obliterated all former regulations of a like kind and

established a standard which it was obligatory upon the township to have observed.

True it points to the provision in s. 26 of the Telephone Act as if that constituted all prior erections valid. It does nothing of the kind as I read it. It preserves the rights of those erected, but of course, presupposes them to have been legally erected.

If my view, as above set out, is correct then this erection did not fall within the reservation and all done there must fall within the regulation.

The trial judge seemed troubled with the want of evidence of the exact date of the latest work. I respectfully submit that it was for those claiming the privilege to have proven they acted within and by virtue of it. (41 D.L.R. 78).

Holding as I do the erection illegal the argument presented in support of a defence of contributory negligence looks very much as if a ruffian had slapped in the face a man driving a load to market and thereby led to the team running away and killing the man, he could be excused from paying damages so resulting by shewing that the load was not built in the best way possible.

Indeed, some of the arguments elaborately put forward as to the alleged contributory negligence are amusing. Because the head-room was not ample, there should have been a wagon with higher wheels to render it less ample; or a culvert constructed which, of certainty, would involve an approach also lessening the head-room, or perhaps both; and, in short, deceased should not have been there; all of which seem ill-fitted to this case.

I have no doubt of the liability of the township and am only sorry I cannot see my way to deal with the question of giving relief over as desired so that the burden fall on those for whom the township were trustees and relieve the ratepayers not concerned.

But on this record, and having regard to the course of events at the trial, the only thing open to this court is to declare that the judgment should be without prejudice to that right if it can be established.

I, therefore, express no opinion as to such right either one way or another.

I think the appeal should be allowed with costs of appellant but not of respondent here and below as against the township.

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I have some doubt if the extra costs created by adding said co-defendant should not be disallowed appellant.

ANGLIN, J.:—At the opening of the argument of this appeal a question of jurisdiction was raised by the court. While the judgment entered in the trial court was for $1,500, that sum was apportioned under s. 4 (1) of R.S.O. c. 151, $500 to the plaintiff William Magill, and $1,000 to the plaintiff Louisa Magill. We held in the recent case of *L'Autorité, Ltd.* v. *Ibbotson* (1918), 43 D.L.R. 761, 57 Can. S.C.R. 340, that where eleven plaintiffs joined in one action alleging injury by the same libel published in the defendant's newspaper and each claiming $2,000 damages, an appeal to this court from the Court of Review by the defendant could not be entertained, the minimum appealable amount from that court being $5,000. There, however, each plaintiff had a distinct cause of action; each could have brought a separate action. There might be defences as to one or more which did not exist as to others. There might be an appeal as to only one of the plaintiffs or a separate appeal as to each of several or of all of them. Therefore as to each plaintiff the matter in controversy on the appeal was his own right to recover damages for the injury done to himself. The court regarded the action as a joinder of several actions.

Here the right of action is purely statutory (R.S.O. c. 151, s. 3). The statute gives but one action (s. 6) to be brought by the personal representative, or, on his default (s. 8), by one or more of the relatives of the class for whose benefit it may be maintained. The cause of action is single; it is for the entire damages sustained by the whole class in whose behalf the statute provides that compensation may be recovered. Either of the present plaintiffs might have maintained this action without joining the other and would have recovered the whole amount to which both have been held entitled. Before that amount is distributed any costs not recovered from the defendants may be deducted from it (s. 4 (1)). The appeal to a divisional court was necessarily from the judgment as a whole. The appeal to this court is to restore that judgment as a whole, and it is the whole amount of it, $1,500, that is "the matter in controversy on the appeal" (Supreme Court Act, s. 48 (*c*)). The court was unanimously of this opinion and jurisdiction to hear the appeal was, therefore, maintained.

The material facts of this case sufficiently appear in the reports of the judgments of the trial judge and of the appellate division (1917), 41 D.L.R. 78, 41 O.L.R. 375, 44 D.L.R. 489, 43 O.L.R. 372. I assume, without so deciding, that there was not statutory authority for placing the telephone wires just as they were, such as would bring this case within the principle of the decision in *Canadian Pacific R. Co.* v. *Roy*, [1902] A.C. 220. Having regard to the conflicting views as to the proper inferences to be drawn from the proven facts, as to which there is little, if any, dispute, I have thought it necessary to study and analyze with care all the evidence in the record. I shall, however, content myself with stating the conclusions to which it has led me. Unless in exceptional cases no good purpose is served, in my opinion, by setting out at length the considerations on which inferences of fact are based in an ultimate court of appeal. No question of credibility being involved, our right, if not our duty, to review the inferences drawn by the courts below is unquestionable. *Dominion Trust Co.* v. *New York Life Ins. Co.*, 44 D.L.R. 12, [1919] A.C. 254, 257.

Before reversing the judgment appealed from, however, we should be satisfied that it is erroneous. I am not so satisfied. On the contrary, my study of the evidence has left me in absolute uncertainty as to whether the presence of the telephone wires at the gateway contributed at all to the upsetting of the load of hay which resulted in the death of James Magill. While it is quite possible that it did, having regard to all the circumstances, it seems to me more likely that it did not—that, if the wagon, loaded as it was, had been driven in the same course, the same results would probably have ensued had there been no wires to have been passed under. Solely on this ground and without finding anything in the nature of a voluntary assumption of risk or contributory negligence on the part of the deceased and also without requiring that it should be established that the negligence of the defendants was the sole cause of the occurrence which resulted in James Magill's death, I would dismiss this appeal—with costs if demanded.

BRODEUR, J.:—I concur with Anglin, J. Brodeur, J.

MIGNAULT, J.:—In my opinion this appeal should be allowed. Mignault, J.

The trial judge found as a fact that the telephone wires in question, which were only 13 ft. 9 inches above the ground, were

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so placed on the highway as to form an obstruction and interfere with the driver on the top of an ordinary load of hay in driving out of the field on to the highway. He also found that the position of the wires causing the deceased to stoop or to crouch down in passing under them was the proximate cause of the horses getting from under that control which was necessary to procure the safe passage of the load. He further found that the deceased was not guilty of contributory negligence.

The appellate division reversed the judgment, Meredith, C.J.O., dissenting, the main reason, as I read the opinion of Hodgins, J.A., being that while the trial judge was entitled to draw the inference that the obstruction resulting from the wires, having caused the driver to stoop or crouch down, was the proximate cause of the horses getting out of control, other inferences could be made, so that the matter was left in doubt and the present appellants could not succeed.

I think, with deference, that the inference drawn by the learned trial judge was a very reasonable one in view of the evidence of the boy Hird, who was on the top of the load with the deceased. There was a clearance of only 3 feet 9 inches between the top of the load and the wires, of which there were six on the lower cross-bar, so that the driver would have to stoop and in so doing would be unable, while crossing a considerable space, to control his horses. Under these circumstances, I cannot say that the findings of fact of the trial judge are clearly wrong.

I also approve of the disposition of the case by the learned trial judge with regard to the respondent, the Moore Municipal Telephone Association.

I would allow the appeal with costs here and in the appellate division and restore the judgment of the trial judge.

Masten, J.

MASTEN, J.:—I concur with Anglin, J.

Appeal dismissed.

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LEROY v. DAVIS & Co.

Quebec Court of Review, Archibald, A.C.J., Greenshields and Letellier, JJ. April 12, 1919.

COMPANIES (§ V F—255)—SHAREHOLDER—RELIEF FROM LIABILITY—UNCONDITIONAL SUBSCRIBERS—CONSENT OF OTHER SUBSCRIBERS.

None of the subscribers of shares in a company can be relieved of their obligation, unless for reasons which annul a contract.

It is illegal for the promotors of a company to relieve unconditional subscribers from their subscription without the consent of the other subscribers.

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LEROY v. DAVIES & Co.

Statement.

APPEAL from the judgment of the Superior Court. Affirmed.

The action is brought by a subscriber for 50 shares in the capital-stock of the Boulevard Building Co., a company to be incorporated and promoted by a syndicate organized and managed by the defendant. The action demands that the plaintiff's subscription be declared null and void, and that the defendant be condemned to refund him the sum of $500 paid by him, on account of his shares.

The issues joined appear sufficiently described from the following summary of the facts proved, made by the judge of the Superior Court, in the considerants of the judgment.

Judgment of the Superior Court:—

At the request of defendant pleading and of their agent, the plaintiff in December, 1912, subscribed a paper addressed to defendant pleading as trustee by which he and the other persons whose names were already on it consented to the formation of the company called the Boulevard Building Ltd., with a capital of $500,000, divided into 5,000 shares of $100 each and subscribed for 50 shares of said company, payable on demand of said trustees in sums not more than 10% per month. The propositions set up before the intended subscribers by the defendant pleading to obtain their signatures comprised a list of the following persons alleged to have consented to act as directors of the company, with a designation of their importance:

Gaspard Deserres, capitalist; L. N. Dupuis, controller, City of Montreal, president, Eastmount Land Co.; Duncan McDonald, president Montreal Tunnel Co.; F. A. Skelton, secretary-treasurer the Canadian Car & Foundry Co. director, Lachine Land Co.; Henry Blatchford, insurance broker; E. R. Decary, notary; W. L. Haskell, president, Fasset Lumber Co.; C. R. Tousaw, president, Standard Dairy Co.; Ernest Pitt, vice-president, J. A. Davis & Co., director, Union Land Co.

The company was to purchase a piece of land on St. Lawrence Boulevard, near Mount Royal Avenue, for $68,000, and to erect a building on it for commercial purposes; the whole was expected to cost about $400,000.

When the subscription list was presented to the plaintiff for his signature, there were the apparent subscription of F. A. Skelton, for 100 shares; J. McCormick, 100 shares; J. A. Davis Co., Limited, 300 shares; George Robinson, 50 shares; J. E. McLean, 20 shares. The names of the above named persons as subscribers and the names of the directors gave plaintiff confidence in the enterprise to such an extent that he subscribed for 50 shares. Deserres, whose name was mentioned as having consented to act as director, was not on the subscription list. He had stated to E. Pitt, the vice-president and manager of the defendant pleading, that he would subscribe, if he could get the money. Robinson was also a conditional subscriber, if he had the money.

On February 8, 1913, the defendant pleading having previously obtained an option, took the deed of the land intended to be purchased at the price of $68,000; in the following months the financial market went from bad to worse to such an extent that no money could be obtained to put up the intended building, and the defendant pleading thinking they had enough money from

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the subscribers who had paid their ten per cent. on their subscription, discharged from their agreement and subscription Skelton, McCormick and McLean, who were unconditional subscribers, and in the course of the fall following they decided, with the approval of the interested subscribers, to abandon the plan to putting up the building, and to dispose of the land, when thought desirable. The defendant pleading, however, persisted in the plan of incorporating a company to take the property from their hands and took the necessary steps to incorporate a company with a capital of $500,000. The plaintiff, Wilson and Lewis, subscribers to the agreement, objected to the incorporation for such large capital. Subsequently, it was found out that a certain number of subscribers to the agreement, to wit, Skelton, McLean, and McCormick, had been released, and that the defendant pleading's subscription for 300 shares ($30,000) was to be paid by the percentage they were to have on the money subscribed, and as the money remaining subscribed after the release was about only $125,000, the defendant pleading's subscription was thus limited to $12,500 or thereabout. The plaintiff protested against what had taken place and withdrew from the agreement and caused a letter to be sent by his attorney to the defendant pleading claiming to be paid back the $500 paid to them. The incorporation of the company was proceeded with and the certificate for fifty shares of that company was sent to the plaintiff, who refused to accept them.

Considering that the subscribers to such proposition as was made in the prospectus in question in this cause did contract the obligation to give effect to their promise to take the number of shares represented by the amount of money mentioned as being their subscription;

Considering that none of the subscribers can be relieved of their obligation, unless for reasons which annul a contract, and that defendant pleading had no power or right to relieve any one of them of their said obligation, except for such reasons;

Considering that it is proved that the plaintiff became a subscriber upon the representation made to him that F. A. Skelton, J. McCormick, the defendant pleading, George Robinson, and McLean were subscribers and that the parties named upon the prospectus as future directors had consented to act as such;

Considering that G. Deserres being only a conditional subscriber ought not to have been given out to the intended subscribers as having consented to be a director;

Considering that G. Deserres and G. Robinson, conditional subscribers, and F. A. Skelton, J. McCormick, and J. F. McLean, unconditional subscribers, were all relieved from their subscriptions by defendant pleading, without the consent of the other subscribers, and that Skelton's name appeared also on the prospectus as having consented to be a director;

Considering that it is proved that the plaintiff would not have subscribed had he not seen the names of the persons who signed before him and the names of the directors mentioned;

Considering that the defendant pleading acted illegally in relieving the unconditional subscribers from their subscription;

Considering that the release of the subscribers above mentioned diminished the number of persons who have to pay for the purchase of the land and for the expenses of incorporating and administrating the company, and the remaining subscribers have to pay more on their shares than they would

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have to if the number of shareholders was larger; and this at a time when the anticipated success of the company was beginning to be doubtful;

Considering that when the plaintiff consented to act on the committee of subscribers appointed to attend to this matter, he was not aware of the fact that Deserres and Robinson were only conditional subscribers and had been released by the defendant pleading, that Skelton, who was an unconditional subscriber, had also been released from his subscription, that the other subscribers released were those above mentioned, and that his consent to act on that committee was given in ignorance of these important facts;

Considering that the plaintiff is entitled to withdraw from the said agreement, to refuse to be a shareholder in the company the "Boulevard Building Co. Ltd.," to have his subscription to said agreement declared null and void, and to be repaid by the defendant pleading the five hundred dollars he paid on his subscription;

Considering that the plaintiff proved the material allegations of his declaration and that the defendant pleading did not establish the facts claimed by it as justifying the dismissal of his action;

The court declares the plaintiff's subscription to the said agreement whereby he consented to take 50 shares of the Boulevard Building Co., Ltd., null and void and condemns the defendant, the J. S. Davis Co., Ltd., to pay the plaintiff $500 with interest from the 20th day of January, 1913, and costs.

On the issue with the Boulevard Building Co., the court renders the following judgment [after having stated as above]:

The proof which is common to both issues establishes that for reasons enumerated in the foregoing judgment plaintiff never was a member of the defendant company, and that the defendant company's contention that he is one of its members is unfounded;

Considering that the plaintiff as against the defendant pleading has proved the material allegations of his declaration and that the defendant failed to establish its defence;

The court declares that plaintiff never was a member of the defendant pleading the Boulevard Building Co. ,that his subscription to the agreement to take 30 shares in the defendant pleading the Boulevard Building Co. is annulled, that his deposit in court of the certificate of shares in the defendant pleading No. 108 is good and valid and condemns the defendant pleading to pay the plaintiff's costs.

Affirmed in review.

W. S. Johnson, K.C., for plaintiff; *Duff & Merrill*, for defendant.

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Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 19, 1919.

EVIDENCE (§ VII M—550)—CONFLICTING—ISSUE OF PURE FACT—FINDING OF TRIAL JUDGE—APPELLATE COURT NOT JUSTIFIED IN REVERSING.

An appellate court is not justified in reversing on an issue of pure fact the finding of a trial judge, necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify.

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Davies, C.J.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Grant, J., and dismissing the plaintiff's action with costs.

G. F. Henderson, K.C., for appellant; *F. H. Chrysler*, K.C., for respondent.

DAVIES, C.J.:—The trial judge in this case in all matters where the evidence of the appellant and the respondent was at variance accepted that of the appellant plaintiff and discredited that of the respondent.

The action was one brought to recover the price of four-fifth shares in a yacht claimed to have been sold to the defendant respondent by the plaintiff and to have been secured by a third mortgage on certain lands of the defendant.

The issues were whether the mortgage was taken and accepted by plaintiff as security only or in payment by way of exchange of the yacht shares for the mortgage, as contended by the defendant. The mortgage, which was drawn up by the defendant respondent, did not contain the usual covenant to pay the amount for which it was given.

On the findings of fact made by the trial judge, which I do not think we should disturb or set aside, and the admissibility of the evidence as to what the real bargain between the parties was, as to which I do not entertain any doubt, such evidence not contradicting the written documents, I am satisfied there was not merely an exchange of properties between the parties, nor do I think the acceptance by the plaintiff of the mortgage without a personal covenant to pay which mortgage had been prepared by the defendant discharged the debt which, in my opinion, the facts shew the mortgage was taken to secure.

I think the payment of the interest on the mortgage for the two years preceding the action admitted by the defendant in his examination for discovery quite inconsistent with his claim that there had been merely an exchange of properties between the parties or an absolute sale of the shares in the yacht without any personal liability on defendant's part to pay the agreed price.

The evidence admitted to explain the real bargain did not contradict the written documents.

As to the absence of any personal liability of the mortgagor to pay the debt for which a mortgage is given, in which there is not

the absence of a personal covenant to pay, see Canadian Edition of Fisher on Mortgages (1910), pp. 7, 413, 415, and 21 Hals., p. 70.

I would allow the appeal and restore the judgment of the trial judge with costs in this court and in the Court of Appeal.

IDINGTON, J.:—I am of the opinion that the questions raised herein ought to be determined by the facts of whether or not the mortgage taken was accepted as payment or merely as security for the payment of the price agreed on.

I cannot see how the undoubted principle of law, that when an agreement between parties has been reduced to writing that writing must govern, can help us herein.

The actual question to be first determined is whether or not the agreement has been reduced to writing or at all events whether or not what has been reduced to writing was really in truth intended to cover the entire contractual relations in question or not.

The reliance placed upon the receipt clause of the bill of sale has very little to support it if we bear in mind the history of our law and its final results in relation thereto. At common law a man signing and sealing a document of that kind was estopped from denying such an acknowledgment. In equity it counted for little and standing alone without a duly endorsed receipt was held to put third parties on inquiry.

A concise statement of the relevant law and authorities is to be found in Elphinstone on the Interpretation of Deeds, pp. 151 *et seq.*

I admit it is a circumstance, even though of minor import, to be had in mind when all the surrounding circumstances have to be considered in order to determine which party's story is correct.

Then there is another circumstance, also of very minor import, in the absence of a covenant for payment.

The general principle of law applicable to a mortgage debt, as stated by Fisher on Mortgages, 5th ed., at par. 8, implying a recoverable debt because it is presumed to be given for a loan, is *primâ facie* applicable. And I do not think that the express statement of the consideration being the price of the sale of same article entirely eliminates the need for observing the general rule.

I may remark, in passing, that is none the less so, when the instrument has been drawn by a professional man a party thereto to be tendered to another, and contains no restriction upon said rule of law or explanation of what was really intended.

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Moreover, in this case the respondent paid the interest from time to time for four years, although he had not covenanted to do so.

The following contains the peculiar terms of payment:—

> Provided this mortgage to be void on payment of $2,000 of lawful money of Canada, with interest at 7 per cent. per annum, as well after as before maturity, as follows: the principal to be paid out of the first proceeds of the sale of the equity of the mortgagee in the said land, the first payment of interest to be made on January 19, 1915, interest thereafter to be paid annually on January 19 in each and every year.

The interest was to run, apparently from date, and to continue "as well after as before maturity"; but when was maturity? We may try to assume that it was meant to be when the sale of the equity was obtained. Are we on such assumption to conclude that unless and until such a sale was effected as would produce $2,000 there could be no maturity?

If we observe literally the language used that would seem to be the case. But if it was found impossible to get more, who was to pay the interest? Was respondent to be presumed bound to supply it? Or was the provision for payment of interest after maturity a mere mockery? And if no more than say $1,000 or $1,500 could be got, what was the purpose of providing for payment of seven per cent. on $2,000 for that is clearly implied? Who was to pay it?

Again, was all that a solemn mockery? And if only say $100 to $500 was ever, or within a reasonable time, realizable, are we to suppose the parties had so contracted that the four-fifths of the value of the yacht was to pass for that trifle?

Such a gamble is conceivable, but does the story told, by either party, indicate that such was the nature of the transaction? All these and many more like considerations press upon one in considering what in truth was the essential nature of the bargain entered into.

The appellant swears he never considered or inquired what the value of the property was, but took the respondent's word as to the probabilities and estimates relative thereto, and there is no attempt made to contradict this statement, or shew facts and circumstances which would furnish contradiction and thereby indicate the intention of the appellant to accept a gambling proposition.

Surely if a gamble of that sort really was what the parties were

negotiating, he who drew the instrument, and against whom it must, therefore, be most strongly construed, should and would have applied his professional skill to frame something entirely different from that presented for our consideration.

It would, I submit, be much more like what the stories given by either or both, so far as reconcilable, should lead us to expect, to infer that the deal was one of bargain and sale at a named price, with a mode and nature of security to be given, for carrying it out, in harmony and consistently with the relations between old friends, whereby there should be a mutual trust and forbearance to be limited by the bounds of what might and should in law be held reasonable.

To so interpret the conduct and purpose of the parties and their intentions towards each other under such circumstances that neither suffer an injustice, is what we should aim at, in order to do justice between them, when unfortunately they have been led to entertain what are probably unjust views of each other's conduct.

Following out that line of thought, and bearing in mind the findings of fact by the learned trial judge, it seems to me that there was an actual sale of the four-fifths of the "Ailsa" at $2,000, and that, not as evidence of contract but to secure the carrying out thereof, there was a rather crudely framed mortgage, intended only as a security, for the execution of the contract, and thus leaving much to be supplied or fulfilled, by the application of the rule of what was, under the circumstances, reasonable.

It seems to me that if the parties had not fallen out, there would have been either an earlier sale of the property so put up as security, or greater forbearance in enforcing the claim for the payment. Should the case not have been tried out and treated on some such basis?

I regret to say that such views received little attention at the trial, and some evidence on that, and other points bearing on the possibilities of realization of the security, has not been presented. We are then left to determine the question of whether or not a reasonable time has elapsed or not to carry out what was the evident intention of the parties.

To blame the war for the condition of things during a year preceding it is not very satisfactory.

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I am quite clear the bargain was concluded a year before the war broke out and the execution of the document only postponed to enable respondent to complete his final arrangements with others.

The conclusions I have reached are, that there was an actual bargain and sale by which the appellant agreed to pay $2,000 for four-fifths of the yacht; that there was to be given a mortgage to secure such payment; that the time for payment was not specified; and hence must be taken to be within what would be a reasonable time within the contemplation of the parties; that such time was not wholly dependent upon the will of the respondent; that having regard to all the circumstances such reasonable time had elapsed at the time of the institution of this action, and hence the appeal should be allowed and the judgment of the learned trial judge restored with costs herein and of the Court of Appeal.

Anglin, J.

ANGLIN, J.:—The issue in this case is whether a mortgage on real estate made by the respondent to the appellant was intended to be given and accepted merely as security for the payment by the respondent of the purchase-price of a four-fifths interest in a yacht bought by him from the appellant or was intended to be given and taken in payment and satisfaction of such purchase-price. Upon that issue parol evidence was, in my opinion, admissible. It in nowise contradicts or varies the written instruments which passed between the parties. The outcome rests entirely upon the credit to be attached to the evidence of the parties themselves who are in direct conflict. The learned trial judge had the advantage of seeing and hearing them, and his conclusion was that the evidence of the appellant was entitled to credit while that of the respondent could not be accepted.

So far as the probabilities may be taken into account they would appear to be almost equally balanced. While it is most improbable that the vendor intended to accept a third mortgage on highly speculative real estate as payment, it is at first blush difficult to account for the omission from the mortgage of a covenant for payment if a personal obligation on the part of the purchaser had been assumed. But it must not be forgotten that the mortgage was taken only many months after the sale, when the obligation (if any) to pay the purchase-price had been assumed. On the whole, I incline to think the probabilities rather favour

the vendor's contention, because otherwise he would not only have to wait indefinitely for payment, but his prospects of ever receiving anything would depend entirely upon the sale of the mortgaged property for a sum over and above what would be sufficient to satisfy the two prior incumbrances upon it. He would be taking all the risk of the defendant's real estate speculation without any prospect of advantage from it beyond his purchase-price. He might get nothing at all and in no case could he hope for more than his $2,000. The admitted agreement to pay interest on that amount almost implies an obligation to pay the principal.

But assuming the probabilities to be equally balanced, which, I think, is the view most favourable to the respondent of which the circumstances admit, with respect, it was, in my opinion, to quote Viscount Haldane, "a rash proceeding on the part of the Court of Appeal" to reverse on an issue of pure fact such as that presented, the finding of a trial judge necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. *Nocton* v. *Ashburton*, [1914] A.C. 932, at p. 945.

The chief difficulty in the case is to determine when the purchase-price became payable, no definite time for payment having been fixed. In my opinion the result of the failure to fix a time for payment was that the money became payable within a reasonable time having regard to all the circumstances. I think the purpose of the parties was to allow the respondent what might be regarded as a reasonable time in which to make a sale of the mortgaged property in order to place himself in funds to meet the appellant's claim. Such a time, in my opinion, expired long before this action was brought and the purchase money was then exigible.

I would, therefore, allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the trial judge.

BRODEUR, J.:—The respondent having paid interest on the mortgage for which he is sued cannot now claim that the mortgage was given in payment of his obligation. Brodeur, J.

This case was principally a question of credibility of the parties. The trial judge having found in favour of the appellant, it seems to me that the Court of Appeal should not have disturbed that finding.

The appeal should be allowed with costs.

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Mignault, J.

MIGNAULT, J.:—In this case I am of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored.

I cannot take the bill of sale, which falsely states that the price of the four-fifths share of the yacht "Ailsa II." was paid by the respondent to the appellant, nor the mortgage signed by the respondent as correctly expressing the terms of the agreement of the parties. The trial judge has found what this agreement really was, and I would not disturb his finding on this question of fact. It would require stronger evidence than that afforded by these documents to make me believe that the appellant agreed to sell an interest in his yacht on terms that would have given the respondent the right to defer payment until he obtained a satisfactory price for his property in Vancouver, an event which might never occur. The mortgage, like any other mortgage, is an accessory contract and a security for a debt. What this debt was is shewn by the testimony of the appellant, which the trial judge accepted in preference to that of the respondent.

I would, therefore, allow the appeal and restore the judgment of the trial court with costs here and in the Court of Appeal.

Appeal allowed.

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Ex. C.

THE KING v. TIMMIS.

Exchequer Court of Canada, Audette, J. December 21, 1918.

EXPROPRIATION (§ III A—106)—COMPENSATION—TITLE OF OWNERS—DEED—PRESCRIPTION—INFANCY.

By a deed between father and son, executed in 1880, it was provided that in consideration of the son's release of his rights in the estate of his mother, the father "promises to transfer to his son, at his demand, all his rights and pretensions into certain two lots of land." The demand to transfer was never made and prescription had meanwhile run against this right, except for the interruption thereof on account of the minority of certain children. The Crown expropriated the land for the purposes of the National Battlefield at Quebec.

Held, that the deed created a gift upon a potestative condition exercisable by the donee and his heirs, a mere *jus ad rem* to demand the transfer but conveying no fee in the land, which was extinguishable by prescription; that the compensation moneys may be paid to the owners in possession subject to their undertaking of indemnifying the Crown in respect of any claims which might be asserted by the children, against whom prescription was not acquired,—such right being a divisible right.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

E. Belleau, K.C., and *L. S. St. Laurent*, K.C., for plaintiff; *Donald McMaster*, K.C., and *A. Gobeil*, K.C., for defendants.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby certain lands were taken and expropriated for the purposes of the National Battlefields at Quebec, by depositing, on September 20, 1911, a plan and description of such lands in the office of the registrar of deeds for the county or registration division of Quebec, P.Q.

The Crown, by the information, offers the sum of $3,557.40, with interest thereon from September 20, 1911, to the date of judgment—this amount being payable to whomsoever is declared by the court entitled thereto.

Four of the defendants—Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine—have appeared by solicitor and counsel and by their plea admit the amount so offered by the information to be a fair and just compensation and ask that the same be paid over to them.

The defendant, Emma Miller Hallandal, who, on April 16, 1917, filed a plea whereby she declared herself satisfied with the amount offered by the Crown, concluding by a demand to share in the same, also, on May 14, 1918, filed a disclaimer or *retraxit*, whereby she discontinued, surrendered and abandoned any claim herein.

The defendant, the Attorney-General of the Province of Quebec, who, made a party hereto in respect of the ground rent upon the lands expropriated, although duly served, made default in delivering a defence and did not appear at trial. The offer made by the information in respect of the arrears and capital of this ground rent, is the sum of $200.63, and judgment should be entered in favour of the Province of Quebec for the amount so offered, with interest.

Counsel appearing at trial for the plaintiff and for the four above-mentioned defendants declared the Attorney-General of the Province of Quebec would be satisfied with the sum of $200.63, without interest; if so, that interest should accrue to the other defendants who recover.

All the other defendants—excepting those just mentioned—have been duly served either out of the jurisdiction of the court, or, being of parts unknown, were called by the newspapers, and being thus served with the information, have made default in delivering a defence—including William Hallandal, the husband

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of the above-mentioned defendant Emma Miller Hallandal, who also did not appear.

But for a certain clause, hereafter mentioned, appearing in a deed of November 20, 1880, the compensation moneys—excepting, however, in respect of the ground rent—would have been paid to the four defendants represented by counsel; hence the institution of the present action with the object of allowing the Crown to pay to the proper persons and have proper title.

This deed *inter vivos* of November 20, 1880, is practically, for all purposes, a deed of agreement—*un acte d'accord*—as between father and son in respect of the abandonment of the rights the son had in the estate of his mother, his father's first wife. The deed, after reciting and describing the lands he thus released and the consideration the father pays therefor, proceeds as follows:—

> And as a further consideration for the present *cession de droits successifs*, the said William Miller promises to transfer to his son, at his demand, all his rights and pretensions as they now are into two certain lots of land situated without the limits of the City of Quebec, on the Plain of Abraham, between Grande Allee and the Cime du Cap, theretofore known as lots Nos. 67 and 68 on a certain plan, but now known as lots Nos. 161A and 161B, of the Parish of Notre Dame of Quebec, Banlieue of the City of Quebec.

Now the lots expropriated herein are the lots 161A and 161B mentioned in that deed of 1880.

The demand to transfer these lots was never made by the son or by any of his heirs and assigns up to date. Thirty-eight years have elapsed since the date of that deed. W. H. Miller, the son, died on February 27, 1889. On his death prescription had run against that right for 8 years, 3 months and 7 days. The prescription of 30 years has since run and been acquired against this right in respect of four of W. H. Miller's children; but through the interruption caused by the minority of the children of Sarah Miller Auldrich, the prescription of 30 years has not been acquired as against herself, her heirs and assigns. And there being no evidence on the record of their respective ages, I am unable to ascertain when the 30 years will expire.

Annie Timmis, the second wife and widow of the late William Miller, appears to be the registered owner of the property and to have had constructive possession of these vacant lots ever since. She has paid taxes upon the same. She was sued by the City of Quebec for such taxes, because she appeared to all intents and

purposes to be the apparent legal owner of the same, and she satisfied such claim.

Without expressing a considered opinion on the nature and effect of the above-mentioned provision in the deed of November 20, 1880, it would appear to be nothing more than a gift upon a potestative condition exercisable by the donee and his heirs, *a jus ad rem* as distinguished from *a jus in rem* which did not convey the fee in such land, but only a right to demand such transfer. And such right is a divisible one which, as exercisable by four of the parties mentioned in par. 8 of the information, has been extinguished by the acquired prescription of 30 years. The only possible claim that could now be set up would be on behalf of the children of Sarah Miller Auldrich for one-fifth of the moneys, namely, the sum of $711.48, with interest from September 20, 1911, to the date hereof. See Domat's Civil Law (Strahan's trans.), vol. 2, p. 431 and foot-note; and *Page* v. *McLennan* (1895), 7 Que. S.C. 368.

Therefore, under such circumstances, out of the compensation moneys—the ground rent, capital and interest should first be satisfied. Then the balance should be paid to the four defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, in the following proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine. However, these moneys will be paid to these four defendants only upon the condition precedent that they shall first give to the Crown good and sufficient title to the lands in question, with covenant to indemnify if at any time any trouble arise in respect of such title—and moreover, upon these four defendants also giving to the Crown a bond, to the satisfaction of the registrar of the court, whereby they will undertake to indemnify the Crown in respect of any claim which might be hereafter made by the children, or their heirs and assigns, of the said Sarah Miller Auldrich. This bond to run up to and expire on the date when the prescription of 30 years would expire, reckoning in such computation of years the time such prescription ran in the lifetime of both W. H. Miller and his daughter, Sarah Miller Auldrich, when of age.

In the final adjustment between the four defendants—Annie Timmis, Sarah Mary Miller, Mary Lepine, and Hilda Lepine—

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the amount of the taxes paid by Annie Timmis alone, must be adjusted and equally borne by the said four defendants.

Coming to the question of costs, it is conceded that the amount offered by the Crown was accepted—but as the Crown did not see fit (with proper justification) to pay such compensation money to the four defendants in question, who were all claiming the same—these defendants were put to cost which, but for this expropriation, they would not have been subjected to. I am therefore of opinion that these defendants should be compensated in a fair manner with respect to such cost and the giving of a bond, which I hereby fix at the lump sum of $200.

Therefore there will be judgment as follows:—1. The lands expropriated herein are declared vested in the Crown since September 20, 1911. 2. The compensation for the lands so expropriated is hereby fixed at the sum of $3,557.40, with interest thereon from September 20, 1911, to the date hereof. 3. The defendant, His Majesty's Attorney-General of the Province of Quebec, is entitled to recover from the plaintiff—upon giving good and sufficient title and the release of the said ground rent—the sum of $200.63, with interest thereon from September 20, 1911, to the date hereof. 4. The defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine—upon giving to the Crown good and sufficient title to the land in question, with covenant to indemnify the same if at any time trouble arise in respect of such title, and moreover upon their giving to the Crown the bond as above-mentioned, are entitled to recover and be paid by the said plaintiff the balance of the said compensation moneys, namely, the sum of $3,356.77, with interest, in the following respective proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine, the amount of the taxes paid by Annie Timmis being first adjusted and borne equally by the said four defendants in their respective proportion. 5. The said defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, are entitled to their costs, which are hereby fixed at the lump sum of $200. *Judgment accordingly.*

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Ontario Supreme Court, Appellate Division, Clute, Riddell, Sutherland and Kelly, JJ. December 27, 1918.

EASEMENTS (§ II A—5)—RIGHT TO BURY IN ANOTHER'S FREEHOLD—FORMERLY CREATED ONLY BY DEED—ADMINISTRATION OF JUSTICE ACT—RULES OF EQUITY—MAY BE CREATED BY AGREEMENT FOR VALUABLE CONSIDERATION.

The right to bury in another's freehold is an easement which formerly could be conveyed only by deed, but since the passing of the Administration of Justice Act and the Judicature Act, the rules of equity prevail, and an agreement for valuable consideration, though not under seal, is sufficient to create a right to such easement, and for the purpose of lawful user is as good as a deed. Part performance by buying a tombstone and placing it upon the plot removes any objection under the Statute of Frauds. Refraining from buying another plot is in itself sufficient consideration.

Statement.

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action, brought in the County Court of the County of Prince Edward, for trespass to a cemetery plot, and to compel the defendant to remove the body of her late husband from the plot, and to restrain the defendant from further trespassing on the plot.

The defendant claimed to be the owner of the eastern part of the plot and to have been in possession thereof for 15 years.

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

H. H. Davis, for respondent.

Clute, J.

CLUTE, J.:—Appeal from the judgn ent of the Senior Judge of the County Court of the County of Hastings, dated the 4th July, 1918.

This action is brought for trespass to a cemetery plot, and for an order directing the defendant to remove the body of her late husband, H. Black, from the said cemetery plot, and for an injunction restraining the defendant from further trespassing on the said lands.

The defendant claims to own the cemetery plot, part of plot No. 58, in question, and to have been in possession thereof for over 15 years. The facts are not in dispute.

Both the plaintiff and the defendant claim title through William Babcock, who was the brother of the defendant and the uncle of the plaintiff. William Babcock, in or prior to the year 1904, purchased the plot No. 58 in the cemetery for $10. His sister, the defendant, being then also about to buy a plot in the said cemetery, was informed by her brother (William Babcock) that she need not do so; that he would give her the eastern part

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of the said plot for the purpose of the burial of herself and husband; and thereupon the defendant refrained from purchasing a plot, and purchased a monument, and, with the consent and in the presence of the said William Babcock, proceeded to erect the same on the said easterly part of the said cemetery plot No. 58. The said William Babcock assisted in the erection of the said monument, and the same has remained so erected upon the said plot ever since. At the time of its erection the names of the husband and wife were inscribed upon the monument and so remain. In this way the defendant has been in possession of the said easterly portion of the plot ever since.

The fact of the monument having been erected by the defendant in the manner aforesaid, and with the consent of the said William Babcock, raises a strong presumption of some agreement or arrangement existing between the owner of the plot and the defendant, sufficient to let in oral evidence of an agreement between the parties. The agreement is fully proven by the defendant and amply corroborated by the erection of the monument upon the plot.

On the effect of part performance, *Lester* v. *Foxcroft* (1700), Colles 108, 1 E.R. 205, and the note in White & Tudor's L.C. in Eq., 7th ed., vol. 2, p. 460, may be referred to, and Shirley's L. C., 9th ed., p. 127, where it is said:—

"Courts of Equity have long been in the habit, when there were acts of part performance and the nature of the case seemed to require equitable interference, of decreeing specific performance of verbal agreements unenforceable at law, by reason of the 4th section of the Statute of Frauds, as being contracts concerning land. The general rule is, that, to justify such interference, the parties must, by reason of the act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract. Thus, in the case of *Dickinson* v. *Barrow*, [1904] 2 Ch. 339, the defendant entered into a parol agreement with the plaintiff to buy a plot of land, together with a dwelling-house to be built by the plaintiff for her at an agreed price, according to a special plan approved by her. During the construction the defendant frequently visited the premises and requested certain alterations and additions, which were carried out. The Court held that the defend-

ant's conduct in visiting the works and inducing the alterations was of such an unequivocal nature as to imply the existence of an agreement, parol evidence of which was therefore admissible, and that the alterations amounted to part performance so as to prevent the defence of the Statute of Frauds. In such cases the Court will try and ascertain what was the oral contract between the parties, and then will give effect to it: *Mundy* v. *Jolliffe* (1839), 5 My. & Cr. 167, 41 E.R. 334."

Applying these cases to the present, and upon the facts, there can be no doubt that there was an agreement for valuable consideration, and that there was part performance sufficient to permit that agreement, though it was not in writing, to be shewn, and to admit parol evidence for that purpose, and so to entitle the defendant to the plot in question.

From the evidence it appears that there was a grant of the portion of the plot in question, as claimed by the defendant, for the burial of herself and her husband, from William Babcock to her, for valuable consideration, and she is entitled to an order vesting the same in her in fee simple.

I am also of opinion that the defendant has been in possession of the plot for more than 10 years, and that under the Statute of Limitations her possessory title is valid. It is not denied by counsel that the possession and occupation by the defendant is complete so far as the portion of the land upon which the monument stands is concerned, but it is denied that this includes that portion of the plot required for the burial of the defendant and her husband.

In this contention I am unable to agree. The defendant was not a trespasser in what she did. The placing of the monument there had relation to the portion of the plot given to her by her brother for the purposes of burial of herself and husband, and the possession of the part occupied by the monument carried with it possession of the portion of the plot given to her by her brother.

It was urged by Mr. Porter that the defendant's claim, if any, was to an easement or license, and he referred to *Bryan* v. *Whistler* (1828), 8 B. & C. 288, 108 E.R. 1050, where a rector granted to A.B., by parol, leave to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of A.B., opened the vault, and buried another person there; and it was held that no action could

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be maintained against him for so doing; for that if the rector had power to grant the exclusive use of the vault, he could not do it by parol. Bayley, J., after saying (p. 293), "If that were an interest in land, the grant could not be binding under the Statute of Frauds, unless there were a memorandum in writing signed by the party granting," goes on to say: "If it be not an interest in land it is an easement, or the grant of an incorporeal hereditament; which could only be effectually granted by deed, and no such instrument was executed. But even had a deed been executed, I think the defendant had not the power to grant any privilege, except for the particular burial then about to take place. The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time, as the necessities of his parish require, and not to grant away vaults, which, as it seems to me, cannot be done unless a faculty has been obtained."

It thus appears that the case has no application to the present. The plot in this case was obtained for the express purpose of burial, and there was good consideration and a part performance in refraining from purchase by the defendant of a plot and by the erection of the monument. Some agreement was intended, and parol evidence was admissible to shew what that agreement was. There was an interest in the land to which the easement could attach. It was not an easement in gross. The *Bryan* case is referred to in *Ashby* v. *Harris* (1868), L.R. 3 C.P. 523, at p. 529; see also *McGough* v. *Lancaster Burial Board* (1888), 21 Q.B.D. 323, at p. 327. But, in my view of the facts, the agreement is not for an easement, but a grant of land for valuable consideration.

The appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—The defendant, who is now a widow, is the sister of the late William Babcock, who lived with her and her husband on their place for more than 7 years before his death in January, 1912. Babcock was the owner of a certain plot of land in a cemetery property organised under the Act respecting companies for the establishment of Cemeteries in Upper Canada, C.S.U.C. ch. 67; R.S.O. 1877, ch. 170. About 1904, the defendant intended to buy a plot for the burial of herself and her husband. Babcock said to her, "You need not buy a plot . . . I will give you a plot for you and your husband," and it was agreed that the

defendant should not buy another plot, but that Babcock would give her a plot and she would "put a tombstone there." She bought a tombstone, had cut thereon the names of herself and her husband, and took it to the cemetery. Babcock went with her, and then himself directed the placing of the tombstone on the plot, where it still remains.

Babcock died in 1912, leaving a will whereby he devised all his estate real and personal to the plaintiff, his nephew.

The defendant brought an action against the plaintiff as representing the estate, claiming, amongst other things, payment for the care etc. of the deceased; this action was settled, and the defendant gave to the plaintiff a release of "all claims and demands" against the estate.

The defendant's husband died in December, 1917, and his body was laid in the plot.

The plaintiff brings an action in the County Court of the County of Hastings, claiming $200 damages for trespass, an order that the defendant remove the body of her husband, and an injunction against her trespassing upon the lot—the learned County Court Judge dismissed the action, and the plaintiff now appeals.

While one part of the defendant's evidence would indicate that she thought that she was to have the ownership of a lot, a careful perusal of the whole of what she says shews that the real agreement was that she was to give up her project of buying another lot and to place a tombstone on the plot of her brother, and in return she was to have the right of burial for herself and her husband within her brother's plot.

Whether this action comes within the Evidence Act, R.S.O. 1914, ch. 76, sec. 12, we need not consider: there is overwhelming and uncontradicted corroboration of the contract on the part of the brother.

The right to bury in another's freehold is considered an easement which can be conveyed only by deed: *Bryan* v. *Whistler*, *supra*; *Moreland* v. *Richardson* (1856), 22 Beav. 596, 52 E.R. 1238; *Ashby* v. *Harris*, *supra*; *North Manchester Overseers* v. *Winstanley*, [1908] 1 K.B. 835, 843; *S.C.*, *sub nom. Winstanley* v. *North Manchester Overseers*, [1910] A.C. 7.

Had the Administration of Justice Act or the Judicature Act never been passed, or were the County Court not a Court with

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equitable jurisdiction, the defendant might be in evil plight. But now the rules of Equity prevail, and the County Court has equitable jurisdiction.

Consequently an agreement for valuable consideration, though not under seal, is sufficient here to create a right to the easement claimed, and for the purpose of lawful user is as good as a deed: *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at p. 782; *White* v. *Grand Hotel Eastbourne Limited*, [1913] 1 Ch. 113; *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *Rogers* v. *National Drug and Chemical Co.* (1911), 23 O.L.R. 234, 24 O.L.R. 486.

The part performance by the defendant by buying the tombstone, and placing it upon the plot, etc., removes any objection under the Statute of Frauds.

Refraining from buying another plot is in itself sufficient consideration. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other:" *Currie* v. *Misa* (1875), L.R. 10 Ex. 153, at p. 162; and such forbearance may be found in anything which limits the legal freedom of action of that other in the future, even though the other receive no benefit or advantage. The tombstone bargain and purchase make the consideration perfect even if otherwise defective.

It is not necessary to discuss the well-known case of *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, 153 E.R 351: that *crux* of the English law and stumbling block to those who wish to believe that the English law is the perfection of human reason, has been reduced to not much more than a matter of pleading by such cases as *Hurst* v. *Picture Theatres Limited*, [1915] 1 K.B. 1, 9, and *Lowe* v. *Adams*, [1901] 2 Ch. 598, 600.

What would appear at first sight a real difficulty in the way of the defendant is the principle that there can be no easement in gross, and that what purports to be such can be considered only as a personal contract sounding in damages: *Miller* v. *Tipling* (1918), 43 D.L.R. 469, 43 O.L.R. 88, and cases cited; *David Allen & Sons Billposting Limited* v. *King*, [1915] 2 I.R. 448, and cases cited.

And were this cemetery a common law burial ground, the God's acre of an English parish, there is some authority for saying that

the rule would apply to a grant of the right to bury in it to one not otherwise entitled: Comyns, Dig., "Cemetery" (B); *Bryan* v. *Whistler*, *ut supra*.

But that rule, if it ever existed, was made to depend upon the peculiar legal position of the parish graveyard, and probably in any case applies only to an exclusive right to bury.

The rule in any event never applied to burial grounds not being parish graveyards, e.g., those attached to dissenting chapels: *Moreland* v. *Richardson*, *supra*, (1857), 24 Beav. 33, 53 E.R. 269; or those established by burial boards under (1852) 15 & 16 Vict. ch. 85 (Imp.): *Ashby* v. *Harris*, L.R. 3 C.P. 523.

In both these cases a personal grant was made of the right to bury, not at all to the grantee as being the owner of any land or messuage, but in gross; and it was held that the grantors had no power to derogate from that grant—in the former case an injunction was granted by Sir John Romilly, M.R.; in the latter a conviction was sustained by the full Court of Common Pleas against the Board for an assault upon the grantee when planting flowers on her husband's grave. Either would be inconsistent with the proposition that the grant simply sounded in damages.

Accordingly, while the right of burial is still called an easement, it is an exception to the general rule that an easement cannot be in gross.

Neither the deceased Babcock in his lifetime nor the plaintiff, his devisee, can derogate from the right given by Babcock—the plaintiff is in no higher position than Babcock would have been.

A release of all claims and demands against the estate is set up by the plaintiff—he himself says when asked about the release that the claims the defendant had against the estate were two only: (1) her legacy; and (2) for "keeping house for him and looking after him and the like of that;" that, when he made the settlement, these were the only claims in contemplation, and there was then no question about the burial lot. I do not think that the right the defendant had in the burial plot was a claim or demand against the estate: it was a property right in precisely the same way as though she and the deceased had been tenants in common, and not something she was claiming from the estate at all.

If the release should as it stands be given the construction contended for by the plaintiff, it would be a gross fraud to allow it to stand, and we should rectify it.

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This disposes of the first claim of the plaintiff—there was no trespass to his lot.

The second claim, the ghoulish demand that the corpse of the defendant's husband should be dug up and carried off the plot, of course falls with the first—not that the cold clay of the dead man has any rights, but that the defendant has the right to keep the body there until the end of time. It is reasonably certain that the plaintiff's ashes, if and when they are laid in the same plot, will not receive any pollution or injury from those of his dead uncle.

The claim for an injunction was not much if at all pressed upon the argument: but it was not expressly abandoned and must be dealt with. It is hardly to be expected that the plaintiff will try to prevent the defendant from having access to the grave of her dead: but the defendant is entitled to be protected against any attempt to do so. A grant of the right to bury must in our system include "a license to do all that was proper and reasonable to keep the grave in a decent state of repair:" *per* Willes, J., in *Ashby* v. *Harris*, L.R. 3 C.P. 523, at p. 530. In our civilisation, it is the custom to keep green the graves of our dead, to adorn them with flowers and plants, for the sorrowing survivor of the wedded mates to visit the grave of the spouse who has passed away. All these decent and usual acts by the side of and over the grave must have been in the contemplation of the party granting the right of burial; and there must be an implied irrevocable license to the defendant to do such acts. The plaintiff has no right to complain if the defendant upon his (the plaintiff's) land does nothing more than is seemly and customary by and about the grave of a deceased husband.

The dismissal of this action will probably be sufficient to prevent any improper interference by the plaintiff; but, if the defendant so desires, I think she should be allowed to set up a counterclaim for a declaration of her rights in the plot, and have a judgment so declaring. This would, if registered, prevent any purchaser from the plaintiff setting up the Registry Act; and it may well be that the Cemetery Act, R.S.O. 1914, ch. 261, sec. 12, does not afford the defendant protection.

The appeal should be dismissed: the defendant, if she so elects, may amend as indicated and recover judgment accordingly —the plaintiff should pay the costs here and below.

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Sutherland, J.

SUTHERLAND, J.:—In or prior to the year 1877, the Ameliasburg cemetery had been organised by one John G. Peck, and the burying ground consisted of a part of the east half of lot No. 93 in the 1st concession of the township of Ameliasburg, in the county of Prince Edward, divided in whole or part into lots or plots shewn on a map or plan thereof. In that year, one William Babcock purchased for the sum of $10 lot No. 58 therein, and received the deed thereof. His sister, Sarah M. Black, the defendant, in or about the year 1903 or 1904, having mentioned to her brother that she and another sister were proposing also to buy a plot therein, he said to her, as she testified at the trial: "You need not buy a plot; I will give you and your man a burial in the plot;" or, as she puts it elsewhere, "I will give you a plot for you and your husband," to which she replied: "If you give me a plot, I will put a tombstone there."

This agreement having been made between them, the defendant bought a monument, costing $75, had the names of her husband and herself inscribed thereon, and had it conveyed to the cemetery. Her brother William himself procured and brought to the place a flat stone to form a pedestal to the monument, and it was placed thereon, in the said lot No. 58, at a point indicated by him, where it has remained ever since.

William Babcock died on or about the 20th January, 1911, having previously made his last will, dated the 10th January, 1911, wherein he devised and bequeathed all of his estate to his nephew, William J. Hubbs, the plaintiff herein, subject to the payment of some small legacies, and, among others, one to his sister, the defendant, of $175, and he therein appointed the said nephew the executor of his will.

Litigation arose in connection with the estate, the defendant asserting certain claims for services alleged to have been rendered to the testator in his lifetime, and on the 11th January, 1912, she executed a release under seal in favour of the plaintiff as executor thereof, in consideration of the payment to her of the sum of $375.

On the 5th December, 1917, Henry Black, the defendant's husband, died, and on the 7th December was buried in a grave dug where the said monument had been placed in the said lot No. 58. The plaintiff was present at the funeral and saw the interment of the body in the grave. He says he thought it was his duty to forbid it, but did not on account of the people and the circum-

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stances. Shortly after, however, he informed the defendant that if she desired to leave her husband where he was, and to be buried there herself, she could have the right upon payment of $200, and that, alternatively, she must remove her husband's body.

Upon her declining to pay the $200, he commenced this action, claiming that amount for trespass and injury to the lot, asking for an order directing the defendant to remove the body of her husband, and an injunction restraining the defendant from further trespass.

The defendant pleaded a grant, leave and license from the deceased William Babcock in his lifetime, the placing of the monument in the lot with his approval and assistance, and possession ever since.

The defendant in reply pleaded the said release in bar, and at the trial obtained leave also to plead the Statute of Frauds.

It appears that, in addition to the legacy of $175 referred to, part of the consideration in the said release was the sum of $200 paid in settlement of the claims also referred to. When the release was executed, there had apparently been no mention of the cemetery lot or the defendant's claim with respect thereto. The defendant suggests that in this action the plaintiff is seeking to recoup himself for the $200 mentioned.

The action was tried by the Judge of the County Court of the County of Hastings, and on the 4th July, 1918, judgment was pronounced dismissing the plaintiff's claim with costs.

The plaintiff admitted at the trial that, when the settlement covered by the release was made, nothing was discussed except the payment to the defendant of her legacy and her claim for taking care of her deceased brother, and that nothing was said about the lot at the time. The trial Judge found, and I think rightly, that the release was not intended to affect, and did not affect, the defendant's rights, if any, in the lot in question, and was not a bar thereto.

He further found that William Babcock, some years before his death, "gave to the defendant the right to bury her husband and to have herself buried beside him in this plot in question, and further, that at that time the defendant, with the consent of the deceased William Babcock and with his assistance, placed a monument at the spot where she was given the right to bury herself and her husband. The words used by the defendant in her evidence go

even further than the right to bury. She says the deceased William Babcock said to her, 'I will give you a plot in my plot.'" And the learned Judge further found that "the defendant had full right to do just what she did do in burying her husband in this plot in the place marked out by this monument, and the spot where the monument was to be placed was named by the deceased William Babcock himself."

While some questions as to title were raised upon the argument, they were not pressed by the appellant; and indeed both parties to the action are expressly claiming the rights they assert under the assumption that William Babcock, deceased, was the owner of the lot in question.

The evidence clearly establishes the agreement entered into between the defendant and the deceased, to the effect that, if she refrained from buying another lot in the cemetery, as she had expressed to him her intention of doing, he would give her the right to bury her husband therein and to be herself buried therein, and, as part of the agreement, consented that she should erect, and permitted her to erect, in the lot, a monument which she proposed to buy; that, in pursuance of such agreement, she did buy the monument referred to, and did erect it at the place indicated by him in the lot, with his consent and assistance.

It is suggested on behalf of the plaintiff that, even if there were such an agreement, it was in legal effect nothing more than a license, and, being merely verbal and not by grant, was revocable at any time in the lifetime of the testator and was revoked by his death.

Reference was made upon the argument to the case of *Wood* v. *Leadbitter*, 13 M. & W. 838, in which it was decided that "a right to come and remain for a certain time on the land of another can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money." In that case "the evidence was, that Lord E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the

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defendant, by the order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea." This is a case which, though much discussed and occasionally questioned, has been followed until recently.

In *Hurst* v. *Picture Theatres Limited*, [1915] 1 K.B. 1, it was held that "the purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance, provided that he behaves properly and complies with the rules of the management. The license granted by the sale of the ticket includes a contract not to revoke the license arbitrarily during the performance. Where therefore the plaintiff, who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that the plaintiff had not paid for his seat:—Held . . . . that in an action for assault and false imprisonment the plaintiff was entitled to recover substantial damages."

At pp. 6 and 7, Buckley, L.J., says: "Let me for a moment discuss this present case upon the footing that *Wood* v. *Leadbitter*, 13 M. & W. at p. 844, stands as good law at this date. I am going to say presently that to my mind it does not, but suppose it does stand as good law at this date. What is the grant in this case? The plaintiff in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture threatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the license, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving pictures as was the case here. So that here was a license coupled with a grant. If so,

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Wood v. *Leadbitter* does not stand in the way at all. A license coupled with a grant is not revocable; *Wood* v. *Leadbitter* affirmed as much. So far I have been treating it as if *Wood* v. *Leadbitter* were law as now administered in every Court."

And, again, at pp. 9 and 10: "The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable considerations, *Wood* v. *Leadbitter*, 13 M. & W. 838, is now law, meaning that *Wood* v. *Leadbitter* is a decision which can be applied in its integrity in a Court which is bound to give effect to equitable considerations. In my opinion, it is not. Cozens-Hardy, J., as he then was, the present Master of the Rolls, in the case of *Lowe* v. *Adams*, [1901] 2 Ch. 598, at p. 600, said this: 'Whether *Wood* v. *Leadbitter* is still good law having regard to *Walsh* v. *Lonsdale*, 21 Ch. D. 9,' —which is a decision of the Court of Appeal—'is very doubtful.' The present Lord Parker, then Parker, J., in the case of *Jones* v. *Earl of Tankerville*, says this, [1909] 2 Ch. 440, at p. 443: 'An injunction restraining the revocation of the license, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any Court.' What was relied on in *Wood* v. *Leadbitter*, and rightly relied on at that date, was that there was not an instrument under seal, and therefore there was not a grant, and therefore the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said as against the plaintiff that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law.

"There is another way in which the matter may be put. If there be a license with an agreement not to revoke the license, that, if given for value, is an enforceable right. If the facts here are, as I think they are, that the license was a license to enter the building and see the spectable from its commencement until its termination, then there was included in that contract a contract

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not to revoke the license until the play had run to its termination. It was then a breach of contract to revoke the obligation not to revoke the license, and for that the decision in *Kerrison* v. *Smith*, [1897] 2 Q.B. 445, is an authority."

Here, in the same way, William Babcock in his lifetime had entered into an agreement with the defendant in which she was to have the right of burial for herself and her husband in the lot in question. On the strength of that agreement she purchased and set up the monument in the lot. There was included in the agreement an implied term not to revoke the license, and it would be a breach of that contract to revoke the obligation not to revoke the license.

Now under the County Courts Act, R.S.O. 1914, ch. 59, sec. 22 (1) (*i*), "actions for equitable relief where the subject-matter involved does not exceed in value or amount $500," are within the jurisdiction of the County Court.

The erection of the monument where it was upon the lot in question was an act of part performance so unequivocally referable to some such contract as that put forward by the defendant as, if proved, would prevent the application of the Statute of Frauds. It is such an act of part performance as would let in proper parol evidence of the contract. The contract has been fully proved, and the objection as to the Statute of Frauds therefore fails.

It may be that the plaintiff has estopped himself by standing by in so far as the burial of the defendant's husband is concerned. He is in any event a mere volunteer. He can have no higher right than the testator. It would have amounted to a fraud on the part of the testator had he been alive and sought to set up the statute against the defendant. The plaintiff can be in no better position than he.

In *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129, it was laid down that: "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land." The present case is much stronger, as there was no error, and the testator was a definitely consenting party. He could not have been heard to contest the defendant's rights under the agreement; and the plaintiff, taking under him, cannot.

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In order to avoid further difficulty, if the defendant desires, the pleadings may be amended and a declaration incorporated in the judgment defining her rights under the agreement which has been proved to exist.

The appeal should be dismissed with costs.

KELLY, J., agreed with Sutherland, J.

Appeal dismissed.

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Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm and Mellish, JJ. May 2, 1919.

CONSPIRACY (§ III—11)—ACTION ON THE CASE—LIBEL AND SLANDER—MEETING OF VILLAGERS TO INJURE REPUTATION OF MARRIED WOMAN—PROOF OF SPECIAL DAMAGE.

The plaintiff, a married woman whose husband was overseas, drove to another village with a married man; upon their return in the evening the defendants, residents of the village in which they lived, met them near the village, fired off guns, rang bells and shouted. The plaintiff claimed that they did these acts for the purpose of bringing her into disrepute and injuring her reputation for chastity. Harris, C.J., held that the acts of the defendants amounted to libel and were actionable without proof of special damage.

Ritchie, E.J., and Russell, J., held that the case was technically not an action for slander or libel but an action on the case for conspiracy. All the elements of conspiracy were present, and the defendants had committed a tort for which they, or any of them, could be sued, and punitive damages might be imposed by the jury, the amount being within wide limits a matter for their discretion.

Chisholm, J. (dissenting), held that the action was one of trespass on the case, but in the absence of special damage, the demonstration of the defendants was not actionable.

Statement.

APPEAL by defendants from the decision of J. A. Grierson, Judge of the County Court for District No. 3., refusing to set aside certain findings of the jury in an action by plaintiff claiming damages for unlawful conduct of defendants committed with the intent and purpose of bringing plaintiff into disrepute and injuring her in her character as a chaste married woman. Affirmed.

J. A. McLean, K.C., for appellants; *W. H. Covert*, K.C., and *O. S. Miller*, K.C., for respondent.

Harris, C.J.

HARRIS, C. J.:—The plaintiff is the wife of a soldier who was overseas and she had been frequently seen by her neighbours driving about the country with a married man named McNayr, who was also a frequent visitor at the house of the plaintiff's mother, with whom the plaintiff was living. On October 23 last, the plaintiff drove from Springfield to New Germany with McNayr and when they returned, the defendants met them near the

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village, fired off guns, rang bells, and shouted, and the plaintiff alleges in her statement of claim that defendants unlawfully and maliciously conspired to do these acts and did them for the purpose of bringing her in disrepute and injuring her reputation for chastity and to suggest that immoral relations existed between her and McNayr, and for this she claimed damages. There is also a claim that McNayr's horse was frightened by the noises and plaintiff was injured in getting out of the wagon owing to the restlessness of the horse. This latter claim was rejected by the jury who, however, awarded plaintiff $200 for damage to her reputation. The case was tried by the County Court Judge for District No. 3 and a motion to set aside the findings was rejected by him and there is an appeal from his decision.

The defendants alleged among other things that immoral and improper relations existed between plaintiff and McNayr and also set up that she had been guilty of "vile and unchaste conduct both in regard to McNayr and with regard to others and in that regard her character and reputation has not suffered in the community in which she lives."

A perusal of the evidence disclosed that she had acted most imprudently, but there is no proof of any immoral conduct on her part with McNayr and the suggestion was repudiated by them both. There was evidence of one witness that plaintiff had admitted to her that she had committed adultery with a certain man, but the plaintiff denied making the statement and also the offence and the matter was for the jury who evidently believed the plaintiff.

There is no doubt from the evidence that the defendant's action on the occasion in question was intended to suggest that plaintiff and McNayr were misconducting themselves and after the charivari was over they, or some of them, plainly intimated to McNayr that they thought his place was at home with his own wife instead of going about with the plaintiff.

There was no proof of special damage and the question raised on the appeal is whether the conduct of the defendants is actionable without such proof.

There was much discussion as to whether what was done came within the designation of slander or libel; and if neither slander nor libel whether an action on the case for conspiracy would lie.

The question as to whether the acts of the defendants are to be regarded as slander or libel becomes important because of the rule of the common law that it is not actionable to impute by words spoken unchastity to a woman without alleging and proving special damage, whereas if the words were written or came within the definition of libel they were actionable without such proof.

Our O. 19, r. 29, was intended to do away with this distinction and provided that:—

> 29. In any action for slanderous words spoken of any woman, imputing to her any unchaste conduct, it shall not be necessary to allege in pleading, or prove at the trial, that any special damage resulted to her from the utterance of such words; but she shall recover such damages as may be assessed, without such averment or proof of damage.

If the acts of the defendants are held to amount only to slander, there would still have to be considered the question whether O. 19, r. 29, applied to the facts in evidence here or whether it would be necessary notwithstanding that rule to allege and prove special damage.

I must confess that on the argument I was inclined to the view that the acts of the defendants were equivalent to saying or speaking of the plaintiff that she was unchaste. I thought it might very well be said that the defendants had made the guns speak and what they plainly said of the plaintiff was that she was unchaste, but after giving the matter careful consideration I have reached the conclusion, though not without much doubt, that the acts in question are of that intermediate character between slander and libel to which the rules applicable to libel apply.

Starkie on Slander and Libel after dealing with the ordinary cases of slander and libel and with libel by pictures and caricatures, says, at p. 179:—

> There remains a class of communications differing from those last adverted to, and which, though accompanied with circumstances of cooler deliberation and more settled purpose than words merely spoken, are not calculated to produce such lasting and widely extended consequences as those effected by writings or pictures. The vulgar custom of riding Skimmington, and the practice of carrying or burning effigies of persons intended to be held out as public objects of disgrace and ridicule, are instances of this description. The impressions made by such proceedings are naturally more lasting, and are likely to produce a greater degree of mischief than words merely spoken; and yet the calumny is not so durable as if it had been conveyed in print or in writing. As, however, these are means by which a man may be rendered, in many instances, contemptible and ridiculous and in others may be exposed to the serious effects of popular indignation and resentment—as the act of

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the defendant is more studied and deliberate, and the consequences more mischievous than those likely to be occasioned by mere oral slander—it seems to be clear that such representations are actionable as falling within the same consideration with the other cases which have formed the subject of the present chapter.

In the case of *Sir William Bolton* v. *Deane*, referred to in the judgment of the Court in *Austin* v. *Culpepper* (1683), 2 Show. K.B. 313, 89 E.R. 960, an action was maintained for scandalizing the plaintiff by carrying a fellow about with horns bowing at the plaintiff's door.

And in the case of *Jefferies* v. *Duncombe* (1809), 11 East 226, 103 E.R. 991, an action was maintained against the defendant for setting up a lamp adjoining the dwelling house of the plaintiff and keeping it burning in the daytime with intent to defame the plaintiff as the keeper of a brothel.

The courts have also held that signs or pictures as by fixing up a gallows against a man's door or painting him in a shameful or ignominious manner may constitute a libel.

After citing a number of cases, Starkie proceeds, at p. 190:—

> Upon the whole, therefore, it may be collected, that any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage. In short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse.
>
> This rule, though apparently very wide and comprehensive, is not considered to be more extensive than the justice of the case demands. No man, abstractedly, has a right to lessen the comforts or enjoyments of another; and when he does it deliberately, wantonly, and maliciously, it would be an insult to common sense to contend that he is not bound, upon the plainest grounds of policy and justice, to make compensation for the mischief so occasioned: and no inconvenience can result from such an extent of the rule.

It is difficult to distinguish in principle between the case of carrying a fellow about dressed with horns and bowing at the plaintiff's door, on the one hand, and the firing of guns, the ringing of bells, etc., on the other. In both cases the imputation was conveyed by the conduct or acts of the defendants and I do not see why there would be a right of action for damages in one case and not in the other; and if one is libel I do not see why the other does not come within the same category.

Slander formerly meant any defamation whether written or spoken, but the modern meaning has restricted it, at least so far

as decided cases go, to spoken words and the tendency seems to have been to embrace everything defamatory (other than spoken words) by the term libel; and a judge in the United States has said that "the attempts to define libel, although practically innumerable, have never been so comprehensive and accurate as to comprehend all cases that may arise and that such attempts in this regard in some degree resemble similar attempted definitions of fraud."

In the case of *Miller* v. *Donovan* (1896), 16 Misc. N.Y. 463, Giegerich, J., gave a definition of libel which seems quite comprehensive enough to include the present case. It was, p. 454:—

> Any unprivileged publication of which the necessary tendency is to expose a man to hatred, contempt or ridicule.
>
> A malicious publication by writing, printing, picture, effigy, sign, *or otherwise than by mere speech*, which exposes any living person or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause, any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation.

It was argued that an action on the case for conspiracy would lie, but as I understand the authorities, the gist of such an action is the damage and not the conspiracy, and a conspiracy to do certain acts gives a right of action only where the acts agreed to be done and in fact done would had they been without preconcert have involved a civil injury to the plaintiff. *Huttley* v. *Simmons*, [1898] 1 Q.B. 181; *Savile* v. *Roberts* (1698), 1 Ld. Raymond 374, 91 E.R. 1147; *Kearney* v. *Lloyd* (1889), 26 L.R. Ir. 280; *Cotterell* v. *Jones*, 11 C.B. 714, 138 E.R. 655; *Municipality of East Nissouri* v. *Horseman* (1858), 16 U.C.Q.B. 556, 562; *Quinn* v. *Leathem*, [1901] A.C. 495.

If the conspiracy had been to libel the plaintiff no doubt damages could be recovered because damages are assumed in such a case, but if the conspiracy was to slander by speaking and publishing something which was not actionable without proof of special damage, then the plaintiff in this case would fail in an action for conspiracy because there is no proof of special damage unless of course our Order 19, rule 29, is comprehensive enough to give a right of action without proof of special damage.

I am unable, therefore, to see how it can be said that an action for conspiracy will lie in this case, where there is no proof of actual damage unless it is first determined that the acts of the

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defendants amount to libel or being slander, that O. 19, r. 29, is applicable and obviates the necessity for proof of special damage.

Having, however, reached the conclusion that the acts of defendants are of the nature of libel it follows, if I am right, that the appeal ought to be dismissed with costs.

RUSSELL, J., concurred with Ritchie, E.J.

RITCHIE, E. J.:—The plaintiff is a married woman. In October, 1917, she was living at Springfield in the county of Annapolis with her mother. At the time her husband was overseas. In the summer and autumn of 1917 there was no man about the mother's place, her sons being also overseas; and a man by the name of Lambert McNayr helped about the place, planting, cutting wood and performing other neighbourly acts such as it would be natural for a man to do for women whose men were fighting the Germans. The plaintiff drove about with this man, McNayr, a good deal, and it no doubt was the cause for remark among the good people of Springfield. The defendants seem to have regarded it as their special duty to take action in regard to the conduct of the plaintiff and McNayr. They saw evil where, so far as the evidence discloses, there was none. The conduct of the plaintiff was, I think, indiscreet, and that is all that can be said against her. The mother who, I assume, is a respectable woman, saw nothing wrong in the relations of the plaintiff with McNayr and did not disapprove of her driving with him, and it seems to me that it would have been far better from every point of view if the defendants had minded their own business. On October 23 last, McNayr drove the plaintiff to New Germany, a distance of 12 miles from Springfield. The object of the trip appears to have been to enable the plaintiff to visit her husband's parents who reside at New Germany. The plaintiff and McNayr were back in Springfield at about a quarter past nine in the evening. The defendants, in their zeal, illegally conspired to commit and did commit an illegal act. There is a custom in the country parts of Nova Scotia for a concourse of people to greet newly married people with the blowing of horns, the ringing of bells, the firing off of guns, and any other device which occurs to them as likely to make night hideous. The underlying idea is that the man and woman are married and have come home, hence the celebration. On the return of the plaintiff

and McNayr from New Germany the defendants went through this kind of performance which I have indicated. It is known as a charivari and is defined by Webster as "a mock serenade of discordant noises, made with kettles, tin horns, etc., designed to annoy and insult; at first performed before the house of any person of advanced age who married a second time."

The conduct of the defendants was absolutely illegal. They assembled together and created a disturbance of the peace of the neighbourhood. They committed a breach of the criminal law. It was an unlawful assembly: 1 Russell on Crimes, p. 423; *Gilmore* v. *Fuller* (1902), 198 Ill. 130.

The plaintiff brings her action under the circumstances I have mentioned. She claims damages under two heads:—1. That the horse was frightened by the noise and that consequently she received bodily injuries in getting out of the carriage. 2. That she has been injured in her character and reputation.

The case was tried in the County Court at Bridgetown with a jury. The questions to and answers by the jury are as follows:—1. Did the plaintiff suffer any personal injury from the celebration? No. 2. Did the plaintiff suffer any damage to her reputation or character by the acts of the defendants in said celebration? Yes. 3. If you find for the plaintiff on either of above questions what amount of damage has she sustained? $200 as to her reputation and character.

The defendants failed in a motion before the county court judge to set aside the 2nd and 3rd findings of the jury, and from his decision and the order made thereon an appeal is asserted to this court. Of course the Springfield people knew that the plaintiff had a husband, and that McNayr had a wife, and I think this action of the defendants imputed misconduct, using the word in the sense which it has acquired in the Divorce Court. An action in this particular form is unusual, but the reason for that is that the circumstances of the case are unusual. If an injury causing damage has been inflicted on the plaintiff it cannot be that the law does not provide a remedy. The scope of an action on the case is wide enough to cover any illegal acts which have caused damage.

This case is, in my opinion, technically not an action for slander or libel but an action on the case for conspiracy. In 27 Hals., at p. 489, it is said:—

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Conspiracy consists in two or more persons agreeing together to do something contrary to law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful. Where two or more persons thus conspire to do . . . an act which causes damage to another, they commit a tort for which they or any one of them can be sued.

This definition which I have quoted is, in my opinion, sound and exhaustive. I refer to the following authorities:

Bowen, L. J., in *Mogul Steamship Company* v. *McGregor* (1889), 23 Q.B.D. 598, at p. 616 (affirmed, [1892] A.C. 25); *Quinn* v. *Leathem*, [1901] A.C. 495, 510; *Jones* v. *Westervelt* (1827), 7 Cowen (N.Y.) 444; *Van Horn* v. *Van Horn* (1890), 52 N.J.L. 284; *Kimball* v. *Harman* (1871), 6 Am. Reps. 340.

In *Quinn* v. *Leathem*, Lord Lindley said, p. 538:—

But numbers may annoy and coerce where one may not; annoyance and coercion by many may be so intolerable as to become actionable and produce a result which one alone could not produce.

I go back to Halsbury's definition as to conspiracy and find that the following elements must be present in order that a civil action be successful:—1. Two or more persons must agree to do something contrary to law. 2. Or wrongful and harmful to another person. 3. Or to use unlawful means in the carrying out of an object not otherwise unlawful. 4. An act done in pursuance of the conspiracy which causes damage to another.

All these elements are present in this case.

That there was an agreement between the defendants to meet together and make the demonstration which it is clear was made is shewn by the evidence, but apart from evidence such an agreement is to be inferred from the fact that they were all present with the guns, horns, bells and other instruments of torture; such a condition of affairs implies concerted action.

This meeting together of the defendants was an unlawful assembly and a disturbance of the peace of the neighbourhood.

Their action was clearly and obviously wrongful and harmful to the plaintiff, as it imputed improper relations with McNayr.

The conspiracy and the acts done in pursuance thereof have caused damage to the plaintiff. As to the damages, the jury have found that the plaintiff has sustained damage to her reputation and character and the damages are assessed at $200. These damages are claimed in the statement of claim, and there is, as the County Court Judge has said, some evidence to sustain the

finding. This case is one for exemplary damages because the defendants acted deliberately, maliciously and wantonly with the intention of grievously insulting the plaintiff. The case of *Doremus* v. *Hennessy* (1895), 62 Ill. App. R. 391, was a civil action for conspiracy. In that case Waterman, J., in delivering the judgment of the court said, p. 407:—

> In such an action as this where the gist of the plaintiff's suit is the damage that has resulted from the malicious acts of the defendants, punitive damages may be imposed by the jury. The amount of such damages is within wide limits a matter of discretion for the jury.

I may add that this is a useful and instructive one on the subject of actions on the case for conspiracy.

In my opinion, the appeal should be dismissed with costs.

CHISHOLM, J. (dissenting):—On January 23, 1918, while the plaintiff, a married woman, was proceeding along the public highway in a carriage with one Lambert McNayr, a married man, not her husband, the defendants fired guns, rang bells and made other loud noises of which the plaintiff complains. She has commenced this action for damages for injury to her reputation resulting from such conduct on the part of the defendants. The demonstration, it is contended, was such as sometimes takes place in parts of the country on the occasion of a wedding, and it was intended, I must believe, to imply that plaintiff and McNayr had been recently married and to reflect upon the plaintiff's moral character. So far as the demonstration of the defendants was criminal in its nature, they have already answered, for they have been prosecuted for their breach of the peace, and in this action we have to consider only whether, under the circumstances of the case, it gave to plaintiff the right to maintain a civil action for defamation. The jury returned a verdict of $200 in favour of the plaintiff for damage to her reputation and character. There is no averment of special damage in the statement of claim and there was, I think, no proof of special damage given on the trial.

Chisholm, J.

The question then reduces itself to this: Can the plaintiff recover in the action without proof of special damage? Or, in other words, are the acts complained of actionable *per se*?

Before the enactment of the Judicature Act, the plaintiff's action would be an action of trespass on the case: Odgers on Pleading and Practice (8th ed.) 199-200. The usual actions for

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libel and slander are actions on the case; and, as stated in Sutherland on Damages, 9th ed., s. 1203, "slander and libel are different names for the same wrong committed in different ways."

The unusual way in which the defendants endeavoured to defame the plaintiff makes it difficult to classify their acts as a civil wrong; but after a careful consideration of the matter I do not think we are driven to decide that the defendants defamed the plaintiff either by what is usually termed a libel or by what is usually termed a slander. Slander and libel are arbitrary terms which came into the law when damage to reputation was almost invariably wrought either by word of mouth, or by writing or its near equivalent.

As regards defamation, the terms slander and libel are not exhaustive, and there may be defamation which is neither slander nor libel in the technical legal sense of the terms.

In Odgers on Libel and Slander, 5th ed., 13, after referring to the ordinary actions of libel and slander, it is said that:—

> A man's reputation may also be injured by the deed or action of another without his using any words; and for such injury he has an action on the case.

In Pollock on Torts (10th ed.) 247, it is observed:—

> The wrong of defamation may be committed either by way of speech or by way of writing or its equivalent. For this purpose it may be taken that significant gestures (as the finger language of the deaf and dumb) are in the same case with audible words; and there is no doubt that drawing, printing and engraving and every other use of permanent visible symbols to convey distinct ideas, are in the same case with writing.

In my opinion, the demonstration made by the defendants does not fairly come within either mode mentioned by Sir Frederick Pollock; it was not made by way of speech, and it was not in any sense made by use of permanent or written symbols.

Case (or Trespass on the Case) lies where a party claims damages for any wrong not included under the head of trespass, and it includes under it the greater number of torts, *e.g.*, torts arising from negligence, fraud, etc. Dicey on Parties to Actions (2nd Am. ed.) 25.

Of that class, in my opinion, is the plaintiff's action, and in the absence of proof of special damage, I do not think she can recover.

I would allow the appeal and dismiss the action.

Mellish, J.

MELLISH, J.:—I would dismiss this appeal with costs. I am

of opinion that the conduct of the appellants amounted to an actionable wrong to the plaintiff without proof of special damage. The plaintiff had a right to the uninterrupted use of the highway. The demonstration complained of was deliberate and malicious and intended to insult the plaintiff and clearly defamatory. I think it was in the nature of a libel. The remarks, however, made by at least one of the defendants, would, I think, in view of the contemporary conduct, amount to actionable slander. The jury found that the plaintiff's personal injuries did not result from the defendants' misconduct; at least, that is the way I think their finding should be interpreted in view of the evidence. Notwithstanding this, I am not at all clear that the plaintiff was not entitled to succeed on that branch of the case. I think substantial justice will be done by allowing the verdict and judgment to stand.

Appeal dismissed.

MORSE v. KIZER.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 6, 1919.

JUDGMENT (§ VI A—255)—MORTGAGE—REGISTRATION—NOTICE OF JUDGMENT—PRIORITY.

In Nova Scotia one who has actual notice of a judgment or compensation order cannot gain priority by obtaining a mortgage of the property and having it registered before the judgment or order has reached the registrar.

[*Kizer* v. *Morse*, 39 D.L.R. 640, affirmed.]

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia (1918), 39 D.L.R. 640, 52 N.S.R. 112, affirming the judgment.

One Blinn was convicted at Bridgetown, N.S., of having obtained money under false pretences. After the conviction the court made an order for compensation, having the effect of a judgment, under s. 48 of the Criminal Code, which order was initiated by appellant who was counsel for the prisoner. Appellant on the next day took from the prisoner a mortgage on land in King's County, N.S., and had it registered before the judgment. The judgment creditor then brought action for an order declaring that his judgment had priority.

The trial judge granted such order and his judgment was upheld by the court *en banc*.

Morse, appellant in person; *O'Connor*, K.C., for respondent.

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DAVIES, C.J.:—I concur in the reasons for judgment of my brother Anglin and would dismiss this appeal with costs.

IDINGTON, J. (dissenting):—Notwithstanding the elaborate history of the law submitted, I am of the opinion that this case should be decided by the construction of the relevant sections in the Registry Act, R.S.N.S., 1900, c. 137.

As I read same the bare fact that a mortgagee has notice of outstanding unregistered judgments against him giving the mortgage in no way touches the rights acquired by the mortgagee taking and registering a mortgage.

To hold otherwise would lead to rather alarming consequences.

Followed out logically, a judgment debtor who was notoriously insolvent never could give a valid mortgage, not even for an actual advance of cash paid him. S. 16 of the Act in question only makes registration of a judgment effective "from the date of such registry."

And if a mortgagee cannot rely upon that I do not see how any man can safely take a mortgage if he has reason to believe there is a judgment anywhere against his mortgagor.

If the facts had been as Drysdale, J., through error states them, then an entirely different case would have been presented. For I think it is at least fairly arguable that if a man by theft or fraud deprives another of specific money which can be clearly traced into an investment in the purchase of real estate, a mortgagee taking with full knowledge thereof a mortgage upon such real estate would have some difficulty in maintaining his security against the party so defrauded.

Here it is neither alleged in the pleading nor attempted to be proved that appellant knew that the money which was invested in the real estate in question was that which had been obtained by false pretences.

It is alleged in the pleading that the said money was that so obtained.

Why the plaintiff so carefully abstained from alleging that appellant knew that alleged fact I cannot understand on any other hypothesis than that plaintiff did not believe such a charge and hence properly refrained from making it.

The temptation to make the charge I should surmise must have been great.

I think the appeal should be allowed with costs.

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ANGLIN, J.:—This appeal from the Supreme Court of Nova Scotia, involving merely a question of priority between a judgment for $71 and a mortgage for $80 upon land said to be of a value insufficient to satisfy both claims, illustrates the necessity for further restricting the right of appeal to this court.

The defendant, a barrister and solicitor, acted as counsel for one Blinn, accused of obtaining $71 by false pretences from the plaintiff. After convicting Blinn the County Court Judge, on March 14, 1917, made an order for compensation against him under s. 1048 of the Criminal Code, which is by that section given the force and effect of a judgment for debt. The defendant initialled the order to evidence his approval of its form. With this actual notice of it, but, so far as the record shews, without any intention of defeating the plaintiff's judgment or of embarrassing him in its recovery and without any knowledge of the fact that the $71 fraudulently obtained had been invested in the property covered by it, the defendant on March 15 obtained from Blinn a mortgage on some real estate for $80, the amount of his fees for Blinn's defence, and immediately caused it to be registered. The plaintiff's judgment was registered only on the following day. By this action the plaintiff seeks

> an order . . . declaring that the compensation order . . . may have precedence and priority on the records of the registry of deeds at Kentville in the County of King's over the said mortgage obtained by the said defendant from the said James F. Blinn.

The trial judge granted this relief and his judgment was unanimously affirmed on appeal.

Much of the argument at bar was devoted to the question whether the plaintiff's judgment gave him a lien on Blinn's real property before its registration. A judgment in nowise affected the debtor's lands at common law. Until the Statute of Westminster 2nd (13 Edw. I., c. 18) provided the writ of *elegit* the debtor's lands were not liable in satisfaction. Black on Judgments, 2nd ed., sec. 397 *et seq.* Whatever might have been the case under the earlier Nova Scotia "Docketing Acts" of 1758 and 1822, I think it is perfectly clear that under the registry legislation in force in March, 1917 (R.S.N.S., 1900, c. 137) no lien arises until registration. But, in my opinion, the plaintiff's claim in this

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action does not depend on the existence of such a lien before registration.

Ss. 2 (*a*), 15 and 16 of the Registry Act of 1900 are as follows:—

2. In this chapter unless the context otherwise requires:—

(*a*) The expression "instrument" means every conveyance or other document by which the title to land is changed or in any wise affected, and also a writ of attachment, a certificate of judgment, a lease for a term exceeding three years, and a vesting order; but does not include a grant from the Crown, a will, or a report of commissioners appointed to make partition.

15. Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to *the same land*, be ineffective unless such instrument is registered in the manner provided by this chapter before the registering of such subsequent instrument. R.S., c. 84, s. 18.

16. A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment. R.S., c. 84, s. 21.

S. 3 of c. 170, the Sale of Land Under Execution Act, is as follows:—

3. The land of every judgment-debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds for the registration district in which the land is situated. R.S., c. 124, s. 1 (part).

The plaintiff's right after obtaining his order for compensation was to cause it at any time to attach to the judgment-debtor's lands in any particular registration district by registering a certificate of it in the registry office of that district under s. 16. With actual notice of that right the defendant took his mortgage. His position is, I think, not distinguishable from that of an English mortgagee or purchaser taking his mortgage or deed with notice of the right of a judgment-creditor to attach the lands of the mortgagor or vendor by suing out a writ of *elegit*, or, if they were situated in a county having a registration system, by registering it in the registry office of such county.

The principle of equity on which such a mortgagee or purchaser is held to take subject to the rights of the judgment-creditor as against the mortgagor or vendor is perhaps most clearly stated by Sir W. Page-Wood, V.-C., in *Benham* v. *Keane* (1861), 1 J. & H. 685, 70 E.R. 919. After reviewing the earlier cases (*Hine* v. *Dodd* (1741), 2 Atk. 275, 26 E.R. 569; *Tunstall* v. *Trappes* (1830),

3 Sim. 286, 57 E.R. 1005; *Robinson* v. *Woodward* (1851), 4 De G. & S. 562, 64 E.R. 958), he says, at p. 704:—

> No person having notice of a judgment can by contract with the debtor put himself in a better position than the person with whom he contracts.

The same principle was acted on by Lord Elgin in *Davis* v. *Earl of Strathmore* (1810), 16 Ves. Jr. 418, 429, 33 E.R. 1043, approved in *Greaves* v. *Tofield* (1880), 14 Ch.D. 563.

As put by Lord Hatherley (formerly Page-Wood, V.-C.) in *Rolland* v. *Hart* (1871), L.R. 6 Ch. 678, at 684:—

> Actual notice must be shewn, which amounts to fraud in the person who, having such actual notice, attempts through the medium of the Registration Act to get priority. . . . The authorities have been uniform in holding that the proof of notice must be very clear and distinct; but if actual notice is proved, then a man cannot take advantage of his registration to invalidate a previous unregistered security.

This doctrine is so firmly embodied in the English equity system that nothing short of explicit legislation will suffice to render it inapplicable where that system is in force. We had to consider such legislation in the recent case of *Union Bank* v. *Boulter-Waugh* (1919), 46 D.L.R. 41, 58 Can. S.C.R. 385.

The language of the English Registry Act dealt with in the cases above cited was more explicit than section 16 of the Nova Scotia Act. The Registration Act for the West Riding of Yorkshire (5 & 6 Anne, c. 18) contained this provision as s. 4:—

> No judgment . . . shall affect or bind any manors, lands, tenements or hereditaments, situate, lying and being in the said West Riding but only from the time that a memorial of such judgment shall be entered at the Registry Office.

The Middlesex Registry Act, 7 Anne, c. 20, by s. 18, provides that:—

> No judgment . . . shall affect or bind any honours, manors, lands, tenements or hereditaments, situate, lying and being in the said county of Middlesex, but only from the time that a memorial of such judgment . . . shall be entered at the said registry office expressing, etc.

I read the affirmative provision of s. 16 of the N. S. Act as implying the negative expressed in both these English statutes and formerly found in the word "only" of the Nova Scotia statute of 1832, c. 51, s. 3; the R.S.N.S. 1851, c. 113, s. 20; the R.S.N.S. 1859, c. 113, s. 22; and the R.S.N.S. 1864 (appendix), c. 113, s. 22, which was dropped in the revision of 1873, c. 79, sec. 22.

I agree with Mr. O'Connor that it is the defendant and not

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the plaintiff who must seek the aid of s. 15 of the N. S. Registry Act to obtain a priority which equity denies him and that he is excluded from its operation because he is not "a person claiming . . . without notice," and possibly also because a judgment is not an "instrument" within the definition of that word in the statute. In any case, while unregistered, a judgment does not affect the title to land within the meaning of s. 15.

Two cases were cited by the appellant as in conflict with the view which I have stated. In *Neate* v. *Duke of Marlborough* (1838), 3 My. & Cr. 407, 40 E.R. 983, the judgment-creditor had not sued out a writ of *elegit* and it was accordingly held that having no legal right against his debtor's land he could not invoke the auxiliary jurisdiction of a court of equity to reach his debtor's equitable interest. That decision has no bearing on the equitable doctrine as to the effect of actual notice. It might be in point if the plaintiff here were suing without having registered a certificate of his judgment.

The personal equity affecting the conscience, referred to by Lord Cranworth, in *Johnson* v. *Holdsworth* (1850), 1 Sim. N.S. 106, 61 E.R. 41, which prevents a purchaser sheltering himself behind the Registry Act to the prejudice of a judgment-creditor of the vendor, with notice of whose judgment he paid his purchase-money, is equally applicable to a mortgagee. The true principle is that stated by Page-Wood, V.-C., that no person can by contract made with notice gain a better position than that of the person with whom he contracts. Here, although the debt as security for which the defendant's mortgage was taken was incurred before the plaintiff's judgment had been obtained, the mortgagee had not and from the very nature of the case in the absence of legislation similar to 33 & 34 Vict., c. 28, s. 16 (Imp.), he could not have had before that time, any equitable lien or claim upon the land in question, such as might have arisen had the debt been incurred on a valid promise to secure it by mortgage—not dissimilar to the equitable interest of a purchaser who has paid over his purchase-money on the promise of a conveyance.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Anglin.

Mignault, J.

MIGNAULT, J.:—I also concur.

Appeal dismissed.

ONT.

S. C.

FLEMING v. TOWN of SANDWICH.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ. December 23, 1918.

MUNICIPAL CORPORATIONS (§ II C—55)—MUNICIPAL BY-LAW AND ASSESSMENT WITH STATUTORY PROVISIONS—STRICT COMPLIANCE WITH STATUTE—LOCAL IMPROVEMENT ACT—PUBLICATION.

Where a municipal by-law and an assessment under it purport to be made in pursuance of a statute, the statutory provisions must be strictly complied with "in the sense that non-observance of any of them is fatal."

A prerequisite to the valid passing of a by-law under the Local Improvement Act (R.S.O. 1914, c. 193) is publication of the council's intention under s. 11.

Statement.

AN appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B., at the trial at Sandwich, dismissing the action.

The nature of the plaintiff's claim appears from the statement of claim as follows:—

1. The plaintiff is the owner of certain lands and premises within the limits of the defendant corporation, being part of what is known as the Indian Reserve.

2. In November, 1916, the defendant corporation proceeded to extend the highway known as Peter street, in the said town of Sandwich, across the lands of the plaintiff from Detroit street to what is known as the 33rd foot road allowance, according to a plan numbered 54, and, on or about the 13th November, obtained from the township engineer what was alleged to be a report under the Local Improvement Act, R.S.O. 1914, ch. 193, the Act under which the proposed work was to be undertaken.

3. In pursuance of the proposal of the council, the corporation caused to be published a notice under sec. 9 of the said Act, in which it was stated that the estimated cost of the work was $3,450, of which amount the Corporation of Sandwich was to pay the sum of $2,305.20, and the estimated special rate per foot frontage to be charged against the owners of the property to be assessed was said to be 1.80\frac{5}{16}$.

4. On the 20th December, 1916, the council passed by-law No. 667 to authorise the opening and establishment of the Peter street extension, and on the same day passed by-law No. 668 to provide for the expropriation of the land required for such extension.

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5. In by-law No. 667 it was recited, among other things, that notice of the intention of the council to undertake such work had been duly published as set out in paragraph 3 hereof.

6. On the 18th October 1917, the council of the defendant corporation disregarded the alleged report of its engineer, and the notice caused to be published as aforesaid, and passed by-law No. 735 to provide for the payment of a one-third share only of the cost of the opening of Peter street under by-law No. 667, and provided for assessing upon the lands to be benefited the balance of the cost of the proposed work; and, in accordance with such by-law, an assessment was made upon the plaintiff's lands, and the lands of other owners sought to be benefited by the work, and the council proposes to pass a further by-law adopting the said assessment and charging the land in accordance therewith.

7. None of the work contemplated by any of the said by-laws has yet been undertaken.

The plaintiff, therefore, claims:—

1. An order declaring by-law No. 735 and the assessment made in accordance therewith invalid.

2. An injunction restraining the defendant corporation from proceeding to pass a by-law imposing the assessment made by its engineer under the said by-law.

3. An injunction restraining the defendant corporation from proceeding further with the proposed work under the circumstances disclosed.

4. Such further and other relief as to the said Court may seem meet.

The following provisions of the Local Improvement Act are referred to in the argument and the judgment:—

9. Notwithstanding anything to the contrary contained in this or any other Act or in any by-law of the municipality, where the council determines and by by-law, passed at any general or special meeting by a vote of two-thirds of all the members thereof, declares that it is desirable that the construction of a curbing, pavement, sidewalk, sewer or bridge, or the opening, widening, extending, grading, altering the grade of, diverting or improving a street or the extension of a system of waterworks, should be undertaken as a local improvement, the council may undertake the work without

petition, and the owners of the land shall not have the right of petition provided for by section 13.

11. Where it is intended to proceed under sections 5, 9 or 10 the council shall not be deemed to proceed on the initiative plan, but, before passing the by-law for undertaking the work, shall cause notice of its intention, Form 1, to be published.

32. The council may provide for the making of the reports, statements, estimates and special assessment roll mentioned in section 30 and 31 in such manner and by such officer of the corporation or person as the council may deem proper, and may do so by a general by-law applicable to all works or to any class or classes of them or by a by-law applicable to the particular work.

J. H. Rodd, for the appellant.

John Sale, for the defendants, respondents.

The judgment of the Court was read by

RIDDELL, J.:—This case affords as striking an instance of uncompromising insistence upon strict legal rights and of wholly unnecessary litigation—unnecessary, that is, in the sense of being avoidable with the exercise of a little "give and take" usually associated with common sense—as often occurs in our Courts. But the parties are entitled to the law as we may find it to be, and they claim their rights in that regard.

RIDDELL, J.

The plaintiff is a large land-owner in the town of Sandwich, owning, amongst other lands, an irregularly triangular block about 900 by 1200 by 1200 feet in extent—this he intended to subdivide into lots and put the lots on the market. Wellington street came up to about the middle of one side and Peter street to about the middle of another. The defendants desired to connect these two streets by a new street opened across the plaintiff's block—to this the plaintiff had no objection; he would thereby dispose of a certain part of his land and acquire better access to another part. Thereupon the council, on the 11th September, 1916, instructed their solicitor to take steps to effect the scheme—"the land to be expropriated and the cost charged against the adjoining land under the Local Improvement Act;" and on the same day appointed a committee "to meet Mr. Fleming and try to come to some definite understanding." The committee met the plaintiff and came to an understanding with him,

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which is manifested by a memorandum signed by him and two of the special committee as follows:—

"Town of Sandwich. At the meeting of special committee on the opening of Peter and Detroit streets to Victoria street and Pajot street respectively, Mr. H. O. Fleming, as owner of the property, agrees with the committee that if the town will pay one-third of the cost and the engineer of the town will assess upon property benefited by the opening such further proportion of the cost as he may be able to under the Local Improvement Act, he will take no step to prevent or obstruct the proceedings, and is willing, if the value of the land taken cannot be agreed upon with the town, to accept the result of the arbitration under the Act. Mr. Fleming also expects such flankage rebate in taxation as is usual in the town, subject to approval of the council.

"September 27th, 1916. Richard McKee.
"H. O. Fleming. William Wright."

At a subsequent meeting of council the following took place:—

"The report of the committee appointed to interview Mr. H. O. Fleming in reference to the opening of Peter street was read. Mr. Fleming stated that he would like to have the council approve his plan so that the engineer can stake out the lots; that as soon as Detroit street is opened his plan will be registered; that he will give 33 feet so as to have a 66-foot street from Pajot street to Wellington street; and that the triangular portion consisting of lots 84 to 89 he will deed to the town, if the town will purchase 33 feet from him, so as to make the street 66 feet wide from Wellington street to Church street;" and "it was carried that Mr. Fleming's proposed plan be approved, and that his generous offer be accepted."

Pajot street runs into the south-east corner of the block; Wellington street to about the middle of the north-east side; and it was proposed to connect them by a 66-foot street along the north-east side of the block, half the land for which would be given by the plaintiff—the plaintiff also to give a part of the block to the town for a park.

The "flankage" was provided for by a general by-law of the town, No. 386:—

"That, where two sides of corner-lots in the municipality of the

town of Sandwich are liable for assessment for local improvement works, 80 feet of frontage or flankage is hereby exempted from assessment for local improvements, and such allowance or exemption on said 80 feet is hereby assumed as part of the municipality's share of the said works."

Without any general or special by-law in the premises, as mentioned in sec. 32 of the Local Improvement Act, R.S.O. 1914, ch. 193, the engineer made an estimate of the cost of opening up the proposed street, estimating it at $3,450; the estimates were approved; and, as it was intended to proceed under sec. 9 of the Act, a notice of street-opening was published, as required by sec. 11 of that Act. This followed the Form 1 referred to in sec. 11, and given at p. 2572 of the Revised Statutes—the important parts are:—

"2. The estimated cost of the work is $3,450, of which $2,305.20 is to be paid by the corporation. The estimated rate per foot frontage is 1.85\frac{5}{6}$. The special assessment is to be paid in 25 annual instalments.

"3. A petition against the work will not avail to prevent its construction; but the owners affected may apply to the Ontario Railway and Municipal Board under the conditions provided in the statutes in that behalf."

The amounts mentioned in the notice are arrived at as follows, as appears from the engineer's estimate:—

Total cost estimated at		$3,450.00
Charge the town the $\frac{1}{3}$ of $3,450	$1,150.00	
On abutting frontage (flankage)	1,155.20	(on 640 feet)
Total	$2,305.20	

The remainder of the cost was apportioned thus:—

To the plaintiff on 387 $\frac{2}{3}$ feet, remainder of abutting frontage	$627.80
On non-abutting frontage (other owners)	517.00
	$1,144.80
Add town's share	2,305.20
Total cost	$3,450.00

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This scheme suited the plaintiff; he was expected to pay $627.80; the town, $2,305.20; and others non-abutting, $517.00—it will be seen that the notice says nothing of the non-abutting land, as directed by sec. 11, Form 1.

No appeal was taken to the Ontario Railway and Municipal Board; and, on the 20th December, 1916, the town passed a by-law (No. 667) under sec. 9 for opening the new street. There is no objection taken to its form, but it is contended by the plaintiff that the conditions precedent have not been complied with.

The council also passed a by-law for the expropriation of the necessary land. A disagreement took place between the council and Mr. Fleming, through which the plan of subdivision of his block was not registered—the town then said: "There being no registered plan, we have no cross-streets; there is therefore no flankage except at the end;" and proceeded on the 18th October, 1917, to pass a by-law, No. 735, whereby the town was only to pay one-third of the cost and compel the abutting frontage, i.e., the plaintiff, to pay the remainder, except what was assessed against the non-abutting property. The engineer had made a report with a corrected and final estimate, on the 4th October, 1917, placing the whole cost at $3,556.39.

Of this the town was to pay	$1,185.46	
and 80 feet flankage	150.00	
In all	$1,335.46	$1,335.46
The non-abutting land		519.13
leaving the plaintiff to pay		1,701.80
In all		$3,556.39

There is no general or special by-law to authorise this report.

The result of this proceeding would be that the town would pay $1,335.46 instead of $2,505.20, and the plaintiff $1,701.80 instead of $627.80—the town gaining $969.74, the plaintiff losing $1,074.

There was no new notice under sec. 11.

Naturally the plaintiff was not satisfied, and he brought this action to set aside by-law No. 735 and the assessment under it, and for consequent relief. The learned Chief Justice of the King's Bench dismissed the action, and the plaintiff now appeals.

In the view I take of the case, there is no need of considering the reasons—if the so-called reasons can be dignified with the name of "reason"—that the plan was not registered.

The by-law here attacked and the assessment under it purport to be made in pursuance of a statute, and it is well established that in such a case the statutory provisions must be strictly complied with, "in the sense that non-observance of any of them is fatal." The whole matter is discussed in *Re Hodgins and City of Toronto* (1909), 1 O.W.N. 31, which was believed and rightly believed to lay down elementary law—so much so that the reporter did not print it in the Ontario Law Reports, and the city corporation did not appeal. The cases referred to in that case are conclusive: *Goodison Thresher Co.* v. *Township of McNab* (1909), 19 O.L.R. 188; *Township of Barton* v. *City of Hamilton* (1909), 13 O.W.R. 1118; *Re Gillespie and City of Toronto* (1891), 19 A.R. (Ont.) 713, affirmed in the Supreme Court of Canada on the 1st May, 1893: *City of Toronto* v. *Gillespie*, Coutlee's Digest, cols. 873, 874. This last case is wholly in point—the notice differed from the by-law in the work done and times of payment; here the notice differs from the by-law in the amount of money the town (and therefore the owner) must pay—quite as important, to many owners more important.

That a prerequisite to a by-law validly passing is publication of the notice of the council's intention, under sec. 11, is the opinion of the Ontario Railway and Municipal Board: *Re Kemp and City of Toronto* (1915), 21 D.L.R. 833, at p. 835.

While we need not look at the reason of the rule, it may be observed that, by the council proceeding without a new notice, the plaintiff was deprived of his right to appeal to the Ontario Railway and Municipal Board under (1914) 4 Geo. V. ch. 21, sec. 42, amending sec. 9 of the Local Improvement Act by adding subsecs. 2 and 3.

There are defects in the notice which I do not think it necessary to consider.

The Courts are not becoming more lax in insisting on the requirements of statutes being strictly observed by municipalities—see, for example, *Anderson* v. *Mun. of South Vancouver* (1911), 45 Can. S.C.R. 425; *MacKay* v. *City of Toronto* (1917-18), 39 O.L.R. 34, 43 O.L.R. 17, 43 D.L.R. 263; and the recent case in

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the Supreme Court of Canada, *Grosvenor Street Presbyterian Church* v. *City of Toronto*, 45 D.L.R. 327, affirming the judgment of the Appellate Division, *Re City of Toronto and Grosvenor St. Presbyterian Church Trustees* (1917), 40 D.L.R. 574, 41 O.L.R. 352.

It was urged, however, that the matter was for the Court of Revision under sec. 36. I do not think that this section debars one interested from claiming that the proceeding is invalid; but, assuming that there might otherwise be some ground for the argument, it is wholly swept away by sub-sec. 2.*

I am quite aware that the result of setting aside the by-law and the assessment under it may do the plaintiff no financial good in the long run—he claims his legal rights, and he must have them.

I would allow the appeal and grant the prayer of the plaintiff as set out in his statement of claim, with costs here and below. The defendants will probably have no difficulty in discovering the proper procedure to take.

Appeal allowed.

*Section 36 (1) provides that the Court of Revision shall have jurisdiction and power to review the proposed special assessment and to correct the same as to certain specified matters; sub-sec. 2 provides that the Court of Revision shall not have jurisdiction or authority to review or to alter the proportions of the cost of the work which the lands to be specially assessed and the corporation are respectively to bear according to the provisions of the by-law for undertaking the work.

CAN.
EX. C.

McCARTHY v. THE KING.

Exchequer Court of Canada. March 17, 1919.

EXPROPRIATION (§ III C—136)—SHIPYARD—COMPENSATION—VALUATION—PETITION OF RIGHT.

Held, where the Crown had been in occupation of a piece of land for a certain time previous to its expropriation, the compensation for such occupation was ascertained by accepting the value thereof as established in the expropriation proceedings and by allowing legal interest thereon.

Statement.

PETITION of right to recover for the use and occupation of land in an expropriation by the Crown.

D. R. Murphy, K.C., *A. Perrault*, K.C., and *P. St. Germain*, K.C., for suppliants; *E. Lafleur*, K.C., *E. H. Godin*, K.C., and *F. Lefebvre*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliants, by their petition of right, seek to recover the sum of $80,000, with interest and costs, alleged to

represent the value of the use and occupation of their Sorel shipyard, since December 31, 1912, under the notice of cancellation of a running lease. This amount to cover the rent for the years 1913, 1914, 1915 and 1916.

The facts of this case are not only interwoven with, but are really so much the same as the facts in the action instituted by way of information by the Crown for the expropriation of this shipyard at Sorel, that at the opening of the trial an order was made, upon motion on behalf of the suppliants, the Crown acquiescing in the same, declaring the evidence, *viva voce* and documentary, in the case of *The King* v. *McCarthy* (1919), 46 D.L.R. 456, 18 Can. Ex. 410, common to this case, so far as applicable.

The petition of right action is but a corollary to the expropriation case, with respect to the period running from December 31, 1912, to the date of the expropriation, 18th December, 1915.

It is unnecessary to pass upon the question of the validity of the lease and the validity of its cancellation, since both parties have, at trial, accepted my view relating to the manner suggested by me at trial of fixing the compensation herein, and that is by treating the matter as if the Crown, under s. 22 of the Expropriation Act, had taken possession of this property on January 1, 1913, instead as of the date of the deposit of the plan and description, on December 18, 1915. The compensation should be ascertained by taking the full value of the property with the area originally mentioned in the information of the expropriation case and accepting the value found by the judgment in the expropriation case, under its ratio for the value of the land per foot.

Therefore, to arrive at the capital upon which interest at 5% should run from January 1, 1913, to December 18, 1915, we will first take the already ascertained value of the shipyard with its restricted area, as follows:—Land, $19,076.85; buildings, $18,250.00; wharves, $16,354.10, = $53,680.95.

To this should be added the abandoned area of 143,163 sq. ft., which, at 5 cents a foot, would represent $7,158.15, making a total of $60,839.10.

Upon this amount of $60,839.10 interest will run at 5%, as already mentioned, between January 1, 1913, to December 18, 1915. The interest upon the same amounts to the sum of

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$9,009.19, which represents a fair and just compensation for the use and occupation of the land, arrived at under the provisions of s. 31 of the Expropriation Act.

This amount may, at first sight, appear large in view of the rent that was formerly paid under the leases; but it should be approached both with the consideration that the government occupied a larger area than that covered by the leases, and also under the circumstances mentioned in ex. F.

It is unnecessary to decide whether this action by petition of right was necessary and whether the matter covered thereby could not have been made part of and decided by the expropriation case; it will suffice to say that counsel for the claimants stated this action was taken to prevent the Statute of Limitation, or rather prescription, becoming a bar to the recovery of the back rent.

Having, however, in the result treated the period covered by the petition of right as if it formed part of the expropriation case, interest cannot be allowed upon the interest already allowed.

In so far as necessary to the determination of all the questions in controversy between the parties in the two actions, these reasons may be read with and taken as part of the reasons for judgment in the expropriation case. Judgment in the latter case being rendered on the same date as in the present case.

Judgment will be entered declaring that the suppliants are entitled to recover, from the respondent, the said sum of $9,009.19 and costs. *Judgment for suppliants.*

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MICKELSON v. KILL-EM-QUICK Co. Ltd.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, and Fullerton JJ.A. April 28, 1919.

TRADE MARK (§ IV—17)—PASSING OFF—SIMILAR NAME AND DESIGNS—POWER OF RECEIVER TO TRANSFER USE OF SIGNATURE TO PURCHASERS OF DEFUNCT COMPANY.

The inventor of a preparation for destroying gophers and similar pests which has been successful with the result that the use of his name on the packages of the preparation sold has become a valuable asset to him is entitled to an injunction restraining the purchasers—from the receiver—of the assets of a company with which the inventor was associated from using his fac-simile signature on the packages sold by the new company, the name being used as an artifice by which intending purchasers were induced to buy the goods on the strength of the well-known signature, the preparation being, in fact, different. The receiver had no power to transfer the right to use the signature, and the purchasers of the assets of the defunct company had no right to use such inventor's signature for any purpose without his consent.

[See *Mickelson Shapiro Co.* v. *Mickelson Drug and Chemical Co. and Anton Mickelson* (1914), 15 Can. Ex. 276; *Mickelson Shapiro Co.* v. *Mickelson Drug Co.* (1915), 23 D.L.R. 451; *Mickelson* v. *Mickelson* (1916), 28 D.L.R. 307, for history of litigation in this case.]

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Statement.

APPEAL from the trial judgment granting an injunction to restrain defendants from using plaintiff's signature in connection with the sale of gopher poison. Affirmed by an equally divided court.

R. D. Guy, and *C. W. Chappell*, for appellant.

W. M. Crichton, and *D. Nicholson*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This is a suit for an injunction to restrain the defendants from making use of the plaintiff's signature, or autograph, or any imitation thereof, in connection with the manufacture or sale of gopher poison. The suit is a re-echo of the litigation that has been going on for some time between the plaintiff and one Shapiro in connection with the manufacture of gopher poison, trade marks respecting the same and infringements of rights thereunder.

The plaintiff, a pharmacist and chemist, discovered a very effective gopher poison. In 1906 he sold to the Mickelson Chemical Co. his formula and goodwill but continued to manage the company's business. This company's name was afterwards changed to the Mickelson Kill 'Em Quick Co., incorporated under the laws of Minnesota. Shapiro acquired a large interest in the company in 1912 and its name was changed to the Mickelson-Shapiro Co. The last mentioned company went into liquidation, a receiver was appointed by the order of the District Court of the County of Hennepin in Minnesota, and the business was carried on as a going concern with Shapiro as manager. In 1915, the receiver sold to Shapiro the assets and goodwill of the company, including the formula for making the poison.

Shapiro then formed the Leo Shapiro Co. in the United States and the Kill 'Em Quick Co., Ltd., in Manitoba.

While the Mickelson Chemical Co. and the Mickelson-Shapiro Co. were making and selling the poison, the plaintiff's name "Anton Mickelson," was placed underneath a printed certificate on the packages alleging that the poison was manufactured under his personal supervision. The name was in script and purported to be a fac-simile of Mickelson's signature. The defendants placed on their packages the following paragraph:—

Beware of imitations. This package contains the original and genuine Kill 'Em Quick gopher poison, a thoroughly tried and tested exterminator,

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manufactured by a secret process exclusively by us, from the original formula prepared and sold to us by Anton Mickelson, Reg. pharm't & chem't.

Shapiro frankly acknowledges that this was done in order to sell the defendant's goods and, in his own words, that "it was intended as a guarantee to the public." He says that the public has been used to seeing that signature on every package put up since 1907, that it is something the people are accustomed to seeing on the package. He also says: "If we left it off and a competitor put it on, great harm would come to us."

Shapiro was asked: "When you say competitor, you mean Mickelson? A. "Yes, as a competitor of ours; and the public having been used to seeing that fac-simile signature as part of our get up, and not seeing it any longer, would naturally think that the competitor's goods were our goods, and we would lose business on that account."

Shapiro claimed that he had the right to use Mickelson's signature because he bought the assets of every description and the goodwill of the Mickelson-Shapiro Co. The bill of sale from the receiver purported to convey to Shapiro the right to use the signature of Mickelson, but it is certain that the latter never gave to the Mickelson-Shapiro Co. the right to use his signature as the defendants are now using it, and the receiver of the former company never possessed the property in the signature which it is claimed he conveyed to Shapiro.

The trial judge has found that the preparation sold by the defendants is "not by any means identical with the preparation specified in the original formula prepared by Mickelson and used by him when acting for the Mickelson Chemical Co., and the subsequent companies in the United States."

He also finds that defendants use about 15% of sugar in their preparation whereas little or no sugar had ever been used by Mickelson. "One result of this change," he says "is that the defendant's preparation, when subjected to damp surroundings, becomes hardened into a solid mass and rendered almost useless." He further finds that the plaintiff never sold or transferred to the Mickelson Chemical Co. or any other company the right to use his signature on their packages and advertisements, and that such use is wholly unauthorized by the plaintiff.

I see no reason why this court should interfere with the above findings. But the defendant claims that even if the use of the

signature is unauthorised, the plaintiff is not entitled to an injunction to restrain the defendant from using it in the manner he is doing. *Clark* v. *Freeman* (1848), 11 Beav. 112, 50 E.R. 759, is relied upon as an authority supporting this proposition. In that case Lord Langdale declined to restrain by injunction the advertisement and sale by the defendant of a quack medicine under the name of "Sir J. Clark's Consumption Pills." Sir J. Clark was an eminent physician and claimed that the defendant's unauthorised use of his name would injure him in his profession. The injunction was refused on the ground that the court would not interfere to prevent the publication of a libel. *Clark* v. *Freeman* has been discredited in later cases, and is no longer an authority. In *Maxwell* v. *Hogg* (1867), L.R. 2 Ch. 307, at 310, Lord Cairns said:—

> It always appeared to me that *Clark* v. *Freeman* might have been decided in favor of the plaintiff, on the ground that he had a property in his own name.

This was approved in *Springhead Spinning Co.* v. *Riley* (1868), L.R. 6 Eq. 551, 561, and in *Dixon* v. *Holden* (1869), L.R. 7 Eq. 488. In *Re Rivière's Trade Mark* (1884), 26 Ch. D. 48, a case in the Court of Appeal, Lord Selborne, at p. 53, said of *Clark* v. *Freeman*:—

> That case has seldom been cited but to be disapproved. Could not a professional man be injured in his profession by having his name associated with a quack medicine?

In *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345, North, J., restrained the publication by a photographer of photographs of a lady taken by him. *Clark* v. *Freeman* was cited but not regarded.

In *Liverpool Household Stores* v. *Smith* (1887), 37 Ch. D. 170, a decision of the Court of Appeal, it was held that, since the passing of the Judicature Act, the court has jurisdiction to restrain the publication of a trade libel, although this jurisdiction should only be exercised in the clearest cases. The jurisdiction of the court to restrain by injunction the publication of a libel is upheld in the following cases; *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501; *Monson* v. *Tussauds Limited*, [1894] 1 Q.B. 671.

The present is not an action to restrain the publication of a libel. I only mention the authorities relating to that subject to shew that *Clark* v. *Freeman* is no longer an authority and that

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the power of the court in regard to applying the remedy of injunction has received a wider interpretation.

The plaintiff was the inventor of a preparation for destroying gophers and similar pests which appears to have been most successful, with the result that the use of his name in connection with that preparation attained a wide notoriety, and his name itself, especially as it appeared in his printed signature, became a valuable property to him. Shapiro, with whom he was associated in the Mickelson-Shapiro Co., acquired from the receiver of that company its assets, and the formula for making the gopher poison. It is not shewn that the exclusive right to the formula was parted with by the plaintiff. The defendants, who acquired their rights through Shapiro, found that it would be of great advantage to them in selling their product to have a fac-simile of the plaintiff's signature printed on their packages in the manner above set forth. Shapiro says this "was intended as a guarantee to the public." It was in fact, an artifice by which intending purchasers would be induced to buy defendants' goods on the strength of the well-known signature of the plaintiff appearing on the packages. The value and importance of the fac-simile signature of the plaintiff on defendant's packages are amply proven by Shapiro's evidence. The plaintiffs' name and signature had a very considerable value to himself in connection with his business and trade of manufacturing gopher poisons.

The trial judge has found that the preparation sold by defendant is not at all identical with the original formula used by Mickelson. It was by means of the goods manufactured under this original formula that Mickelson acquired his reputation. Apart from the objection which he might well take to having his name used in an artifice designed to mislead the public, he would most certainly suffer substantially in his business of manufacturing gopher poison if rival manufacturers used his name and signature on their packages to help sell their goods in competition with his. I quite agree with the trial judge that it is immaterial that the plaintiff does not himself sell the gopher poison to the public. It is clear that he is much interested in the Prairie Chemical Co. Ltd. He manufactures the poison for that company and the company sells it. Anything that reduces its sales is a direct injury to him. If their market is interfered with and restricted

through the abuse of the plaintiff's signature by the defendants, the plaintiff suffers damage through the falling off of sales.

There is also the danger that the value of the goods made by him may, if a free use of his name is permitted, be depreciated by goods of an inferior quality being offered for sale with his name upon them.

The defendants' contention that the right to use plaintiff's name on their packages was transferred by the receiver of the Mickelson-Shapiro Co. to Shapiro and by the latter to the defendants is quite untenable. The name of "Mickelson" did not form part of the trade mark registered in 1909; see *Mickelson Shapiro Co.* v. *Mickelson Drug & Chemical Co.*, 15 Can. Ex. 276, 282. The receiver had no power to transfer to Shapiro the right to use the signature of the plaintiff. The made-up packages of the old Mickelson-Shapiro Co. had, no doubt, to be disposed of and these bore the script signature of the plaintiff, but when these had been sold and the company had become defunct, the purchaser of its assets, etc., had no right to use the plaintiff's signature for any purpose without his consent.

I would affirm the judgment of the trial judge and dismiss the appeal.

CAMERON, J.A.:—This action is brought for an injunction to restrain the defendant company from making use of the plaintiff's fac-simile signature in connection with the manufacture or sale of a gopher poison. The defendant company acquired the assets and good-will, including the formula, of the Mickelson-Shapiro Co., a Minneapolis company, by conveyance from the receiver of that company to Leo Shapiro, who formed the defendant company in Manitoba and transferred to it the assets in Canada received under such conveyance. The history of the transfers from the plaintiff, the original discoverer of the formula, through various intermediaries down to the defendant company, is set out in the judgment of Galt, J., who tried the action and gave the plaintiff the injunction prayed for and $10 damages. (23 D.L.R. 451.)

Cameron, J.A.

It appears that the defendant company has discontinued the use of the plaintiff's signature, and does not intend to resume it. This apparently resolves the questions in appeal largely into a matter of costs. It is asserted, however, that use has been made of the judgment appealed from in advertising goods in which the

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plaintiff has an interest, and, in any event, the parties are entitled to a determination of the issues raised.

In the year 1908, the plaintiff, as manager of the Mickelson Chemical Co., placed on one side of the package containing the gopher poison a certificate bearing his fac-simile signature to which were subjoined the words "registered pharmacist and chemist," and a statement asserting that the poison was manufactured under his personal supervision. Subsequently, while the receiver was in control, a change was made which was adopted by the defendant company when the Canadian assets were transferred to it, so that the certificate above referred to became a simple statement that the poison in the package was the genuine and original poison and that it was manufactured by a secret process from the original formula prepared and sold by "Anton Mickelson, registered pharmacist and chemist," the name being printed as a fac-simile of Mickelson's signature.

The plaintiff alleges in his statement of claim that in the year 1914 he commenced and is still carrying on business as a manufacturer and vendor of gopher poison in the City of Winnipeg. These are not, however, the facts as they appear in the evidence. A gopher poison, called "My own gopher poison," was manufactured and put on the market originally by the Mickelson Drug & Chemical Co. Ltd., and then by the Prairie Chemical Co., an American company. This company was subsequently incorporated under the Dominion Companies Act in July, 1917, as the Prairie Chemical Co. of Canada Ltd., of which the plaintiff himself and a few others were stockholders, and which continued the manufacture of "My own gopher poison" under the supervision of the plaintiff. It might be inferred from the evidence that whatever rights the plaintiff had were transferred to the Prairie Chemical Co. and subsequently to the Prairie Chemical Co. Ltd. He certainly has not established that he has been since 1914 a manufacturer and vendor of gopher poison in Winnipeg. He does not allege, and he fails to establish, that he is still the owner of those rights and assets and that he parted with them for a time to the companies named for a consideration, with a reversion of those rights to himself after the expiry of the period. These circumstances appear to me to distinguish this case from those appearing in *Warwick Tyre Co.* v. *New Motor &*

General Rubber Co., [1910] 1 Ch. 248. At p. 256, Neville, J., says:—

> If the Warwick Tyre Co. had parted finally with their rights in the name, they could not sue; but they have not done so. They have given another company certain rights for a particular time, the right to be determined after the lapse of a certain number of years; subject to another company having the right to manufacture and sell the goods for them, the right to the trade name appears to me to remain vested in the plaintiff company, and I think they and, as it seems to me at present, they alone can sue for the protection of their trade name.

On the above facts Neville, J., gave the Warwick Tyre Co. the relief asked for, but, in my opinion, it is difficult to see how the decision in that case can be made applicable to this. We have, therefore, an action where the plaintiff has failed in his evidence to substantiate the allegations concerning the all-important matter of his right to recover, and, as it appears to me, the conclusion that he must fail on this ground in his action cannot be avoided.

It was argued for the defendant on this appeal that the right to the use of the fac-simile signature was acquired under the management of the plaintiff during the years 1908-1913, by the Mickelson Chemical Co. and its successors; that the fac-simile signature was used as and became part of the get-up of the package, and thus became so identified with the business as to become part of the goodwill, and I agree with this view.

It is contended that these rights (including the use of the signature) which unquestionably belonged to the Mickelson-Shapiro Co. passed from it to the receiver in the Minnesota courts and from the receiver to the defendant by bill of sale, which seems perfectly adequate for the purpose. The only question to my mind on this branch is, as to the rights acquired by the receiver. Under our King's Bench Act the court has power to appoint a receiver whenever it may be "just or convenient" to do so. The object sought in the appointment is to provide for the safety of property pending litigation, or during the minority of infants, or to preserve property in danger of being dissipated or destroyed by those entrusted with it. Kerr on Receivers, p. 4. This is substantially the law in the United States. See 34 Cyc. 17, 18, which we are entitled to look at under s. 32 of our Evidence Act, C. 65 R.S.M. The receiver, to the extent of the debtor's interest in the property, has been held to stand in the shoes of the debtor, 34 Cyc. 191.

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A sale and disposition of property in the hands of a receiver may be made with the approval of the court. *Ib.* 309. Certified copies of the order appointing the receiver (under which he is authorised to "hold, preserve and manage . . . all of the franchises, property and assets" vested in him by law and the said order) and of other documents are filed together with the original bill of sale from the receiver to Shapiro and from Shapiro to the defendant company. The plaintiff was a party to the receivership proceedings, and he does not appear in the record so far as appears to have made objection to them. In my judgment, the receiver acquired, under the law and the order appointing him, all the rights, property and assets of the Mickelson-Shapiro Co. and I would take these to include the right to the use of the autograph fac-simile signature as part of the get-up and, therefore, part of the goodwill.

Attempted definitions of "goodwill" are more or less vague, but we have the authoritative judgment of Lord Hatherley, then Page-Wood, V-C., in *Churton* v. *Douglas* (1859), 28 L.J. Ch. 841, at 845:—

> Goodwill (he there said) I apprehend must mean every advantage—affirmative advantage, if I may so express it, as contrasted with the negative advantage of the vendor not carrying on the business himself—that has been acquired by the old firm in carrying on its business, everything connected with the premises, or the name of the firm, and everything connected with or carrying with it the benefit of the business.

This judgment has been generally approved. See *Trego* v. *Hunt*, [1896] A.C. 7, p. 17. The above passage is also cited in the note to 20 Cyc. 1276, and in Allan on Goodwill, p. 8, and elsewhere. Lord Eldon's definition in *Cruttwell* v. *Lye* (1810), 17 Ves. 335, 34 E.R. 129, is undoubtedly "too narrow;" *per* Lord Herschell in *Trego* v. *Hunt*, [1896] A.C., p. 17. See the judgment of Lords Macnaghten and Lindley in *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine Co.*, [1901] A.C. 217:—

> It is obvious, therefore, that a trader has much the same right in respect of his trade name, the get-up of his goods and all the other distinctive badges and description by which goods are known to be his, as he has in respect of his trade marks, although the latter is called a right of property, and the former is commonly, but not invariably, denied that title. Kerly on Trade Marks, 4th ed., p. 533. Matters connected with the get-up and distinctive badges and description are practically on the same footing as trade marks which can still be acquired by use (*i.e.*, apart from registration). *Ib.*, 373, 376.

A trader may still acquire the right to a trade mark within the United Kingdom by user, *per* Stirling, J., in *Sen Sen Co.* v. *Britten*, [1899] 1 Ch. 692, at p. 694.

Title to a trade mark . . . may be assigned and transmitted together with the goodwill of the business. Kerly, p. 384.

It was argued that as this was a sale by a receiver and not by a vendor, the purchaser acquired, so far as the signature was concerned, really no rights whatever, and Lord Macnaghten in *Trego* v. *Hunt*, *supra*, was quoted. There he says (p. 23):—

There is all the difference in the world between the case of a man who sells what belongs to himself, and receives the consideration, and the man whose property is sold without the consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

But that broad statement must be read with reference to the facts in *Trego* v. *Hunt*, a case where the goodwill of a business having been sold, it was held the vendor may still set up a rival business, if he has not bound himself to the contrary by express stipulation, but he may not go so far as to steal away his former customers. The decision of Lord Jessel referred to was in *Walker* v. *Mottram* (1881), 19 Ch. D. 355, where he held that the rule in *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322, that, while in the case of a voluntary sale the vendor of the goodwill of a business is precluded from soliciting its former customers, cannot be extended to the case of a purchaser from a trustee in bankruptcy. It follows that Lord Macnaghten's statement is of no application here. Other cases, such as *Thynne* v. *Shove* (1890), 45 Ch. D. 577, hold that a purchaser of a goodwill has the right to use the name of the vendor but not so as to expose him to liability. But there is no question that

upon the death or bankruptcy of a trader, his trade mark may be sold with the goodwill of his business by his executors or trustees: Kerly 392. If the trustee in bankruptcy of a trader sells the goodwill and trade marks of the latter's business, the trader has no right to continue to use the marks. *Ib.*, p. 464, citing *Hammond* v. *Brunker* (1892), 9 R.P.C. 301, and *Hudson* v. *Osborne* (1870), 39 L.J. Ch. 79.

Lord Cranworth laid it down in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 H.L.C. 523, at p. 534, 11 E.R. 1435:—

I further think that the right to a trade mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods, on which the mark has been used to be affixed, and may lawfully be used by the purchaser.

My conclusion, therefore, is that the right to the use of the

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fac-simile signature was acquired as part of the get-up of the package by the Mickelson-Shapiro Co. as above indicated, and passed to the receiver with the goodwill and other assets and from the receiver ultimately to the defendant company.

What right of property has the plaintiff in the use of his name?

Cameron, J.A.

There is no property in a name, because every man, according to English law, is entitled to hide under any name that he pleases, whether it be his own or not, provided only that he do not adopt a name or style by which the public are induced to believe that they are dealing with some other person, or obtaining the goods of some other maker. Allan on Goodwill, 21.

The only right the English law recognizes in any name or mark other than a registered trade mark is the right of a person who uses such name or mark to prevent others using the same so as to deceive the public into thinking that the business carried on by such persons and the goods sold by them are his. 27 Hals. 744, referring to *Reddaway* v. *Banham*, [1896] A.C. 199.

The court exercises its jurisdiction for the protection of property rather than of personal feelings and does not in general interfere to protect a non-trader or one who in fact is not trading under or using the name in question or some similar name. 27 Hals. 748.

The only remedy, therefore, of the plaintiff is a "passing off" action and in that action it must be established that this defendant has used the trade name, mark or get-up of the plaintiff's goods, in such a manner as to be calculated to induce the public to believe that the infringing goods are the goods of the plaintiff. *Ib.* 767-768. But the foundation of the action is destroyed if it does not appear that the plaintiff has manufactured goods himself (or through an assignee as in the *Warwick* case) otherwise it is impossible to shew damage.

I concur with the judgment of Fullerton, J.A., and would allow the appeal.

Haggart, J.A.

HAGGART, J.A.:—I think substantial justice would be done between the parties by the judgment of the trial judge. The defendants, (appellants) after two days' argument, say that they do not want to use, or intend to use, the signature on the boxes, the right to which they have been asserting. The whole controversy is now only as to costs.

I would affirm the judgment of the trial judge and dismiss the appeal.

Fullerton, J.A.

FULLERTON, J.A.:—The facts are set out fully in the reasons for judgment of the trial judge. The action is framed as a "passing off" action only.

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The plaintiff alleges that he is a manufacturer of gopher poison; that in the years 1909 to 1913 having a secret formula for the manufacture of a peculiarly efficacious gopher poison, he was engaged by the Mickelson's Kill 'Em Quick Co. for the purpose of manufacturing for the said company the said gopher poison; that it was arranged between the said company and the plaintiff that the packets of the said gopher poison sold by the said Mickelson Kill 'Em Quick Co. should have endorsed upon them a certificate or statement that the said gopher poison was manufactured under the personal supervision of the plaintiff over the signature of the plaintiff, as registered pharmacist and chemist, reading as follows:—

> Kill-Em-Quick Gopher Poison is a thoroughly tried and tested exterminator; it is prepared from a formula discovered by and is manufactured under the personal supervision of
>
> Anton Mickelson,
> Registered pharmacist and chemist.

Plaintiff further alleges that in January, 1914, he commenced and is still carrying on business as a manufacturer and vendor of gopher poison at the City of Winnipeg, that the defendants have been and are doing business in the City of Winnipeg as manufacturers and vendors of gopher poison, and are using subjoined to another and wholly different and an untrue statement, an imitation of the plaintiff's signature or autograph as registered pharmacist and chemist in the same position on the packets of gopher poison which they are now vending as the position previously used for the plaintiff's certificate and having a similar appearance thereto, and that such use of plaintiff's signature is wholly unauthorised, is calculated to deceive and is being used with the intention of deceiving and actually does deceive the public, and the defendants are thereby reaping a great benefit to themselves to the great detriment and loss of the plaintiff.

Further, the plaintiff alleges that in consequence of the defendants' use of the plaintiff's signature or autograph, the mind of the public has become confused, as to whether the gopher poison offered for sale by the defendants is actually manufactured and sold by the plaintiff or not, and the plaintiff has in consequence suffered great loss of trade, and has suffered damages on this account by reason of the defendants' gopher poison being purchased by the public when intending to purchase the plaintiff's gopher poison.

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The claim for relief includes an account, damages and an injunction restraining the defendants, their servants or agents from making use of the plaintiff's signature or any imitation thereof in connection with the manufacture or sale of gopher poison or at all.

The obvious answer to the plaintiff's action as framed is that the plaintiff has never at any time manufactured or sold gopher poison in packages bearing a certificate or device similar in any respect to the one complained of. In fact, the plaintiff has sold no gopher poison of any kind since 1908.

In *Lawson* v. *Bank of London* (1856), 18 C.B. 84, 139 E.R. 1296, an action to restrain the defendants from usurping the name of the plaintiff bank, a demurrer was allowed because the declaration did not allege that the plaintiff had carried on business as a banker, but only that he had expended money in advertisements. Willes, J., said: "No action, could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forward to the world by the party complaining of the misuser of it."

The trial judge refused relief on the basis of a "passing off" action. He holds, however, that "the defendants never acquired and do not possess any right to the plaintiff's signature nor any right to claim over that signature, and contrary to the fact, that their gopher poison is manufactured from Mickelson's original formula," grants an injunction as prayed and $10 damages for the infringement of the plaintiff's legal rights to his signature.

The judge has found as a fact that the poison sold by the defendants is not identical with the preparation specified in the original formula prepared by Mickelson, and used by him when acting for the Mickelson Chemical Co. and other companies in the United States, in that the defendants now utilize about 15% of sugar in their preparation, whereas little or no sugar had ever been used by Mickelson.

With all deference, I am of opinion that there is no substantial difference. Mickelson says that in his formula there was no sugar, Shapiro says that there was, and that so far as sugar was concerned it was merely a question of sweetening so that it would be tasty to the gophers. He says that the company sometimes used saccharine instead of sugar when it was cheaper, and that saccharine is about five hundred times sweeter than sugar.

From 1907 to 1913 the Mickelson Kill 'Em Quick Co., whose name was afterwards changed to the Mickelson-Shapiro Co., used as a part of the get-up of the packages in which their gopher poison was sold, the statement, or what for convenience we will call the certificate, previously referred to over the fac-simile signature of Anton Mickelson. During all these years, Mickelson was an officer of the company, was fully aware of and acquiesced in the use of his signature.

In November, 1913, the Mickelson-Shapiro Co. went into the hands of a receiver, one Henry Doerr. As such receiver, Doerr continued the business, changing the form of the certificates on the packages as follows:—

> This package contains the original and genuine Kill-Em-Quick gopher poison, a thoroughly tried and tested exterminator, manufactured by secret process exclusively by us, from the original formula prepared and sold to us by
>
> Anton Mickelson,
> Registered pharmacist and chemist.

In November, 1915, the receiver, under the order of the court sold to Leo Shapiro:—

> As an entirety and as a going concern, all of the property of every character and description, including all franchises, assets, formulae, trade marks, trade names, goodwill, and all tangible assets in my hands and under my control belonging to Mickelson-Shapiro Co., or in which said company is now or has been interested in, and all contracts, rights and privileges and all other property of every kind and description now in my hands or under my control as receiver of and now or at any time belonging to said Mickelson-Shapiro Co.

Leo Shapiro by bill of sale dated December 30, 1915, transferred to the defendants all the Canadian property and rights so acquired by him.

The defendant company thereby acquired the right to use in Canada the formula for making "Mickelson's Kill 'Em Quick gopher poison" and any trade mark which the Mickelson-Shapiro Co. were entitled to use in connection with the sale of gopher poison to identify and distinguish it from the gopher poison sold by anyone else.

The authorities shew that it is not necessary that the goods should be in the market with the mark affixed for any definite time. It is sufficient to entitle a trader to protection for his mark that he has offered goods for sale with the mark so attached, and that it will, when known, indicate his connection with the goods.

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Now the Mickelson-Shapiro Co. used the trade mark with the certificate and signature complained of for at least 5 years, and in an action recently tried in our courts, a perpetual injunction was granted restraining the Mickelson Drug and Chemical Co., with which the plaintiff was prominently connected, from using the words "Mickelson's Kill 'Em Quick gopher poison" in connection with the sale by them of gopher poison.

The certificate complained of, with the slight alteration above alluded to, equally formed a part of the get up, badge or description by which the plaintiff's business and goods are known to be theirs. While it is not necessary to express an opinion on the point, it may well be that if the plaintiff should attempt to sell gopher poison with a similar certificate attached, he would be restrained from so doing.

Apart altogether from this consideration, what authority is there for holding that a private individual not engaged in trade can restrain another from making use of his name, where such use is not calculated to expose him to risk or liability?

In 27 Hals. 744, the law is laid down as follows:—

> The only right the English law recognizes in any name or mark other than a registered trade mark is the right of a person who uses such name or mark to prevent others using the same so as to deceive the public into thinking that the business carried on by such persons and the goods sold by them are his.

DuBoulay v. *DuBoulay* (1869), L.R. 2 P.C. 430, was an action for a declaration that the name DuBoulay assumed by the defendant, belonged to the plaintiffs and their family. Lord Chelmsford said, at p. 441:—

> In this country we do not recognize the absolute right of a person to a particular name, to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action; or he may be restrained from the use of a name by injunction. But the mere assumption of a name which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress.

In *Routh* v. *Webster* (1847), 10 Beav. 561, 50 E.R. 698, the provisional directors of a joint stock company, having without the authority of the plaintiff published a prospectus stating him to be a trustee of the company, were restrained by injunction.

The decision was based on the ground that the plaintiff was exposed to some risk by the unauthorised act of the defendant in using his name.

In *Clark* v. *Freeman*, 11 Beav. 112, the defendant Freeman, a chemist and a druggist, advertised certain pills as "Sir J. Clark's Consumption Pills." One advertisement published in the public papers by him was as follows: "By Her Majesty, the Queen's permission, Sir James Clark's consumption pills."

Sir Edward Clark, who was a very eminent physician practising in London, applied for an injunction to restrain the defendant from selling or exposing for sale or procuring to be sold any pills or other medicines described as or purporting to be those of the plaintiff, and from publishing or circulating advertisements so contrived or expressed as to represent that any medicine sold by the defendant was so sold by him as the agent or on behalf of the plaintiff. The evidence shewed that no person of the name of Sir J. Clark was in practice in England or known in England as a medical man.

Lord Langdale, M.R., refused to grant an injunction. At p. 119, he says:—

> If Sir James Clark had been in the habit of manufacturing and selling pills it would be very like the other cases in which the court has interfered for the protection of property. . . . The case of the defendant is disgraceful; but I think the granting the injunction in this case would imply that the court has jurisdiction to stay the publication of a libel, and I cannot think it has.

The decision in this case has been severely criticized in a number of subsequent cases.

In Kerly on Trade Marks, at p. 538, it is said that:—

> It has always been considered that a narrow view was taken of the facts of this case, as the sale of pills under a well-known doctor's name is eminently calculated to suggest that the pills are prepared according to his directions, and to injure his practice if they do not meet with a favourable reception by purchasers who are or might become his patients.

Lord Cairns, during the argument in *Maxwell* v. *Hogg*, L.R. 2 Ch. 307, at 311, said that it might have been decided in favour of the plaintiff on the ground that he had property in his own name.

During the argument in *Levy* v. *Walker* (1879), 10 Ch. D. 436, Jessel, M.R., put the following question to counsel:—

> Is there any authority shewing that a man has such a property in his name that he can prevent another person from using it where the principle

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of trade mark does not come in, except the dictum in *Maxwell* v. *Hogg*, *supra*, which does not seem to have been well considered. A man can assume what name he pleases.

While in the case of *Re Rivière's Trade Mark*, 26 Ch. D. 48, Lord Selborne, at p. 53, said that *Clark* v. *Freeman* had seldom been cited but to be disapproved—the reason for such disapproval being that a professional man might well be injured in his reputation by having his name associated with a quack medicine.

In *Dickson* v. *Holden* (1869), L.R. 7 Eq. 488, the publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained.

In *Walter* v. *Ashton*, [1902] 2 Ch. 282, a dealer in goods having advertised his goods in a manner which satisfied the court that he intended the public to believe that the proprietors of the "Times" newspaper were either the vendors for whom he acted as manager, or partners, or in some way responsibly connected with the sale of "Times" Cycles, an injunction was granted.

From an examination of the authorities cited on the argument and other authorities, I am of opinion that the law applicable to the case now under consideration is correctly stated by Byrne, J., at p. 290, where he says:—

> Now, as I have said, this not being a case as between rival traders . . . it is not enough to shew a probability of deception of the public for the purpose of this interlocutory injunction, or to shew that persons may be deceived into thinking that these cycles are the manufacture or the property of the "Times" newspaper; that alone would not be sufficient for the present purpose. I think you must shew some probable risk of injury by what has been done. . . . The principle is clear enough; the court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property and the probable effect of it will be to expose him to risk or liability; then, if I rightly understand the law of this court, an injunction is the proper remedy. . . . So that in considering what kind of liability will justify interference, I think the court will be careful to see that the suggested liability was not something merely visionary or shadowy.

Byrne, J., arrived at the conclusion that there was such a reasonable probability of the "Times" being exposed to litigation, and possibly of being made responsible as to justify the granting of an injunction.

In the case at Bar I am unable to discover that there is the slightest possibility of the plaintiff being exposed to any risk or liability by the use of the signature "Anton Mickelson" on the

packages of gopher poison sold by the defendants, and it appears clear from the authorities that in the absence of some possible injury being occasioned by the use of a name an injunction will not be granted.

I would allow the appeal with costs, and dismiss the action with costs.

Affirmed by an equally divided court.

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Ontario Supreme Court, Appellate Division, Mulock, C. J. Ex., Clute, Riddell, Sutherland and Kelly, JJ. December 18, 1918.

CONTRACTS (§ IV C—350) — SALE OF SECOND-HAND TRUCKS — TO BE "PROPERLY OVERHAULED"—MISREPRESENTATION—PERFORMANCE—ONUS OF PROOF—LIABILITY.

On the sale of two 3½ ton second-hand Sheffield motor trucks the vendor agreed to "properly overhaul trucks and turn them out in A1 shape mechanically." The purchasers knew that they were getting old trucks that had been discarded by a mercantile company, and there was no misrepresentation or fraud. Held, that the contract was not to turn them out as good as new, but in first-class shape mechanically for second-hand trucks, and to succeed in a counterclaim for breach of the contract it must be shewn that the overhauling given them by the plaintiffs was not such as to put them in first-class condition mechanically for second-hand trucks, it was not sufficient to shew that they did not run satisfactorily.

The onus of proving that the supplying of other engines in the trucks, and of goods and services charged for, was in the endeavour to implement their contract to "properly overhaul the trucks and put them in A1 shape mechanically," was on the defendant, and there was no *evidence* to establish this contention.

Statement.

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

This is an appeal by the plaintiffs, with a cross-appeal by the defendants, from the judgment of the County Court of the County of York (Coatsworth, Jun. Co. C.J.) whereby the plaintiffs' claim was dismissed with costs, the defendants' counterclaim for $800 was dismissed without costs (reserving their right to bring a separate action thereon), and their first counterclaim was dismissed with costs except as to $31.43, for which they had judgment with Division Court costs—costs to be set off *pro tanto*.

It is necessary to consider the frame of the action. It was begun by a specially endorsed writ claiming "$490.40 for work

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done for the said defendants"—the particulars seem to be copied from a ledger account; they begin with

Account rendered		$197.64
and then items are added running from 10 cents to $225, amounting in all to		859.00
A total of		$1,038.64

Then appear three credits:

Contra account	$211.07	
Carburetor allowance on trucks	70.00	
Allowance on installing	267.17	
		548.24
Balance		$490.40

An affidavit was filed by the defendants and also a statement of defence and counterclaim—these make no admissions but set out a purchase in April, 1916, by the defendants from the plaintiffs of two "motor-trucks with a loading capacity of 3½ tons" and in a perfect operating condition, non-delivery of one truck till September, a capacity of only 2 instead of 3½ tons, want of perfect operating condition, agreement by the plaintiffs to install new engines in them, and deficiency of power in the new engines, with an allegation that the work charged for by the plaintiffs was really done on their own behalf to implement their contracts. So much for the statement of defence: the counterclaim, repeating the above statements, claimed damages for loss of the use of the said trucks and loss in the endeavour by the defendants to operate them. For this is claimed the sum of $1,433.63, and this is the "first counterclaim" referred to by the learned County Court Judge. It is further alleged in the counterclaim that the defendants had paid the plaintiffs the sum of $800 on account of the purchase-price of the trucks; a claim is made for the return of the $800, and this is the counterclaim dismissed without costs at the trial.

The plaintiffs join issue simply, and on these pleadings the case goes to trial.

The history of the transaction is given by the learned County Court Judge:—

"It appears that they (the trucks) were both second-hand trucks and had been owned by the Canadian Fairbanks-Morse Company, and I believe were old trucks, out of which the best had been taken by the Canadian Fairbanks-Morse Company, because we find they sold them to Brenard & Co., junk-dealers. There is no date given for that sale or how long it occurred before the date of the contract (exhibit 1). The next transaction was the sale by Brenard & Co. to the plaintiffs of the two trucks for $1,250. The next was the sale by the plaintiffs to the defendants of both trucks, for which the plaintiffs asked the defendants, at first, $3,000, but finally reduced the price to $1,898, being $949 each for the two trucks. It is rather difficult to understand a firm of the standing and position of the defendants permitting themselves to believe that they could get good service out of two such motor-trucks, which had been evidently in use for a number of years and discarded by the Canadian Fairbanks-Morse Company and sold by them to a firm of junk-dealers. It is quite possible that occasionally there may be a good second-hand truck for sale in a bankrupt stock or something of that kind, but all circumstances here pointed to the putting of the defendants upon inquiry as to whether or not they were getting any value for their money, which appears to me very doubtful. There was apparently no misrepresentation to the defendants. They brought the trucks knowing them to be old, second-hand trucks, which had been used by the Canadian Fairbanks-Morse Company, and it was quite open to them to ascertain why they had been discarded by that firm; and these circumstances, to my mind, have an important bearing upon the whole case."

The only change I would make in the above statement is to say that it is impossible to believe that the defendants imagined that they were getting anything but old and almost worn-out trucks—and, to do them justice, they do not swear that they did. Mr. Francis Rogers saw the trucks—they were in the possession of the defendants before the purchase; no misrepresentations of any kind are alleged to have been made; the contract of sale was made by and between the parties at arms' length and without fraud or concealment. Then came the agreement in writing which the

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defendants plead, and upon which they rely; the only important parts are as follows:—

"Hall Motors Limited agree to sell and F. Rogers & Co. agree to purchase two only 3½ ton second-hand Sheffield motor-trucks, formerly owned by Canadian Fairbanks-Morse Co., on the following conditions.

"(1) Hall Motors Ltd. to properly overhaul trucks and turn them out in A1 shape mechanically."

It is alleged that the plaintiffs did not "overhaul trucks and turn them out in A1 shape mechanically," and it is mainly for damages for breach of this contract of the plaintiffs that the counterclaim of $1,433.63 is made.

The contract-price for the trucks was $1,898; $300 in cash and a note for $1,598, renewable in part from time to time. But in this price was included $70, the estimated cost of Raphael carburetors, which were to be put in the trucks; it was agreed that this would be waived, and accordingly the defendants would be credited with $70. This is the second item of credit in the plaintiffs' statement.

After one of the trucks had been in use for a short time, it became manifest that the engines were not satisfactory, and an agreement was made that the plaintiffs should "install" other engines in the trucks, at the defendants' cost. The precise terms are differently stated by the parties. The plaintiffs contend that the defendants agreed to pay $225 for each substituted engine and also the cost of installing, and many of the items in the plaintiffs' statement are for the cost so computed.

The defendants assert that they were to pay $250 each for the engines, including installing. Whatever the truth, the parties agreed long before action that the price should be $250 each, including installing. Of course, the claim of the plaintiffs should have been put on that agreement; but, apparently for book-keeping reasons, the account of the defendants was left in its original shape, and $267.17 was entered on the credit side, "allowance on installing." This is the third item of credit in the plaintiffs' claim. The first item of credit is an account of the defendants against the plaintiffs—quite unconnected with the motor-truck transaction. It is admitted, as is the first item, "Account rendered, $179.64," in the plaintiffs' claim.

L. F. Heyd, K.C., for plaintiffs.

George Wilkie, for defendants.

The judgment of the court was read by

RIDDELL, J. (after setting out the facts as above):—It must be obvious that there were only three questions to be tried: (1) the damages, if any, to which the defendants were entitled for breach of the primary contract; (2) the right of the defendants to recover the $800 paid by them on their contract-price; and (3) the items of the plaintiffs' claim (outside of the $179.64) and beyond the $500 admittedly due.

The learned County Court Judge found the first of the above questions in favour of the plaintiffs, and from that finding the defendants appeal.

The second question the learned Judge dealt with in a peculiar way; he has dismissed this part of the counterclaim without costs, but allowed a separate action to be brought. This he should not have done without consent. *Lockie* v. *Township of North Monaghan* (1917), 12 O.W.N. 171; *Tyrrell* v. *Tyrrell* (1918), 43 O.L.R. 272. We endeavoured to have the parties agree that the whole matter should be opened and tried in an action now pending. Such consent was not given. No imputation of misconduct or impropriety is made in respect of either counsel; each, standing on his strict rights, acted as he conceived it to be best in the interest of his clients, which was his plain duty; and we must deal with the case as we find it on the facts and law.

Upon the admitted facts of the case this branch of the counterclaim could not possibly succeed; it is based upon the hypothesis that the sale of the trucks was null and void, to mention which is sufficient to shew its absurdity. The parties were dealing with certain known trucks; these certain trucks were bought and sold, the property passed; and there is no more reason for the contention that the contract was void than for the contention that when a certain known horse is bought the contract of sale is void if he does not come up to a warranty. The learned County Court Judge rightly dismissed this claim, but he should not have reserved leave further to litigate it: *Lockie* v. *Township of North Monaghan*, *supra*.

I cannot understand the course taken in respect of the plain-

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tiffs' claim. The learned County Court Judge has dealt with it as though the plaintiffs succeeded only on their account rendered, $179.64 (which is admitted), and that the defendants had pleaded their admitted account of $211.07 as a set-off, under the Ontario Judicature Act, sec. 126, and has given judgment as directed by sec. 128 for the excess of $211.07 over $179.64, i.e., $31.43. But the account of $211.07 is not pleaded by the defendants as a set-off (a defect which we would readily correct by an amendment of the pleadings); and, what is much more important, the learned trial Judge has entirely ignored the plaintiffs' admitted claim for $500 for the new engines, and also the $70 admittedly allowed to the defendants on the carburetors. (Of course, the plaintiffs could not, without the consent of the defendants, unless there was an agreement to set off, bring the $70 or the contra-account of $211.07 into the action: *Furnival* v. *Saunders* (1866), 26 U.C.Q.B. 119; *Re Jenkins* v. *Miller* (1883), 10 P.R. (Ont.) 95; *Osterhout* v. *Fox* (1907), 14 O.L.R. 599; but there is nothing to prevent the defendants allowing this to be done, and here they do not object.)

With the findings of the trial Judge, the judgment should have been for the plaintiffs, dismissing the defendants' counterclaim and allowing the plaintiffs' claim at $398.57 made up as follows:—

Account rendered admitted.....		$179.64
New engines, including installing.....		500.00
		$679.64
Less		
Contra-account admitted.....	$211.07	
Allowance for carburetors	70.00	
		281.07
Balance		$398.57

This result, however, leaves quite out of account the items contained in the plaintiffs' statement other than the admitted account, $179.64; and these items are now to be considered. These items are admittedly made up of: (1) $225 for each of the two new engines; (2) the installing of the same; and (3) certain other items unconnected with the engines and their installation. The first two classes of items must be disallowed, as admittedly

they were replaced by the fixed sum of $500; but at the same time the third credit item on the plaintiffs' statement, "allowance on installing $267.17," also disappears. There is no dispute that all the items were actually supplied, but the defence is that they were (at least mostly) so supplied in the endeavour on the part of the plaintiffs to implement their contract "to properly overhaul trucks and turn them out in A1 shape mechanically." The onus of proving this is on the defendants, and they admit that some of the items are properly chargeable. I can find no evidence to establish the contention of the defendants. The plaintiffs' counsel has pointed out some 25 items, amounting in all to $111.40, wholly unconnected with the new engines and their installation; we have no evidence the other way; and that sum should be added to the plaintiffs' judgment, making in all $398.57 + 111.40 = $509.97. But the plaintiffs do not claim more than $490.40—*quilibet renuntiare potest juri pro se introducto et invito beneficium non datum*—and they should have judgment for that sum with interest from the date of the writ, with costs here and below. They should, however, not be limited to that sum if it be found that the defendants are entitled to their counterclaim for breach of contract.

The learned trial Judge dismissed the counterclaim from the following considerations:—

"When the defendants found that the trucks were not working and were not in A1 shape mechanically, according to the contract which the plaintiffs made with the defendants, then what was the defendants' duty? Was it not to return the cars to the plaintiffs and tell them that they had not been properly overhauled and turned out in A1 shape mechanically, and therefore the defendants could not accept or use them? This, to my mind, the defendants ought to have done. Instead of that, they spent a great deal of time and took a great deal of trouble trying to fix these old cars up and nurse them along and make them satisfactory, all of which was probably very praiseworthy between two friends; but, when they come into Court for a legal decision, I am bound to find that the defendants had no right to do as they did with the cars and spend so much time upon them, and pay the bill for repairs and be out of service of them in the manner set out; and that, failing to return the cars at once to the plaintiffs, which

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they might have done in pursuance of the contract, they are not entitled to recover the amount of their first counterclaim against the plaintiffs."

It is impossible to support the conclusion arrived at by the reasons given—if the defendants intended to repudiate their purchase and claim that the contract was void, they might well tender back the trucks and demand their money back; but that they did not intend to do, they intended to remain owners of the trucks and to rely upon the contract. Upon the facts of this case they could not do otherwise.

By acting as they did, they did not deprive themselves of the right to sue for damages for breach of the express contract; and, if they have established a breach and consequential damages, they are entitled to judgment on this counterclaim. Even if the case had been, as suggested but hardly argued, that the trucks did not answer the description, the proper course was to sue on the agreement after they had been used by the defendants as their own: *Behn* v. *Burness* (1863), 3 B. & S. 751, 122 E.R. 281; *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44; *Hill* v. *Rice Lewis & Son Limited* (1913), 12 D.L.R. 588, 28 O.L.R. 366, and cases cited.

Nor, as was also suggested, could it be that the learned trial Judge looked upon the trucks as not of value, and, by setting off the items of the plaintiffs' claim which he omitted to dispose of against the expense to which the defendants had been put, he thought he was doing substantial justice. There is no semblance of such an idea in the reasons for judgment: and of course the trial Judge knew that he sat not to give to the parties substantial justice in the abstract but substantial justice according to law: *Gardner* v. *Merker* (1918), 44 D.L.R. 217, 43 O.L.R. 411. In a court of justice every litigant is entitled to every right the law gives him—the Judge may and very often does act as conciliator, he may by consent of both parties act as arbitrator; but, when he acts as Judge, he is bound to administer law; and, if any litigant is not given every right to which he is entitled by law, a wrong is done him. *Misera est servitus ubi jus est vagum aut incertum.* The learned Judge did not affect to arbitrate, but he was giving his view of the legal rights of the parties.

The defendants then, suing for damages, must accept the onus of proving breach and consequential damages.

To understand the full extent of the alleged contracts, the facts of the case must be borne in mind.

This sale was not by description, but of two specific trucks well known to both parties and one already in the defendants' possession; there is no pretence in the evidence that the defendants gave the plaintiffs to understand that they were relying upon the plaintiffs' skill or judgment. There was no implied contract then by the plaintiffs except as to title: Halsbury's Laws of England, vol. 25, paras. 282, 284; and the defendants must rely upon the express contract itself. It is said that the trucks were not 3½ ton trucks, but at the best would carry only 2 tons. But the sale was of the two well-known trucks, which were known in the trade as 3½ ton trucks, a name rather than a description of the load they could carry; and in any case it is plain that the trucks could carry 3½ tons of coal; the trouble was in the motor apparatus. As will be seen, any defect in the Russell engines was not covered by the original contract—they were the subject of a different contract altogether, not sued on in this action: Halsbury, vol. 25, p. 159.

Then as to the express contract of the plaintiffs, it must be borne in mind that the trucks were second-hand, "almost prehistorical," so worn-out that their former owners had sold them for junk; the contract to "turn them out in A1 shape mechanically" does not require the plaintiffs to turn them out as good as new, but in A1 shape, i.e., first-class shape mechanically for second-hand trucks.

It is not sufficient to shew that the trucks did not run satisfactorily—naturally with their history they would not run satisfactorily—it must be shewn that the overhauling given them by the plaintiffs was not such as to put them in A1 shape mechanically for second-hand trucks. I can find no evidence of that kind: the "expert" finds the main if not the only fault in the engines—"it was out of a touring car" (p. 206), "a Russell motor-engine" (p. 204); but the Russell motors were put in on a special contract for these very motors. Then he says that "it was out of alignment," but there is no evidence how this came about, and in any case that had nothing to do with the original contract. The defendants are not suing for damages for breach of implied contract to put the Russell engines in properly, and we are not to pass

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upon that contract in this action—the defendants, no doubt, may, if they are so advised, set it up specifically in another action. Something is said about the clutch by this expert, but it seems that the particular clutch he described was not put in by these plaintiffs: and in any case it had nothing to do with the original contract.

I have read all the evidence, most of it more than once, and I can find nowhere anything to justify a finding of breach of this contract by the plaintiffs and damage resulting therefrom— nor could the able and diligent counsel for the defendants refer us to any such evidence.

I would allow the appeal of the plaintiffs and direct judgment to be entered in their favour for $490.40 and interest from the teste of the writ, with costs here and below, and dismiss the cross-appeal of the defendants, thereby dismissing both branches of the counterclaim with costs here and below.

As I have already said, this will not prevent the defendants, if so advised, setting up in any other action breach by the plaintiffs of an implied contract to install the Russell engines skilfully—although it will operate by way of *res adjudicata* to prevent them setting up the claim for $800 and that for damages based upon the original contract.

Plaintiffs' appeal allowed.; defendants' appeal dismissed.

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DESROSIERS v. THE KING.

Exchequer Court of Canada, Audette, J. February 12, 1919.

PRINCIPAL AND AGENT (§ II B—17)—LIABILITY OF UNDISCLOSED PRINCIPAL—ACTION AGAINST AGENT—"FACTOR OR COMMISSION MERCHANT."

M., without disclosing the fact that he was acting as agent for the Crown, purchased hay from the suppliant and was sued in a provincial court for a balance of the purchase price. At the trial that fact became known to the suppliant, but he nevertheless proceeded with the case and recovered judgment against M. Later the suppliant brought an action in the Exchequer Court to enforce the claim against the Crown.

Held, the suppliant having elected to proceed to judgment against M. could not afterwards sue the Crown.

2. That M., having been retained to make such purchases on a commission basis, was a "factor or commission merchant" and alone liable under arts. 1736, 1738 of the Quebec Civil Code.

Statement.

PETITION of right to recover a balance for goods sold and delivered.

E. F. Surveyer, K.C., and *L. E. Beaulieu*, K.C., for suppliant.

F. J. Laverty, K.C., and *O. Gagnon*, for respondent.

AUDETTE, J.:—This matter comes before the court under the provisions of r. 126, whereby the points of law arising upon the statement in defence are *in limine* submitted for adjudication before trial.

The facts alleged by the pleadings are, for the purposes herein, taken as admitted.

During the months of August, September and October, 1914, the suppliant sold and delivered to one James McDonnell a certain quantity of hay which was partly paid for, leaving, however, a balance due, for the recovery of which the present action is instituted under the circumstances hereinafter mentioned.

McDonnell always acted in his own name, never disclosing whether or not he was acting for any principal. Failing to pay the balance claimed by the suppliant, an action was—prior to the filing of the present petition of right—instituted by Desrosiers against him (McDonnell) in the Superior Court for the District of Montreal for the same claim set out in the present action.

At the opening of the trial of that case in the Superior Court, counsel for the defendant McDonnell informed the court that the hay in question had been intended for the benefit of the Imperial government. Nevertheless Desrosiers elected to pursue his remedy to judgment against McDonnell in the Superior Court. He did not ask to suspend the action and made no claim against the Crown until after judgment had been rendered in his favour in this action before the provincial court.

The question now submitted is whether or not the fact of having pursued his remedy against McDonnell by obtaining judgment against him is now a bar to the present action—accepting as a fact for the purposes herein that McDonnell was, in purchasing and accepting delivery of the hay, acting for an undisclosed principal, a fact which came to Desrosiers' knowledge at the opening of the trial of the case before the Superior Court, and *before judgment was entered against McDonnell.*

Under the laws of the Province of Quebec, as laid down in art. 1716, a mandatory (agent) who acts in his own name is liable to third parties with whom he contracts, without prejudice to the rights of the latter against the mandator (principal) also. There is no corresponding article in the Code Napoleon. At p. 10, vol. 3, of the Report of the Commissioners appointed to codify

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the law of Lower Canada, it is said that the law as laid down in art. 1716

declares useful rules of undoubted authority in our law, which, it may be observed, differs from the Roman Law. Under that system, originally the mandatory was always personally liable, being obliged to contract in his own name. This rigor, however, was afterwards modified by the praetors in dealing with commercial mandatories known as Institores, Exercitores and Prepositi.

Under art. 1727 of the Civil Code, also relied upon by the suppliant, and which really completes art. 1716, the mandator (principal) is bound in favour of third persons for all the acts of his mandatory (agent), except in the case of art. 1728—to which reference will be hereafter made. Now, under this doctrine, the Commissioners for the codification say (vol. 3, p. 12) that this article

announces the general rule of the liability of the mandator and does not materially differ from art. 1998 of the Code Napoleon. Troplong, however, puts the construction upon that article that the mandator is not bound when the contract is in the name of the mandatory, without the name of the other being disclosed, except in certain cases. This is in harmony with the doctrine of the Roman law; but it is directly against the rule declared by Pothier, with *whom the English, Scotch and American law coincides*. The article submitted is based upon Pothier's statement of the rule, and includes all acts of the mandatory whether in his own name or that of the principal.

It would seem conclusive that under the articles just cited that the English common law is introduced upon the general principles of the subject matter in question and that where no solution or precedent can be found upon the question submitted herein which necessarily flows from such general principles, recourse should be had to the English common law, which is rich and exhaustive upon the question under consideration, and to which reference will be hereafter made.

Counsel for the suppliant—it may be said *en passant*—seems to rely with great stress upon the citation to Story, at p. 570 of vol. 13, in de Lorimier's Bibliothèque du Code Civil; but he overlooks that the learned author's reference is not apposite and is absolutely *nihil at rem*, because he relies upon Story on Bailment, which is quite a different doctrine from that of agency. Indeed, from the perusal of a few pages of Story on Bailment, under the head of Mandates, it is immediately realized that the whole of that chapter refers to bailment and not to agency; the doctrine of law corresponding to bailment under the Code is known as that

of deposit, and that of agency as mandate. Moreover, in referring to Story on Agency, we find the very leading case of *Priestly* v. *Fernie* (1863), 3 H. & C. 977, 159 E.R. 820—to which reference will be hereafter made.

Strong, J., in *V. Hudon Cotton Co.* v. *Canada Shipping Co.* (1883), 13 Can. S.C.R. 401, says:—

> Arts. 1716 and 1727 of the Civil Code, which make the principal liable to third persons, even although the agent may have contracted in his own name, and as a principal, thus assimilating the law of Quebec to the English law, must, I think, be considered by an extensive construction as also making third persons so contracting with the agent liable reciprocally to the principal. . . . From the terms of the articles and from the report of the commissioners, it appears to have been intended to make this provision accord with the doctrine of Pothier . . . and the corresponding rule of English commercial law which, as is well known, differs in this respect from the modern French law.

In this case the Supreme Court of Canada has felt bound to accept the English common law in construing art. 1716 and its consequences—that is, in dealing with the rights and liabilities arising thereunder. See also *Bryant* v. *Banque du Peuple*, [1893] A.C. 170.

I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same, I take it that as arts. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrine and which are a sequence from the same, as Strong, J., seems to have found in the case above mentioned.

The English common law is indeed redundant with precedents upon the subject in question. The effect of such doctrine is that the creditor may make his *election* to sue either the principal or the agent at any time before he has obtained judgment against either of them; but he has no such option after he has so sued one of them to judgment. Conclusive evidence of such an election is afforded by an action which has been proceeded with to judgment and execution even without satisfaction, says Evans on Agency, 529.

The leading case upon this point is *Priestly* v. *Fernie*, 3 H. & C. 977, decided in 1863, before the Civil Code, P.Q., was in force.

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In that case it was held that the second action did not lie, even if the judgment was not satisfied.

If this (says Baron Bramwell, who delivered the judgment of the court) were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. By an election to sue was meant an election to sue to judgment. The reason given being that an action against one might be discontinued and fresh proceedings be well taken against the other—*Evans*, 530.

And Bramwell, B., p. 823, in the *Priestly* case (*ubi supra*), adds:—

The very expression that where a contract is so made, the contractee has an election to sue agent or principal, supposes *he can only* sue one of them; that is to say, sue to judgment.

In *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, Lord Cairns says:—

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. . . . But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and *given credit to the agent*, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal when there was no contract, and when it was never the intention of any of the parties that he should do so.

(And in the present case it is alleged in the petition of right that McDonnell was buying on a commission upon the number of tons.) Again, if an action

were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal, while, if the principal were liable to be also sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgment recovered first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts.

There is upon this doctrine a very long catena of decisions to the same effect and purport and I will limit myself to mentioning only the following:—Hals., vol. 1., No. 445, p. 209; 10 Encyclopaedia of the Laws of England, 373, and cases therein cited; Wright, Principal and Agent (1894), 401; *Ethier* v. *Pilon* (1901), 7 Rev. de Jur. 97; *Huard* v. *Banville* (1907), 31 Que. S.C. 27; *Beaudoin* v. *Charruau et al* (1908), 15 Rev. Leg. 213; *Barnard* v.

Duplessis Independent Shoe Co. (1907), 31 Que. S.C. 362; Anson on Contract, 14th ed., 420; Bowstead on Agency, 5th ed., 306, 321; *Morel* v. *Earl of Westmoreland*, [1904] A.C. 11.

In addition to all that has already been said, there is the important allegation, in the first paragraph of the petition, that McDonrell, in purchasing the hay from the suppliant, was acting under a contract whereby he was receiving a commission based upon the number of tons procured. This allegation would certainly make McDonnell, under art. 1736, "a factor or commission merchant," and bring the whole matter within the purview of art. 1738, referred to in art. 1727. If the facts disclosed at the trial of the case before the Superior Court, at Montreal, are as alleged in sub-par. (*d*) of par. 3 of the statement in defence, does not then the case come under art. 1738, and is not the factor alone liable under these circumstances?

I therefore find, under the circumstances of the case, that McDonnell's principal was disclosed to the suppliant before he obtained judgment in time for him to stay his hand, and that the fact of persisting to sue to judgment with such knowledge amounts to a bar and estoppel which denies him a second action against the principal. It is a *fin de non recevoir*.

The suppliant is therefore found not entitled to the relief sought by his petition of right.

Petition dismissed.

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MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

MULCAHY v. EDMONTON, DUNVEGAN & B.C.R. Co.

Alberta Supreme Court, Scott, J. March 19, 1919.

COSTS (§ II—29)—*Trial—Adjournment—Costs of day—What taxable—Witness fees—Disbursements.*]—Appeal from an order of the taxing officer allowing certain costs.

H. L. Hawe, for plaintiff; *H. H. Parlee*, K.C., for defendant.

SCOTT, J.:—By my order of March 3rd instant the trial was adjourned on the application of the plaintiff, and he was ordered to pay the costs of the day including the costs of defendants' witnesses, together with the costs of and incidental to the application to adjourn.

The following items allowed by the taxing officer are objected to:—

1. Preparation for trial, $50; 2. Ten extra witnesses, $100; 3. Counsel fee opposing motion to adjourn, $50; 4. Adjournment of trial, $25; 5. Witness fees as per schedule, $385.

Items 1 and 2 do not form part of the costs of the day. They are part of the costs of the trial and are taxable only after it takes place.

As to item 3 my recollection is that the application to adjourn was made on the morning of the day which had been fixed for the trial. Although opposed by defendants' counsel I then directed the adjournment subject to certain terms. Upon the hearing of the appeal I intimated that the defendant should be allowed only $25 in respect of items 3 and 4, as item 4 which the taxing officer properly allowed included the whole amount to which the defendant was entitled. I now find that the order of March 3 shews that an affidavit on behalf of the defendant was read at the hearing. I, therefore, hold that the defendant should be allowed the costs of preparing that affidavit. As it is not on the files of the court I am unable to ascertain with certainty what amount should be allowed for it, but I think a fee of $10 would be a reasonable amount.

Item 5 is for witness fees for seven witnesses who I assume are employees of the defendant. It is made up as follows:—Railway fare on defendants' railway, $185.60; conduct money paid for loss of time, $56; sleeper going and coming, $34.80; meals on train, $45.60; hotel and meals in Edmonton, $63: total, $385.

The only items shewn to have been actually disbursed by the defendant is $56 for conduct money paid these witnesses for loss of time.

As to the charge for railway transportation, the affidavit of disbursements states that the defendants operating department at the request of its claims department, issued transportation for these witnesses to travel upon its railway, and that the operating department has charged the claims department therefor, and that the latter has paid the operating department therefor.

R. 729 provides that "costs" shall include all the expenses which any party has reasonably and properly paid or become liable to pay for obtaining the attendance of witnesses at the trial.

R. 771 provides that no allowance shall be made for any services attendances or fees except the charges of barristers and solicitors and the fees paid to officers of the court, unless the payment of the amount sought to be taxed is proved by affidavit.

Under these rules the defendant is entitled to tax for witness fees only those amounts which it has actually paid to the witnesses. This has always been the rule, and it does not appear to me to be an unreasonable one. If a suitor procures the attendance of his witnesses without payment it would be unreasonable that he should be entitled to charge against the opposite party the fees which they would have been entitled to had he paid them, and if he carries them to and from the trial in his own vehicle he should not be entitled to recover the fees they would have been entitled to for mileage had they provided their own means of transport. I cannot see how any distinction in that respect should be drawn between an individual suitor and a railway company.

The first and second items objected to are disallowed. The third is reduced from $50 to $10. The fourth will stand as taxed, and the fifth reduced from $385 to $56.

The time for the payment of the costs by the plaintiff prescribed by my order of March 3 is extended to 5 days after the time for appealing from this order has expired, and if an appeal

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is taken therefrom then for 5 days from the time the appeal is disposed of.

The plaintiff will have the costs of the appeal, which I fix at $20, and any further costs of taxation which may be occasioned by this appeal and will be entitled to deduct these costs from the amount of the defendants' bill of costs.

Judgment accordingly.

GUNN v. JOHNSON.

Alberta Supreme Court, Stuart, J. March 7, 1919.

MORTGAGE (§ VI G—121)—*Judicial sale—Right of plaintiff mortgagee to purchase—Master's order—Appeal—Practice.*]—Appeal by plaintiff from the master's order refusing her the right to purchase the mortgaged property at the price of $12,500. Affirmed.

C. F. Adams, for plaintiff; *J. B. Barron*, for defendant.

STUART, J.:—It appears that it was agreed between the parties that it would be useless to go to the expense of a sale by auction as the property would not realize the amount standing against it.

The practice in both the master's offices has for some time admittedly been in such a case to allow the plaintiff mortgagee, if he so desires, to purchase the property at a price fixed by the master and to permit execution to issue for the balance.

The propriety of this practice has been questioned by Scott, J., in *Creighton* v. *Dunkley*, [1919] 1 W.W.R. 547, at 552. In the present instance neither party has raised any question as to the propriety of the practice, but it seems to me that the decision of the present appeal must rest upon a consideration of the true basis of this practice if it is proper at all, and of the principles which should be followed in applying it.

The defendant company is the present registered owner and the defendant Johnson is the original mortgagor.

It seems to me that the first thing to be observed is that the enquiry must necessarily proceed upon the hypothesis that a sale has been ordered and that it has proved abortive. This is contrary to the fact, but it is common ground, as I have said, that a sale even if directed would, upon the ordinary condition as to a reserved bid, prove abortive, and that it would be a useless formality resulting only in the addition of costs.

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I will assume, therefore, that there has been an abortive sale. What is the proper practice for the court to adopt in such a case?

It is, I think, unfortunate that we have no rules of court which would furnish a guide and create a settled uniform practice. Such rules exist both in Ontario and in England, although in the latter the rules do not seem to carry the matter much further than the point where our rules now leave it. The Ontario r. 438 permits a sale either by public auction, private contract, or tender or part by one mode and part by another as the master may think best.

It appears from English marginal rules 680 (a) to 682, and the notes thereto in 1919 Annual Practice, that much is made in England of the distinction between a sale "with the approbation of a judge" (*i.e.*, as stated in r. 680 (a) by laying proposals before the judge in chambers for his sanction) and a sale altogether "out of court." In the last method the judge still fixes a reserved bid and the auctioneer's fee and the purchase-money is ordered to be paid into court, but, apparently, this is as far as the court keeps control in a sale "out of court" or, as said in r. 680 (a) "altogether out of court," and the imposition of these conditions does not make the sale one "under the direction of the court." Daniell, Ch. Pr., 8th ed., p. 940. At p. 942 of the work just cited, it is said that "It is in the discretion of the judge to direct whether the sale should be carried out in his chambers or in the district registry," and *Macdonald* v. *Foster* (1877), 6 Ch. D. 193, is cited. A reference to that case shews, however, that what is being considered is a sale "under the direction of the court," and that the actual presence of the judge is not in contemplation although Hall, V-C., did, before directing the sale to take place in his chambers, enquire into the state of business in his chambers. He said: "The convenience of having the sale carried out in the ordinary way in judge's chambers is very great and quite outweighs any advantage to be derived from its taking place in the country. . . That is the general practice, and unless there are any special circumstances which make it desirable to alter the practice in a particular case I shall not order a sale to take place otherwise than in chambers. When it takes place there the judge is accessible from time to time in case points arise with reference to settling the conditions of sale or otherwise; whilst if it is conducted

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in the country, occasional and probably frequent applications to the judge in a far less convenient manner may be necessary in reference to the proceedings. Every consideration of convenience therefore seems to be in favour of the sale taking place in chambers."

Now there is much in those words which suggest that the Vice-Chancellor was referring not merely to the actual bidding, but also to the preliminary preparations. On appeal, he was sustained on the ground that it was in his discretion, but the doubt was cast upon his view as to the general practice, and James, L.J., spoke of it as being more convenient to have the property "sold at Liverpool."

I refer to this case which occurred as late as 1877 for the purpose of suggesting that it was apparently considered quite proper that the actual bidding should be in the judge's chambers. I think everything including the actual "bidding was included in Hall, V-C's remarks, though I doubt if he meant to become himself an auctioneer. In Annual Practice 1919, p. 891, a sale by private contract after an abortive sale by auction is spoken of as quite in order.

There seems to me to be no doubt that the whole question of the manner of conducting a sale is within the discretion of the judge or master. English marginal rule 682 says that the property "shall be sold with the approbation of the judge to whom the cause or matter is assigned to the best purchaser that can be got for the same, to be allowed by the judge."

I refer to the English rules not as now binding upon us but as shewing what is considered proper practice. In my opinion, it is quite open to the master to do that which the Ontario rule above quoted permits, that is to sell either by auction, by tender or by private sale or partly in one mode or partly in another. But undoubtedly he must do his very best to see that the property is sold to "the best purchaser that can be got for the same." It is noticeable that the English rule says, not the best *price* but "the best *purchaser*," because, particularly if time is allowed, the personal responsibility of a proposed purchaser is to be considered. This, however, all merely brings us to the exact point whether or not it is in any case proper to allow a plaintiff mortgagee to make an offer to buy the property at a certain price and to sell the property

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to him at that price. It is not the same question as the question whether a plaintiff should be allowed to bid at an auction sale. He is allowed to do so sometimes, but never if he has the conduct of the sale. But certainly he is in certain cases allowed to become a purchaser in the sale proceedings. Ontario rule 442 says:—"All parties may bid except the party having the conduct of the sale." And Daniell's Chancery Practice, 8th ed., says, p. 942:—

> Where all parties to the action have liberty to bid a solicitor not concerned for any of them, to be mutually agreed upon, or, if they cannot agree, to be nominated by the judge, will be appointed to conduct the sale.

Therefore, it is not considered improper in itself for a plaintiff to become a purchaser. If he wishes to do so he must merely have nothing to do with conducting the sale.

It seems to me, therefore, that it cannot be considered in itself an improper practice for the judge to allow a plaintiff to become a purchaser no matter in what form the sale goes through, provided proper precautions are taken.

But I am bound to say that I feel the very gravest doubts as to the propriety of permitting the plaintiff to make an offer to buy, after an abortive sale or even when a public sale would obviously be abortive, and to decide the question whether he is to have it or not merely upon a consideration of conflicting affidavits as to value.

Of course, if the defendants and all other parties interested consent to such a course, it then becomes, in substance, a contract between the parties, an adjustment of the business matter by consent, just as if the mortgagor had agreed to give a transfer at a certain figure and had consented to judgment for the balance. If there is consent to abide by the decision of the master as to value and an agreement by the plaintiff to buy and by the defendant to sell at whatever value he fixes then the matter still is in substance an agreement, and the master's order need be only one vesting the title. But where there is no such complete agreement, the matter must take the form of a forcible sale by the court. Obviously a plaintiff cannot be forced to buy and the contention put forward on the argument that he can, even on any terms, is clearly absurd. He can always stand on his right either to a sale by auction or tender or by private contract to a third party subject to the court's approval, or to complete foreclosure. It is only the

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mortgagor who may be overruled in the face of his own opposition. The question is how far and upon what conditions he can be made to submit to a sale of the property by the court to the plaintiff. On the other hand, it cannot be said, I think, that the plaintiff has any *right* to buy at all. The court, in its discretion, and under proper conditions, may *permit* him to buy. The question is should the court permit him to buy in the face of the mortgagor's opposition? The mortgagor or owner is really presented with an alternative. He may consent to a sale to the plaintiff at what the plaintiff is willing to give, in which case the contractual nature of the matter at once appears, or take the alternative consequences, namely, either a sale by auction or tender duly advertised, the costs of which if he wants it he may be required to advance (and indeed is required by the Ontario rules to advance) or to submit to foreclosure.

In the present case the plaintiff mortgagee by appealing is insisting upon his absolute right to buy at the sum of $12,500. One of the affidavits of value places it at $15,000 upon time, and (rather doubtfully) at $12,500 at a cash or forced sale. The other places it at $12,500 even upon easy terms. The master refused to permit the plaintiff to buy it at that price, but made an order permitting him to buy at $16,500, the extra $1,500 being the estimated value of a certain party wall.

For myself, I can see no ground upon which the plaintiff can claim any actual right to buy at $12,500. Possibly her counsel did not intend to make such a claim, but merely to assert that the master ought, in his discretion, to permit him to buy at that price. No doubt, I am not bound by the master's discretion and may, on this appeal, exercise my own. But in doing so, I think I ought to consider seriously the course of practice in the master's office. He tells me that he never permits a plaintiff mortgagee to take the property over, that is, to buy, except at about the highest price suggested in the affidavits of value. I do not myself think he ought to do so in the face of opposition from the defendant where there has been no public opportunity given to outside parties to bid. Even at the highest price, if the defendant objects and is prepared to advance the expense of advertising, I think his wish in the matter should prevail. But, in that case, of course, he will be bound to submit to either a sale at a bid reserved or complete foreclosure.

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I see no reason either why the plaintiff, if he is prepared to put up the expenses of advertising, should not be entitled to a sale by tender with liberty to put one in himself. He, in such case, has no control of the sale, but even then he may be met with a reserved bid. If his tender reaches that, there is surely no reason why he should not be allowed to buy. Indeed, he would thus doubtless reach his desired end in another way.

There are two reasons, however, why I think a sale by order of the master to the plaintiff even at the highest appraised value is open to criticism. The first rests upon the obvious right of an objecting defendant to have every chance given to get the highest price. This is, of course, met if the defendant is given the opportunity to have a sale by tender or auction if he will advance the expense. But if the defendant assents to a sale at about the highest appraised value the matter then, I think, takes the form of contract and ought to be put in that form by record before the master, because I doubt the propriety of giving any such transaction the form of a sale by the court where there has been no public advertising. The defendant should be asked to put, not so much his consent to an order of the master as his assent to a contract between the plaintiff and himself at the price and terms mentioned upon the records in the master's office. Any lingering reluctance to do so on his part would no doubt be overcome by his being presented with the alternatives I have mentioned.

The second reason is that a sale to the plaintiff by order of the master without advertising comes altogether too near the nature of foreclosure and a mere appraisement by the master of the value of what the plaintiff gets. And this is in great danger I think of leading to difficulties if there is execution to be issued for the balance. If all this is done without a virtual contract agreeing thereto by the defendant then it seems to me the way is, if not clearly open, very clearly suggested to the defendant to claim that by the issue of execution the foreclosure is opened, and that if the plaintiff is not able to reconvey the execution must be stayed. The distinction between a sale to the plaintiff without advertisement at an appraised price in the absence of contractual consent thereto by the defendant and perhaps in the face of his mere forced acquiescence, and an ordinary foreclosure is to my mind altogether too narrow and fine a one to justify any assurance

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that the difficulties I suggest may not ultimately arise. The practice has doubtless been rather forced upon the masters by the peculiar provisions of the recent Act forbidding procedure by execution until a sale has been made or foreclosure ordered and permitting execution merely to go for the unrealized balance. What the unrealized balance may be after foreclosure was perhaps a problem, but as intimated in a case I decided just before hearing the present appeal, viz.: *Caughren* v. *Carbon Hill Coal and Coke Co. Ltd.*, I think the result of the final decision in *Mutual Life Assurance Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243, clearly is that, by foreclosure, nothing is realized at all. If the whole debt is not extinguished and paid, then surely none of it can be said to be so. The present practice seems to me to be rather too close to a mere declaration by the court that a certain amount has been realized by a foreclosure. What after all is the substantial difference between the court saying to a plaintiff "we shall let you buy (or take) this property at so much and give you a vesting order and let you issue execution for the balance," and saying "we give you foreclosure and a vesting order and we shall declare that you have got the same amount on account?"

The court may no doubt *permit* and *confirm* a sale by private contract, but the court then does not itself sell. Where the court itself sells, it is itself the vendor, I am bound to say that, without the publication of its intention and a notice of what is to be done, with a resulting opportunity to the public to bid if any one wants to, there are in my mind the most serious reasons on grounds of public policy why the court should not itself sell. The court itself should not make a "*private*" contract, although it may confirm and approve one when it has been made between others. It may be said that the sale is not private when the interested parties are there, but the matter has, I think, a wider aspect than that.

However, I think, even if the general practice be proper, that the master was not in error in refusing to permit the plaintiff to become a purchaser as at a judicial sale for the sum of $12,500, and that the appeal should be dismissed with costs.

Appeal dismissed.

TRUSSED CONCRETE STEEL Co. v. TAYLOR ENGINEERING Co.

Alberta Supreme Court, Walsh, J. April 7, 1919.

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MECHANICS' LIENS (§ IV—27)—*Material for construction of building—Contractor insolvent—Mechanics' Lien Act (Alta.)—Material on adjoining property—Material not used—Affidavit in support.*]—Motion to dispose of the question of law raised as to the plaintiff's right to a mechanic's lien.

WALSH, J.:—The plaintiff claims a lien under s. 5 of the Mechanics' Lien Act upon certain material supplied by it to the defendant, the Taylor Company, to be used in the construction of a building which it was under contract to erect for the defendant, the Imperial Oil Co. Ltd., this material not having been yet put or worked into the building and the price thereof being wholly unpaid to the plaintiff and the contractor, the Taylor Company, having become insolvent. The motion was originally one for an injunction to restrain the defendants from using or in any way disposing of or removing this material until the trial of the action, but by consent it was turned into a motion to dispose of the question of law raised as to the plaintiff's right to the lien which it claims, all those claiming liens under s. 4 having been notified of the motion, and many of them being represented before me on the hearing of it.

S. 5 gives to the plaintiff in terms the lien which it claims, for it provides that "when any material is brought upon any land to be used in connection with such land for any of the purposes enumerated in the last preceding section hereof the same shall be subject to a lien for the unpaid price thereof, in favour of any person supplying the same, until it is put or worked into the building erection or work as part of the same." It is said, however, that this material is subject to the lien created upon it by s. 4 which covers not only the land and the building but "all materials furnished or produced for use in constructing or making such works or improvements so long as the same are about to be in good faith worked into or made part of the said works or improvements," and that the particular lien given by s. 5 must give way to the general lien thus created in favour of all lien-holders. I do not think that this contention is sound. It is quite true that s. 4 gives the general lien contended for, but it is in my opinion subject to any lien or charge to which the material is otherwise subject.

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If, for instance, the material was under mortgage or was the subject of a conditional sale agreement, the right of the general lien-holders certainly could not prevail over that of the mortgagee or vendor. The lien given by s. 5 is a particular one for a limited amount on certain property, and in my judgment it is a charge which is entitled to priority over general liens which arise under s. 4. The lien under s.4 certainly attaches to this material, but only subject to the prior charge created by s. 5.

This material is not upon the land on which the building is being constructed, every foot of which is taken up with the structure itself, but is upon land adjoining it which has been acquired by one of the defendants expressly for the storage of the material intended for use in the building. It is contended that because of this the plaintiff is not within s. 5 which only applies "when any material is brought upon any land to be used in connection with such land." I agree with the opinion of Scott, J., in *Canadian Equipment and Supply Co.* v. *Bell* (1913), 11 D.L.R. 820, at 824, in which he says:—

> Some of the materials delivered for the work and used in the building were not delivered on the lands on which the hotel was erected, the reason being that there was no room thereon for storing them. They were deposited on ground in the immediate vicinity thereof and I am of the opinion that that was, in effect, a delivery upon the land on which the hotel was erected.

I, therefore, do not give effect to this objection.

It is objected further that s. 13 of the Act which makes necessary the filing in the Land Titles Office of an affidavit in support of the lien has not been complied with. I do not think that that section applies to such a lien as this. It deals only with a lien upon a building, erection, mine, works or improvements or land, and is obviously meant for the information and protection of those dealing with land which is subject to a lien.

It is pointed out that the statute provides no means for the enforcement of the lien, which is perfectly true. It is argued from this that the lien is for this reason ineffective. I do not think that that is so. The absence from the statute of some method for realizing this lien may create some difficulty for the plaintiff in that respect, but I do not see how it can have the effect of completely destroying the lien which the statute has so clearly given.

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In my opinion, the plaintiff is entitled to the lien which it claims upon this material.

The defendant Taylor Engineering Co., Ltd., by its defence, admits its liability for the principal sum of $7,646.34 claimed by the plaintiff and that it has been due and payable to the plaintiff since on or about September 28, 1918, but denies liability for the interest which the plaintiff claims on it at the legal rate since that date though alleging no reason why it should not be liable for such interest. The plaintiff is entitled to judgment against this defendant for this sum with interest as claimed.

My understanding is that these were the only two points that I was to deal with. If any question of working out the lien or relating to the costs arises it may be spoken to again.

Judgment accordingly.

REX v. FEATHERSTONE*.

Alberta Supreme Court, Walsh, J. March 14, 1919.

CERTIORARI (§ I A—3)—*Conviction of having cocaine in possession—Reasonable excuse—Dom. Statutes, 1 & 2 Geo. V. c. 17, sec. 3—Certiorari taken away by statute—Examination of depositions.*]—Motion to quash a conviction under the Opium and Drug Act.

G. W. Massie, for the motion; *G. H. Van Allen*, for the Attorney General.

WALSH, J.:—The defendant being convicted of having in his possession, without lawful excuse, a quantity of cocaine and of having in his possession, without lawful or reasonable excuse, a quantity of morphine, moves to quash the convictions. The only ground argued before me in support of the motion was that the evidence disclosed the existence in the defendant of a lawful or reasonable excuse for his possession of these drugs. The prosecutions were under s. 3 of c. 17 of the statutes of Canada, 1 & 2 Geo. V. It is only to one who does the things thereby prohibited "without lawful or reasonable excuse" that the section applies.

Unfortunately, however, for the defendant, s. 12 of the Act provides that "no conviction, judgment or order in respect of an offence against this Act shall be removed by *certiorari* into any

*See *The King v. Vroom*, 45 D.L.R. 494.

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of His Majesty's Courts of record." The right to *certiorari* being thus taken away by statute, I think that I have no right to examine the depositions to ascertain whether or not there was any evidence upon which the magistrate could properly find as he did. This renders me powerless to help the defendant for, of course, it could only be in the depositions that I could find anything upon which to found relief for him.

From what was said in argument, and what was then read to me from the depositions, this strikes me as being a case in which the defendant has been rather harshly treated and so whilst I feel compelled to dismiss his motions I do so without costs.

Motion dismissed.

C. v. C.

Alberta Supreme Court, Walsh, J. March 25, 1919.

DIVORCE AND SEPARATION (§ III E—38)—*Grounds for—Adultery of wife—Evidence—Admissions—Corroboration—Jurisdiction of court.*]—Action for divorce.

H. C. Macdonald and *H. H. Robertson*, K.C., for plaintiff.

Defendant does not appear.

WALSH, J. (oral):—The evidence in this case convinces me that the defendant during her married life and without the connivance or condonation or collusion of the plaintiff committed adultery on more than one occasion and with more than one man.

In an ordinary case the admissions made by her to her sister and to Mr. Sandles would be sufficient upon which to rest such a finding, but a divorce action is not an ordinary action. It is one which peculiarly lends itself to collusion on the part of husband and wife. It is a kind of action in which a wife, separated from her husband, when she has become tired of the marriage tie and when she knows that her husband is anxious to be rid of her might be willing to make some admission of infidelity on her part for the purpose of aiding her husband to free himself in this way, even though the admission were not true. Every divorce action, of course, is of immediate interest only to the parties who are concerned in it, but it is in the public interest that divorces should not be lightly granted, that they should not be granted for insufficient reason or upon insufficient evidence, and the community, therefore, is interested in seeing to it that a divorce is

only granted when the evidence points irresistibly and conclusively to the guilt of the defendant. For these reasons, speaking for myself, I would hesitate very long before granting a divorce either to a man or woman upon nothing but the uncorroborated admission of the defendant in the action. I see no reason, however, why such admissions cannot be made use of for building up and supplementing the other evidence in the case. In this case, the admissions sworn to by Miss Spottiswood and Mr. Sandles fit very exactly into the evidence given by Miss Spottiswood as to the conduct of the defendant while in Moose Jaw. There is no doubt from what she said that the opportunity presented itself to the defendant there upon more than one occasion of having the adulterous intercourse which she afterwards confessed to. There were at least the two visits made by her to the tent occupied by the man with whom she was keeping company, as it were, in Moose Jaw. There were the other drives taken by her with him alone. There was the night trip from which she returned and in respect of which when she returned she stated that she had been out with this man having a good time. These are statements which I see absolutely no reason to discredit. They shew quite clearly that she had the opportunity and apparently the disposition at that time to commit the offence which she afterwards admitted with this man, and for that reason I think that her admissions may very properly be looked at for the purpose of rounding out the evidence of the incidents to which Miss Spottiswood referred. The evidence of her conduct elsewhere, particularly in Edmonton and in Calgary, is not very strong, and would not be sufficient, I think, standing by itself, to justify a conclusion that adultery has been established against her, but when read in the light of her statement to Sandles, I think may be so treated. There are a great many incidents of a doubtful character so far as her conduct is concerned. The incident of the key and the bank account, the telephoning and visiting, the mysterious trips about town, the frequent visits to the Arlington Apartments, and everything of that kind, may, I think, be very properly looked at to lend strength to the truthfulness of the admission which she made to Mr. Sandles, and so my conclusion is from a review of all the evidence that the plaintiff has made out his case

It is said by the Court of Appeal in the case of *Allen* v. *Allen*, [1894] P. 248 at 251-2:—

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It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden* v. *Loveden*, 2 Hagg. Cons. 1 at 2: "If it were otherwise there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights."

My finding of fact is, therefore, as I have indicated. I think, however, that until the jurisdiction of this court to grant a divorce is maintained by the Privy Council it would not be proper for me to direct that judgment be entered for the plaintiff. It has been held by this court that it has the power to grant divorce, but that judgment will soon be under review by the Privy Council which may or may not take the same view. I think so long as any doubt remains it would be improper for me to direct that judgment issue in favour of the plaintiff, because, if eventually the other view should prevail, a great wrong might be done to some person by the granting of the judgment now. I understand the question is to be argued before the Privy Council in the month of May, so that it will not be very long before we have the authority of the judgment of the highest court in the Empire on the point. My direction, therefore, will be that if the jurisdiction of this court to grant a divorce is ultimately established by the judgment of the Privy Council, judgment will go in favour of the plaintiff for the decree as prayed. If on the other hand, the Privy Council should hold that there is no jurisdiction in this court to grant divorce, the action will be dismissed, because in that case I would have no power to grant the judgment.

[The jurisdiction of the court has since been affirmed by the Privy Council. The decision will be published in an early issue of the D.L.R.]

McNAUGHT v. STOKES-STEPHENS OIL Co.

Alberta Supreme Court, Stuart, J. March 24, 1919.

ARBITRATION (§ IV—44)—*Award of arbitrators—Enforcement of under Arbitration Act—Enforcement of as a judgment—Order for.*]—Action upon an award of arbitrators.

A. H. Clarke, K.C., for plaintiff; *A. M. Sinclair*, K.C., for defendant.

STUART, J.:—This is an action upon an award of arbitrators. The matter has been before the courts in various forms for some years past, and various judgments are reported in which the facts

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are explained, so that I need not now rehearse them. The last is the judgment of the Appellate Division (1918), 43 D.L.R. 743.

The present action is to recover the indefinite amount allowed by an award of arbitrators dated July 6, 1916. The plaintiff had attempted to enforce that award by execution in a summary way under the Arbitration Act, but an order of Simmons, J., giving them leave to do so was set aside by an order of the Appellate Division, the reasons for which are to be found in (1918), 43 D.L.R. 7. By that judgment of the Appellate Division, and the order made thereon, the order of Simmons, J., giving the plaintiff leave to enforce the award *as* a judgment, was confirmed. The present action is to enforce the award in that way. All the Appellate Division decided in the judgment of October 17, 1918, was that Simmons, J., was not entitled to remove, by extrinsic evidence, the uncertainty as to amount which was left in the award of the arbitrators. The award is to the following effect:—

1. That it is not now economically practicable to complete the well contracted to be drilled under the said agreement beyond its present estimated depth of 2,400 ft. at the present diameter of 10 inches.

2. That the delay in arriving at a decision as to the course to be adopted for the completion of the well is attributable to the Stokes-Stephens Oil Co. Ltd. and C. W. McMillan.

And we do further award and direct that the contractor is entitled to payment at the contract price for the drilling to an estimated depth of 2,400 ft.

We further award and direct that Stokes-Stephens Oil Co. pay to J. Y. McNaught his costs of the reference to be taxed as between party and party and the costs of this award.

Now, in view of what was said by the Chief Justice in delivering the judgment of the Appellate Division in *Re McNaught and Stokes-Stephens Oil Co.* (1918), 43 D.L.R. 7, and in view of what Fletcher-Moulton, J., there quoted, said in the case there cited, it seems to me, that the award I have just quoted must be treated as having the status of a judgment of the court. The order of Simmons, J., giving leave to enforce the award as a judgment or order still stands undisturbed. It may be that that order, and the order of the Appellate Division confirming it, ought to have been pleaded. But, at any rate, they were put in evidence, I think, without objection, and I can see no reason why it should be improper to notice their existence. The result of doing so is that I have something more before me than an action on an award. I have an action on an award which has been given "the status of a judgment of the court." This seems to me to answer

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one of the contentions put forward by counsel for the defendant that evidence to fix the amount was inadmissible. It might be inadmissible if I had merely an award to deal with, but when that award has the status of a judgment it seems to me the situation is clearly different. We have in effect a declaration by a court that the plaintiff is entitled to be paid "at the contract price for the drilling at an estimated depth of 2,400 feet." I think such a declaration as a judgment of the court can be enforced by an action and that in that action the amount of the contract price and of what credits are to be allowed can be ascertained by evidence. If there is no authority for this it is time one was made. I have seen no authority against it.

With respect to the objection to the word "estimated" I find that the first meaning given for it in the Oxford Dictionary is "assessed or appraised." The use of the word, therefore, is quite definite, in my opinion, and amounts to a fixing of the depth at 2,400 ft.

With respect to the other objection made on behalf of the defendant that the arbitrators went beyond their jurisdiction in deciding that it was not economically practicable to complete the well, it may be, in consequence of what was said by the Chief Justice in delivering the judgment of the Appellate Division upon the substantive motion to set aside the award, which motion was dismissed that it is still open to the defendant to raise this objection. Probably, what was said there should be treated as a reservation of leave to the company, whenever the award was sought to be enforced "with the status of a judgment," to raise this objection as if it were still being made to a mere award. That, I think, is the true position upon this point although, as I have said, I think it is clearly otherwise with respect to the matter of the uncertainty of the amount.

It is contended that the question of whether it was reasonably practicable to complete the well with 8¼ inch casing was left by the agreement to the company's managing director, and that the arbitrators had no right to deal with it. In the first place, I do not see quite clearly that they did. They said that it was not economically practicable to go beyond the then present depth of 2,400 ft. at the present diameter of 10 inches. But even if it amounted upon the facts to the same thing, and I rather imagine, of course, that it did, it seems to me that, in view of all that has

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been said in the various appeals in this matter, the company cannot now further contest the validity of the first award, not only on this ground, but on any ground.

It may be that the general reference of all matters in dispute, whether of law or of fact, to the second arbitration and the award thereon, might better have been pleaded. But they were put in evidence anyway. The decision in the last appeal interpreted the first award as having at least impliedly decided that the contractor had completed the drilling so far as there was any obligation to him to do so. I concurred in that judgment, and am still of that opinion. That interpretation of the first award, now sued upon, means obviously that the court held that the first arbitrators had dealt with the general question of the responsibility for failure to proceed. In view of the decision in *Re Hohenzollern Actien-Gesellschaft and London Contract Co.* (1886), 54 L.T. 596, I think the arbitrators were perfectly correct in dealing with that question. Whether their decision as to the economic impracticability of going further with a ten (10) inch diameter was merely an irrelevant opinion on an immaterial matter, or a definite decision on a point necessary to be decided before arriving at a conclusion on the rights of the parties seems to me to be quite a matter of indifference. If the former, then it may be disregarded. If the latter, then, I think, considering the whole situation, they had a right to decide it and that the company, in view of its whole course of conduct, has now lost all right to object to it.

There will be judgment, therefore, for the plaintiff, for $9,575 with interest at 8% since one month from the date of the award, and for $413.60 the costs of the arbitration with interest at 8% thereon from the date of the certificate or other settlement of the amount. I allow one month from the date of the award as a reasonable time for the defendants to ascertain the exact amount awarded thereby.

The plaintiffs will have the costs of this action. There will be an order for payment out to the plaintiff of the amount in court to be applied upon the judgment. But as there may still be an appeal, this order will not issue for twenty days.

Judgment accordingly.

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McDOUGALL & SECORD v. MERCHANTS BANK OF CANADA.

Alberta Supreme Court, Harvey, C.J. March 11, 1919.

DISCOVERY AND INSPECTION (§ IV—31)—*Mortgagee of chattels on mortgaged lands—Bank manager—Examination of—Practice—Directions.*]—Application by way of directions for the selection by way of substitution for examination for discovery of a local manager of the defendant bank as the officer whose examination may be used in evidence at the trial against the defendants.

C. F. Newall, K.C., for plaintiffs; *S. B. Woods*, K.C., for defendants.

HARVEY, C.J.:—The plaintiffs are the holders of a real estate mortgage against one McDonald, and under the attornment clause in this mortgage have seized certain chattels situate on the mortgaged premises. The defendants are the mortgagees of the chattels and an issue has been directed to determine their relative rights. The amount involved is considerably over $50,000.

Formal pleadings have been delivered and the plaintiffs, in their reply, allege several grounds upon which they claim that the chattel mortgage is bad as against them, one being that it was agreed with McDonald that the chattel mortgage should not be registered, but that a new one should be given before the expiration of 30 days, which should be similarly renewed, which would mean that the mortgage would be kept in good standing by means of renewals rather than by way of registration as was done. Whether this is a good plea as between the present parties is not raised before me, but it is perhaps of some importance for the consideration of the point which is raised.

The chattel mortgage in question, which, I understand, was not the first one which was renewed from time to time, is dated June 30, 1915, and it is admitted that the then local manager was superseded by the present local manager during the following month, and that the latter made the affidavit of *bond fides* and caused the mortgage to be registered. It was also admitted that the former local manager is at present local manager at Stettler, in this province, but not in this judicial district.

The plaintiffs desire to examine the latter as the person whose answers may be used against the defendants, who object but offer the present local manager here for this purpose but at the same time offering no objection to the examination of the Stettler manager for the purpose of information.

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R. 234 permits the examination of any party or any present or past employee of a party with knowledge of the facts, and R. 250 provides that if it is the examination of a party it may be used against him, and if it is of an officer of a corporation which is a party it may be used against the corporation if the officer has been selected "to submit to an examination to be so used."

Sub-rule (2) provides that "such selection shall be made by the corporation, or by a judge if the corporation refuses or fails to select any or what the judge considers the proper officer or officers having regard to the questions involved."

This rule came into force in 1914, and, though I was a member of the Commission which framed it, as far as I am aware there is no rule in similar terms in any other jurisdiction.

It has as yet received little judicial consideration, the only decision on the sub-rule, so far as I am aware, being *Lea* v. *City of Medicine Hat* (1917), 35 D.L.R. 109, 11 A.L.R. 380, in which I gave the reasons of the Appellate Division for refusing to allow the opposite party to select the person he then desired as representative of the corporation for the purpose of making admissions binding on it, and *Pelican Oil and Gas Co.* v. *Northern Alberta, &c.*, [1918] 1 W.W.R. 957, in which Beck, J., gave the reasons of the majority of the court for refusing to set aside the selection of the corporation.

Some of the principles underlying the main rule had previously been considered in *McLean* v. *C.P.R.* (1916), 28 D.L.R. 550, 12 A.L.R. 61, and *Medicine Hat Wheat Co.* v. *Norris* (1916), 29 D.L.R. 379, 10 A.L.R. 21.

It will be useful to consider briefly the history before, and the state of the practice at the time of, the passing of this rule. This was considered by me to some extent in giving the reasons of the court *en banc* in *Nichols* v. *Skedanuk* (1912), 4 D.L.R. 450, 6 D.L.R. 115, 5 A.L.R. 110.

Under the old equity practice as pointed out in Bray on Discovery, p. 81, if a plaintiff wished to obtain discovery from any officer or member of a company who had knowledge of the facts he made such person a party defendant for the purpose of discovery. The answers of a party could, of course, always be used in evidence against him, but Bray says, p. 84, that though

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there was no actual decision, the opinion was that the answers of officers or members of a corporation could not be read against it, and this is stated by Rigby, L.J., in *Welsbach Gaslight Co.* v. *New Sunlight*, [1900] 2 Ch. 1 at 12, to have been the law.

When the Judicature Act was passed it was provided that when a corporation was a party, an officer or member could be examined for discovery, and it is pointed out in the *Welsbach* case that his answers are the answers of the corporation and may be used against it.

But in England the method of examination is by interrogatories formally and carefully framed, the answers to which may likewise be deliberately and carefully prepared.

In *Berkeley* v. *Standard Discount Co.* (1879), 13 Ch.D. 97, Jessel, M.R., says at p. 99:—

> The member is a partner or *quasi* partner in the company. By reason of our technical rule as to corporations if the company is incorporated the partners are not actually named defendants on the record but the members are the real defendants who together make the company which is the defendant, and it is their property which is sought to be affected by the action. Therefore, I can well understand that those persons who, if there had been no corporation, would have been actual defendants and liable to answer so as to give discovery, may if the judge thinks fit, be made to answer . . . The company has as much interest as anybody else in seeing that the proper man should answer because the effect of the answer may be very serious as regards the position of the company. . . . The ordinary practice, I believe, is for the company's solicitor to act for the officer or member who is directed to answer and to prepare the answer for him.

In Ontario the English method of examination by interrogatories was not adopted but in lieu thereof an oral examination was provided, and for discovery by a corporation the examination of an officer only was permitted. At first this examination could not be read against the corporation, and the courts gave a very liberal interpretation to the term officer, but as I pointed out in the *Skedanuk* case, *supra*, at a later stage after the rules had provided for the use of such examination against the corporation it was intimated in *Morrison* v. *G.T.R. Co.* (1902), 5 O.L.R. 38, that the interpretation of "officer" should be restricted. At p. 41 Maclennan, J.A., says:—

> At the time of our decision in *Leitch* v. *G.T.R. Co.* (1890), 13 P.R. (Ont.) 369, the officers of corporations could only be examined before trial for purposes of discovery, and the depositions could not be read against the corporation. I thought and held in that case that the rule applied to every officer of a corporation who might reasonably be supposed to possess knowledge of

the facts, discovery of which was sought. If the depositions could at that time have been read against the corporation, I think I would not have put so wide a construction upon the rule.

Moss, J.A., at p. 43, says:—

The fact that a person holding some position of subordinate rank or grade which some might call an office, happened to be the person whose dealing or conduct had given rise to the action ought not necessarily to subject such person to examination on behalf of the corporation for the purpose of discovery any more than if he was an officer or employee under an individual party to an action.

At the time that decision was given, while portions of the examination of the officer could be read against the corporation, yet in that event the corporation could read as evidence in its own behalf the remainder of the examination of the officer, which privilege did not exist in the case of the examination of a party other than a corporation. However, in the following year, the rule was amended to permit of the examination of not only an officer but a servant of the corporation, but at the same time the provision for reading the examination against the corporation was repealed.

Just prior to the coming into force of our Rules of 1914 our practice was the same as that of Ontario prior to the change I have just mentioned as having been made in 1903.

The Commission framing the present rules had before it the situation presented by the facts and decisions to which I have referred.

R. 234 authorizes the examination of a party or any present or past employee of a party who has knowledge of the matter in issue. This is an immense extension of the right of the opposite party to obtain information, and it applies in all cases without regard to whether the party is a natural or an artificial person.

But when it comes to the use of the information so obtained as evidence, it is necessary to make restrictions and r. 250 authorizes the use in the case of a natural person being a party of his own examination only as admissions against him. In the case of a corporation which itself cannot speak, someone must speak for it, and the rule authorizes the corporation itself to name in the first instance the person whom it wishes to speak for it, and by whose admissions it is willing to be bound. Leave, however, is given to a judge to name a different officer if he considers that a proper one has not been named.

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The right which is given to a corporation to select its own mouthpiece for the purpose of making admissions is one which ought not lightly to be taken away as the consequences may be very serious for it.

No doubt if a corporation were to select an officer whom it would be difficult and expensive to examine when it had an officer who could be conveniently examined and who could give the requisite information it might be proper to set aside its selection.

In England, though that might be the only way in which the information could be obtained, it appears that the court would not interfere with the company's discretion and substitute an officer to whom there could be any reasonable objection; see *Manchester* v. *Slagg*, [1882] W.N. 127. Under our present practice there is no necessity to do this for the purpose of obtaining information, the primary purpose of discovery, and there would, therefore, appear to be little justification for interfering with the corporation's selection when honestly and reasonably made.

Then more regard, too, perhaps, ought to be paid to the corporation's wishes when the examination is a *viva voce* one and the questions depend on the answers to previous ones, than when they are formally submitted to the company which can then have some knowledge and perhaps control over the answers.

In *Pelican Oil* v. *Northern Alberta*, *supra*, our court refused to substitute another officer though it was shewn that the one selected by the corporation was absent and could not be examined for some time, the corporation protesting and raising a suggestion of a conflict of interest between itself and the officer proposed to be substituted.

In the present case the defendants have selected the most available local manager and the one who has had charge of the mortgage upon which the defendants rest their claim since a few days after it was given and who, though, perhaps, having no personal knowledge of any negotiations or undertakings prior thereto, would naturally, in the course of his duties, have familiarized himself with the facts connected therewith.

It appears to me that there is no room for considering that the selection by the defendants has been other than an honest and *bonâ fide* one. There are no affidavits before me, but it is apparent that the defendants may not have the same confidence in the former manager as in the present one. It was the former

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who was responsible for bringing about the circumstances causing this litigation; he has been removed from the important branch of this city to that of a small town in another part of the province, which could hardly be thought to be a promotion. If he had ceased to be in the employ of the defendants there is no doubt he could not be imposed on them, and, of course, if they seriously object they might consider the advisability of dismissing him, so that to order that he be substituted might be doing him a grievous injury. No objection is or could be made to his being examined and all the information in his possession obtained, the only objection being that what he says should not be taken as an admission made by his employers. When it is looked at in that way it seems that only in the most exceptional cases should the court make an order for substitution against the corporation's will.

In the *Welsbach* case, Collins, L.J., said, p. 14:—

> The party who wishes to obtain the information can, if he chooses, subpœna the person who can give it, and if his evidence is relevant it will be admitted at the trial. But as my brother Rigby has pointed out, it is no part of the duty of the plaintiffs to assist the defendants in getting up evidence in support of their case. When once you grasp the fundamental principle, that the answer of the company's officer is the answer of the company and not of the individual the whole thing follows logically.

When, as under our practice, the witness can be examined before trial so that no risk need be taken in calling him as a witness the case is much stronger.

The last remark of Collins, L.J., states the principle that the only person to be selected must be one who can speak for the company. As was said by Jessel, M.R., in the *Berkeley* case, *supra*, as a member he is one of the company and it is to be observed that only officers, who presumably are members, or other members of the company are subject to examination under the English rule. A local manager of a bank may be an officer in one sense but in view of our rule which says officers or persons employed there is room for doubt whether he comes within the term "officer" as used therein. Certainly there seems no reason why he should be necessarily a member or shareholder of the bank. I think it would be no answer to say that the bank itself proposes a local manager for it is putting forward a mouthpiece, and I see no reason why it could not authorize any one to speak for it that it wishes.

Moreover, in offering this local manager it is shewing its good

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faith by offering the person most available and one in whom it has confidence and one most conversant with the facts, unless possibly the other local manager whom it does not feel disposed to accept as its mouthpiece.

I must, therefore, decline to interfere with the defendant's selection. *Judgment accordingly.*

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DUNN v. McINTOSH.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and MacDonald, J. ad hoc. March 20, 1919.

CONTRACTS (§I D—53)—*Agreement to grub and break land —Definiteness—Telegram by wife without husband's knowledge —Telegram to husband in reply which he never saw—No contract between parties.*]—Appeal by plaintiff from the trial judgment in an action for breach of contract. Affirmed.

H. E. Sampson, K.C., for appellant.

A. E. Cairns, for respondent.

The judgment of the court was delivered by

MACDONALD, J.:—The claim herein is that on or about the month of June, 1917, the plaintiff entered into an agreement, partly verbal and partly written, with the defendant, whereby the defendant agreed in the proper season of 1917 to grub and break 50 acres or more of land on the east ½ of section 15-46-19-W2, and to construct a fence on two sides thereof, supplying the material therefor, on terms that the defendant should receive as his remuneration the use during 1918 of the land so broken, together with the use for pasturage of the remainder of said land for 1917 and 1918; that it was further agreed that, should the defendant in 1917 grub and break at least 75 acres, the plaintiff would supply the material for the said fence; that defendant neglected to perform said agreement, wherefore plaintiff claimed damages. The defence denies all the allegations in the statement of claim.

The plaintiff testifies that in 1916 he had letters from defendant relative to buying or developing said land. In June, 1917, he went to Melfort, and had several interviews with the defendant. Defendant suggested that he should break and grub 50 or 100 acres and fence it in exchange for the first crop. This was satisfactory to plaintiff, provided defendant would contract

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to break at least 50 acres, and the plaintiff might reserve the right to sell the land at any time. No price was fixed for grubbing and breaking the land, in case the land was sold before defendant could take off the crop. Plaintiff also says he agreed to let defendant have the use of the pasture for two seasons. The plaintiff left Melfort without receiving any answer, but asked defendant to wire him on Monday. On Monday plaintiff having received no telegram called the defendant by long distance telephone. Defendant first answered, but in a moment gave place to defendant's wife, who carried on the conversation with plaintiff. She told him they had been busy and had been unable to make arrangements. He asked her to let him know by wire the following day, and, as an inducement, stated that if defendant would break 75 acres plaintiff would pay for the fencing material.

In explanation of the statement of defendant's wife to plaintiff that "they had been unable to make arrangements," I may state that it appears from the evidence of the defendant and his wife that at the interview in Melfort defendant stated it was impossible for him to do the breaking as he was already engaged to work for a Mr. McPhail until freeze-up; that defendant's wife, at plaintiff's request called up a number of people to inquire if they would do the breaking. She, however, did not succeed in getting anyone to undertake the work.

The day following the said telephone conversation, the plaintiff received a telegram. This telegram he tendered in evidence, but its reception was objected to. There was no proof that defendant ever sent a telegram of which the copy of telegram received by plaintiff was a copy. It was therefore inadmissible. *Adamson* v. *Vachon* (1912), 5 S.L.R. 400. The defendant's wife produced what she swore was a copy of the telegram sent, and it reads as follows:—

> Will accept your offer re breaking on east half of 15-46-19, I to break 75 acres if possible, you to furnish material for fence, I to erect same for first crop, if sold before crop harvested I want seven dollars an acre, for breaking and grubbing. Am writing.
>
> MRS. JOHN MCINTOSH
> 2nd Avenue, Melfort, Sask.

To the telegram received by him the plaintiff replied as follows:—

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Moose Jaw, June 13, 1917.

John McIntosh,
Melfort, Sask.
Your telegram received. Seven dollars satisfactory. Rush work.
W. F. DUNN.

This latter telegram was addressed to defendant presumably because the copy received by plaintiff was—according to plaintiff's evidence—signed "John McIntosh." Said interviews and telegrams are said to constitute the contract between the parties.

The defendant's wife testified that at one of the interviews in Melfort plaintiff wanted defendant to undertake the grubbing and breaking, but defendant declined positively to do it because he was already engaged and not free to do it. And in the telephone conversation between plaintiff and defendant's wife she told him, she says, that she was fairly sure of getting 50 acres or thereabouts broken; that plaintiff wanted the land broken anyway and wanted to know if she could look after it and get it done for him. She told him she would do her best and would wire plaintiff; that she told her husband about the telephone conversation which she had with plaintiff, and her husband, the defendant, said he would have nothing to do with it. Next morning she made inquiries and thought she had good prospects of getting the work done. Then she sent the telegram in question, which defendant never saw.

It is clear that defendant knew his wife was sending plaintiff some telegram, but he never saw it, and he might well have thought that it was merely informing plaintiff of the prospects of getting the land broken by other parties. In any event, the evidence does not go far enough to establish that in sending the telegram the wife was acting as the authorized agent of defendant.

With respect to the telegram to plaintiff, the trial judge found as follows:—

> The defendant says he never knew anything about this telegram other than the part his wife informed him, that she intended to telegraph the plaintiff. After hearing the evidence of the parties I am satisfied this evidence is correct.

There is ample evidence to sustain the finding of the learned trial judge, which should not be disturbed. Even if the evidence of defendant and his wife were rejected, there would be

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no proof whatever of any telegram having been sent to plaintiff by defendant. It necessarily follows that there was no contract between the plaintiff and defendant, and the appeal should be dismissed with costs. *Appeal dismissed.*

HABER v. BUTTERY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

MASTER AND SERVANT (§ I C—10)—*Contract for first year's services—No definite contract for second—Termination by employee on month's notice—Wages—Rights of parties—Construction of contract.*]—Appeal from the trial judgment dismissing the plaintiff's action for wages claimed to be due under a contract.

C. W. Hoffman, for appellants.

J. F. Frame, K.C., for respondent.

The judgment of the court was delivered by

ELWOOD, J. A.:—This is an action for wages claimed to be due by the defendant to the plaintiffs.

For the year ending the end of October or November 1, 1916, the plaintiffs had worked for the defendant for $500; of which $20 a month was to be payable for the months of November, December, January, February and March, and the balance in equal portions over the following months; either party to have the right to determine the hiring without notice and without cause. On November 1, 1916, the defendant asked the male plaintiff if he wished to continue for another year, and on November 6 it was arranged that they should continue for another year. They remained until April 1, 1917, when they left after having given a month's notice, and this action is brought for their wages for the part of the year from November 1, 1916 to April 19, 1917.

The defence is that it was an entire contract for a year, and that the plaintiffs having broken the contract are not entitled to any wages. The district court judge before whom the action was tried found for the defendant and dismissed the plaintiffs' action, and from that judgment this appeal is taken.

The district court judge bases his judgment on his finding that, at the time the contract for the second year was entered

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into, it was arranged that the contract could only be cancelled for cause, and he comes to that conclusion from an answer given by the male plaintiff in his examination for discovery. The answer is this:—

> The man must have a reason to quit, he must have reason too to lay me off and if we are not satisfying him then we have a reason to leave him.

And the district court judge concludes from that answer that there must have been some arrangement whereby the plaintiffs could only leave for some reasonable cause.

At the examination of this plaintiff at the trial, referring to the first year's hiring, he gives this answer:—

> I said to Buttery that I would not hire under any other . . . unless leave him any time he can get along that anything happens between us because of dispute or he don't like us or we have a reason to leave him, to part, that is why I said the price of the winter months and the price of the summer months

The plaintiffs are evidently foreigners, and, while the former answer refers to the hiring for the second year and the latter one to the first year, there is very little—if any—difference in the effect of these answers. The undoubted evidence is that the contract for the first year could be terminated at any time without notice and without cause. Both the plaintiffs and the defendant swore positively that there was no conversation about the termination of the contract for the second year, and I am of opinion that the proper conclusion is, that, so far as the second year is concerned, the hiring was exactly the same as the first year; that is, there was nothing said, and the only conversation that they had was as to the amount of the remuneration for the second year, and it was finally determined that it should be the same as for the first year, and under these circumstances all parties had the right to conclude that the terms were in all respects the same as for the first year.

A man named Evenson was called to give evidence for the plaintiffs. He swore that he had two conversations with the defendant, one of which was before and the other after the defendant had been notified that the plaintiffs were going to leave, and Evenson's account of the conversations is that the defendant told him that the plaintiffs could leave when they liked. The defendant denied having any such conversations with Evenson. The district court judge in his judgment stated that he did not

find that Evenson was perjuring himself but that he was going to overlook his evidence, and gave reasons therefor. SASK. C. A.

I do not think that the reasons given by the district court judge are sufficient to cause one to disregard this evidence: particularly as he does not find that Evenson perjured himself. To my mind the conversations took place, or else Evenson perjured himself; and, as the district court judge finds that he did not perjure himself, I think the evidence should be considered. It clearly corroborates the plaintiffs as to their being entitled to leave at any time.

In addition to the claim for wages there was a claim for $10; additional wage while threshing. The sum of $10 was paid during the first year for cooking done by the female plaintiff while threshing. I think the fair inference from the evidence is that this was a gratuity, and that she did not receive it as a matter of right, and I am not satisfied from the evidence that she is entitled to receive this, or any extra sum, for the second year.

In my opinion the appeal should be allowed with costs, and judgment entered for the plaintiffs against the defendant for $132 and costs.

Appeal allowed.

BADGER v. TOROSOFF. K. B.

Saskatchewan King's Bench, MacDonald, J. February 20, 1919.

EXECUTION (§ II—20)—*Judgment debtor—Examination of in aid of execution—Knowledge of debtor as to assets and liability —Order to inform himself—Power of court.*]—Appeal by plaintiff from an order made in an examination in aid of execution. [See *Badger* v. *Torosoff*, 39 D.L.R. 606.]

P. H. Gordon, for appellant.

P. G. Makaroff, for respondent.

MACDONALD, J.:—The defendant herein recovered a judgment against the plaintiff for costs. On August 22, 1918, the defendant obtained an order under r. 501 for an examination of the plaintiff in aid of execution. The examination took place on September 18, 1918, and the transcript of evidence consists of 77 typewritten pages, containing 1,030 questions and answers.

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To a large number of questions put to him, the plaintiff replied that he did not know or that he did not remember, but he did not refuse to answer the questions put, except in a few instances which are not in question here. The solicitor for the defendant obtained from the Clerk of the Court a certificate that on such examination the judgment debtor "failed to give out information relating to his assets and liabilities in reply to the questions put to him," and on January 13, 1919, the defendant made application to the district court judge at Saskatoon, on notice, and supported by the said order of Aug. 22, 1918, the appointment, subpœna, and notice to produce the examination and said certificate for an order that the plaintiff

> do fully and completely acquaint himself with and inform himself as to all matters relating to his assets and liabilities, and do attend at his own expense before the clerk of this honourable court or his deputy and answer all questions relating to the assets and liabilities of the said Russell Badger pursuant to the order of the acting judge in chambers dated the 22nd day of August, 1918, and particularly all questions relating to the following:

Here follow three pages of so-called particulars, the generality of which may be seen by reference to the first heading:—"1. Plaintiff's business dealings and occupation since coming to and taking up his residence in Saskatchewan."

The application also asked for an order that the plaintiff produce any and all books and documents in his possession or power and particularly those under eight specified headings and that the plaintiff pay the costs of the examination and application.

The judge made an order in the terms of the notice of motion, with a few slight additions. From that order this appeal is taken.

R. 503 provides, *inter alia*, that any person liable to be examined under r. 501 shall be subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness on a trial.

This is quite similar to the provision contained in r. 278 respecting examinations for discovery before trial, which provides that any party to an action or issue may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination as a witness.

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In fact r. 501 (3) says the examination under said rule is to be for the purpose of discovery only, and I am of the opinion that the same principles apply to an examination for discovery in aid of execution as to an examination for discovery before trial.

It has been held that where a party is interrogated—by interrogatories under the English practice—as to matters done or omitted to be done by his agents and servants in the course of their employment, he does not sufficiently answer by saying that he does not know and that he has no information on the subject. He is bound to go further and obtain information from such agents or servants of his, or he must shew sufficient reason for not doing so. *Bolckow* v. *Fisher* (1882), 10 Q.B.D. 161, Bray on Discovery (1885), 139. The same rule applies to examinations for discovery, under our practice. *Bondar* v. *Usinovitch* (1918), 11 S.L.R. 64, and cases therein cited.

So, a party being interrogated is bound to disclose anything of which he has knowledge or information at the time the discovery is sought of him. In addition to this, he is bound to seek information from documents and from persons. Bray on Discovery (1884), p. 134.

He must, if necessary, examine documents in his possession or power. All documents which he has a right to inspect, provided he can enforce that right, are in his power. Bray, 135.

As before stated he is bound to use his best efforts *bonâ fide* to get all the information he can from his agent, but there is no obligation on him to apply for information to persons who are not, or have not been his agents, nor to seek information which is equally accessible to both parties, and which is not either in his own possession or knowledge or that of his agents or persons within his control. Bray, p. 142.

In this case, the plaintiff, as before stated, did not refuse to answer the questions put, except in a few immaterial instances. Nor is there any suggestion that the information sought is within the knowledge of any agent, present or past, of the plaintiff, or of any person under his control. And as to documents the plaintiff swears positively that he has none. Some of the questions relate to the formation, capital, shareholders of and numbers of

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shares issued by The Badger Mill and Elevator Co., Ltd., of which the plaintiff at one time was secretary; but plaintiff swears he has no documents containing the information sought, and he is not bound to search the records of the registrar of joint stock companies, which records are equally accessible to defendant. Bray, pp. 135 & 143.

The other information sought relates to matters of which the plaintiff when examined swore he had no knowledge or recollection, and it has not been made to appear that he either has the means of acquiring the knowledge or of refreshing his recollection. In such circumstances I do not see how an order could be made against him.

In *Nelson* v. *Ponsford* (1841), 4 Beav. 41 at 43, 49 E.R. 252, Lord Langdale says:—

> With regard to the rule stated that a man must either admit or deny his own recent facts, it is possible that a defendant with the most delicate conscience, may be unable to do so; and I know of no means, by which a discovery can be obtained from a defendant, as to matters on which he swears he is ignorant. All the court can do is to get from him such an answer as he swears he is able to give; it can do no more than compel him to state the impression on his mind. If his statement can be proved to be untrue, he will be liable to the penalties of perjury.

A plaintiff must be satisfied with what the conscience of the defendant will allow him to swear, for the court can give him no more, and it cannot on the question of insufficiency try whether it is true or not. *Farquharson* v. *Balfour* (1823), Turn. & R. 184 at 204, 37 E.R. 1067. Bray, 129.

In any case, even where the court decides that the party examined has not discharged the duty imposed on him of informing himself on matters within the knowledge of his agents, or persons under his control, or contained in documents which he has a right that he can enforce, to inspect, I am of opinion that the application should not be for an order in the nature of a mandamus to compel him so to inform himself, but for an order that he attend and make sufficient answer to the questions not so answered before, or in the alternative be committed for contempt. This seems to be the correct practice. *Harris* v. *Toronto Electric Light Co.* (1899), 18 P.R. (Ont.) 285, *Brydone-Jack* v. *Vancouver Printing Co.* (1911), 16 B.C.R. 55. Judgment of Irving, J. A., appeared in *Bondar* v. *Usinovitch, supra.* And the notice

of motion should particularize the answers complained of. *Foster* v. *Van Wormer* (1888), 12 P.R. (Ont.) 597. SASK. K. B.

The appeal will be allowed with costs, the order appealed from set aside, and the application below dismissed with costs.

Appeal allowed.

NICHOLAS v. DUMOULIN. C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. March 20, 1919.

PRINCIPAL AND AGENT (§ II A—6)—*Sale of goods—Agent making sale—Agreement as to commission—Understanding of parties—Agent's authority.*]—Appeal from the trial judgment dismissing an action for commission on the sale of a popcorn and peanut wagon. Affirmed.

J. B. Haig, for appellant.

W. H. B. Spotton, for respondents.

HAULTAIN, C. J. S. (dissenting):—This action was brought by the plaintiff for $140; the amount of commission alleged to be due him by the defendants for procuring a purchaser for a Seator's popcorn and peanut wagon, the property of the defendants.

The evidence clearly proves that the plaintiff was asked by the defendants to find a purchaser for the wagon, and that he did find a purchaser in the person of a man called Halliday, who was introduced by him to the defendants and subsequently bought the wagon from them. The defendant McLeod, according to his evidence given at the trial, asked the plaintiff to get a man "to run the wagon," but admits that he wanted to have the wagon either worked or sold. He said that he was anxious to dispose of the wagon or rent it, and often spoke to the plaintiff about disposing of it. He first got into communication with Halliday, the purchaser, through the plaintiff. He did not recollect whether he gave Nicholas the particulars of price, etc., or not, but Nicholas swore that he did. He admitted that he had an idea that Nicholas was in the way of getting a commission for wagons that were sold through him, and knew that he was the agent for the manufacturers of wagons of that description and got a commission on sales made through him. There was no commission agreed upon, and, in fact, commission was not mentioned.

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On cross-examination, McLeod was asked the following question:

> Q. Why did you expect that Nicholas would do the work for nothing? Getting purchasers for nothing?
>
> (He answered): I did not have any reason to expect one way or another. Just as one man would be speaking to another. I asked him if he knew where I could get a man.

The plaintiff, Nicholas, stated in his evidence that after he had told McLeod about Halliday, McLeod asked him to go out and see Halliday about taking the wagon. He also stated that McLeod got the name and address of Halliday from him, and later on informed him that he had talked to Halliday and asked him to get in touch with Halliday and sell him the wagon. He also stated that the defendant Dumoulin had also asked him to get a purchaser. After the plaintiff informed McLeod about Halliday, McLeod, according to plaintiff's evidence, told him what the terms of sale would be. Plaintiff also swore that he saw a number of other men with regard to the wagon and sent them to the defendant's as probable purchasers.

Halliday, the purchaser of the wagon, testified that he made the final agreement for the purchase of the wagon with the defendant Dunn, to whom the plaintiff had sent him, and that he would not have bought the wagon if the plaintiff had not advised and persuaded him to do so.

This evidence clearly establishes the relationship of principal and agent between the parties, and shews that the agent performed the service he was requested to perform. Under these conditions there must be shewn some special circumstance to deprive the agent of his right to compensation for his services. There was no express agreement to pay a commission, but, in my opinion, the facts of the case necessarily imply such an agreement. It is true that the plantiff's ordinary business was that of a peanut vendor, but it was known to the defendants—through McLeod when he employed him—that he was the selling agent of wagons of a similar description, and, for that reason, would naturally come in contact with possible purchasers of the defendant's wagon. Although both Mr. Dumoulin and Mr. Dunn almost indignantly repudiated any idea of payment of a commission, there is nothing in the circumstances of the case

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or the relationship of the parties to rebut the presumption that payment for the services performed by the plaintiff at the defendants' request was intended.

I would therefore allow the appeal with costs, and the judgment appealed from should be set aside and judgment entered for the plaintiff for the amount of his claim and costs.

LAMONT, J. A., concurred with ELWOOD, J. A.

ELWOOD, J. A.:—This is an action brought by the plaintiff to recover from the respondents a commission on the sale of a Seator's popcorn and peanut wagon.

The district court judge before whom the action was tried dismissed the plaintiff's action on the ground that the defendants never agreed to pay a commission and there was nothing in the evidence to warrant him in holding that the defendants knew or should have known that the plaintiff would charge commission.

The plaintiff was first approached in the matter by the defendant McLeod, and the plaintiff's evidence in this connection is as follows:—

Q. Who introduced the purchaser to the defendants? A. Well, I did in this way. McLeod first came to me quite early in the year and asked me to get a renter for the wagon, and asked me if I would not go up myself. Later on I seen Halliday and I told him about the wagon, and after that I seen Mr. McLeod and told him that I had a purchaser for the wagon if they would sell it. McLeod said "sure we want to sell that wagon if we can get a good man, we want to get it out of the garage as it is costing us money there." I did not tell him who the purchaser was as he came to the wagon quite often. Finally, he came to the wagon and said he would like to get that man's name and address. Q. How long after this was the sale made? A. He came back to me soon afterwards and said he had talked to him, and Halliday said he would do nothing until he had seen me, and he said, "Now you get in touch with him and sell him that machine." Q. Was anything said about a commission? A. No.

The plaintiff testifying as to how it was that Halliday came to him stated as follows:—

Q. The first conversation that took place between you and Halliday was when Halliday asked you if you could get him a machine? A. Well, he said he would like to go into that business if I could get him a machine.

It appears from the evidence that the plaintiff is in business as a popcorn and peanut vendor in the city of Moose Jaw, and that he conducts his business in a similar machine to the one

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which was sold to Halliday, and with respect to which the commission in this action is claimed. It also appears that Seators, the manufacturers of these wagons, have allowed to the plaintiff a commission on any of their wagons which he has sold. It does not however appear how many wagons he has sold for Seators, but I apprehend from the evidence not very many. He does not advertise himself as an agent for the sale of these wagons.

McLeod's evidence as to what he knew about the plaintiff getting commission is as follows:—

> Q. Did you know that before that time Nicholas was agent for those wagons? A. I had an idea that he was in a way getting a commission for wagons that were sold. Q. So that you know that he was an agent for those wagons? A. Yes, sir. Q. Why did you expect that Nicholas was doing this work for nothing—getting customers for nothing? A. I did not have any reason to expect one way or another. Just as one man would be in speaking to another I asked him if he knew where I could get a man.

The plaintiff went to no expense in connection with effecting a sale of the wagon, and I think the fair result of the evidence is this, that in the first place McLeod went to him and asked him to try and get some person to rent the wagon; he went to the plaintiff not because the plaintiff was a dealer in these wagons, but because the plaintiff was conducting the same kind of business that would be conducted by a purchaser or tenant of defendant's wagon, and the people who came to the plaintiff to buy his wares might possibly inquire about the business and express some desire to get into a similar business and in this way inquire as to where a similar wagon could be rented. It was in this way that Halliday first came to the plaintiff. Halliday at that time had not any money. He was working for the plaintiff's son at the latter's farm, and the plaintiff apparently wished Halliday to continue working there so long as his son required him, and he also knew that Halliday had no means of purchasing the wagon until he earned more money.

The terms upon which the sale was made were such as would lead one to believe that the defendants at least did not expect to pay a commission. These terms were $25 cash, and $50 a month.

I think, under the evidence, the district court judge was justified in coming to the conclusion that the defendants were justified in assuming that the plaintiff would not make any

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charge for what he was doing, and that he was simply acting gratuitously, and therefore, under these circumstances, he would not be entitled to any commission. I would not disturb the finding of the district court judge and would, therefore, dismiss the appeal with costs. *Appeal dismissed.*

STRONGMAN v. DOW and SASK. WESTERN ELEVATOR Co.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ.A., and MacDonald, J. March 20, 1919.

LIENS (§ II—9)—*Thresher's lien—Right to seize grain—Reasonably sufficient to satisfy claim—Cannot apply surplus on old account—Conversion.*]—Appeal by defendant company from the trial judgment holding that there had been conversion of grain seized under a thresher's lien. Affirmed.

H. J. Schull, for Sask. Elevator Co., appellant.

D. Buckles, for respondent.

LAMONT, J. A.:—The plaintiff, a farmer, in June, 1917, employed the defendant Dow to thresh his crop. The threshing bill amounted to $150, of which the plaintiff paid $80. Not receiving the balance, Dow, on July 5, went to the C.P.R. car at Rush Lake, which was being loaded by the plaintiff with the wheat threshed, and took therefrom 52 bushels. This he took to the elevator of the defendant company where he stored it until July 11, on which day he sold it to the company for $106.08. The cost of taking the wheat to the elevator was $1. This, with the balance of $70, due on the threshing account, made a total of $71 coming to Dow. Dow refused to pay over the balance of purchase-money after satisfying his claim, on the ground that the plaintiff owed him in respect to some other accounts. The plaintiff sued for the conversion of the wheat. Dow did not defend the action. The defence set up by the defendant company was that Dow was entitled to take the wheat purchased by them by virtue of his right to a thresher's lien given by c. 152, R.S.S. and amendments thereof, and that he, having kept the wheat for a period of 5 days as required by the statute, and not having been paid his threshing bill and hauling charges, had sold the wheat to the company. To this defence, the plaintiff in his reply alleged (1) that he was not at the date of the seizure indebted to the defendant for threshing; (2) that within 5 days

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after the wheat was seized he so notified the defendant company.

The district court judge before whom the matter came held that there had been a conversion of wheat to the amount of $35.00, "that being the difference between the value of the grain the defendant Dow was entitled to seize under his thresher's lien and the value of the grain he actually did sieze." From this judgment the defendant company appeals.

The liability of the defendant company depends upon whether or not Dow was entitled to seize under his thresher's lien all the wheat which he actually took away. If not, there was a conversion of the grain improperly taken, and for that grain both the defendants are liable.

In 27 Hals. pp. 889 and 890, I find the following:—

> To constitute conversion there must be a positive and wrongful act, but there need not be any knowledge on the part of the person sued that the goods converted belong to someone else.
>
> A wrongful sale of the goods of another person, if accompanied by delivery of the goods, or documents of title, amounts to conversion, and both the seller and the buyer in such cases are liable to be sued.

In *Crane & Sons* v. *Ormerod*, [1903] 2 K.B. 37, it was held that where goods were taken in execution and sold by the bailiff and it subsequently appeared that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser did not acquire a good title to the goods as against the real owner.

The Act Respecting Threshers' Liens provides that everyone that threshes or causes to be threshed grain for another at a fixed price or rate of remuneration shall for a specified time have a lien upon such grain threshed, and he may, after 24 hours' notice, "take a sufficient quantity of such grain to secure payment of said price or remuneration."

S. 2 provides that the quantity of grain which may be so retained shall be a sufficient quantity computed at the market value thereof, at the nearest market, to pay for the threshing and certain charges fixed by the section for haulage. Sub-s. 2 (*a*) (added by 1916, c. 37, s. 25) reads as follows:—

> 2a. The person taking the necessary estimated quantity of grain may forthwith store it in his own name in any public elevator or at the thresher's risk in any other suitable storing place, and if, at the expiration of five days from the taking, the price or remuneration for the threshing has not been paid, he may sell the grain at a fair market price.

(2) The proceeds of sale shall be applied first in payment of the reasonable cost of transporting the grain to market, and next in payment of the price or remuneration for threshing. The residue, if any, shall be paid forthwith to the owner of the grain or his assigns.

These sections shew that the defendant Dow was authorized to take a sufficient quantity of grain to secure his claim and the costs of haulage. These amounted as I have already pointed out, to $71. The market price of wheat was $2.04. Thirty-five bushels would therefore have secured his entire claim. He took 52 bushels; practically one-half more than was necessary. The defendant company contended that, as s. 2a. made provision for the return to the owner of any sums realized over and above the unpaid threshing and costs of haulage, the statute impliedly authorized the taking of more than enough to secure the claim, but cast upon the thresher the duty of returning any surplus.

In my opinion, this is not the meaning of the section. The section cannot be interpreted as impliedly authorizing something inconsistent with that which it authorizes in express words, and what it authorizes is the taking of enough of grain to secure the claim. This does not mean that a thresher must only take the exact number of bushels and pounds which at the market price 5 days after the taking will satisfy his claim. It would be impossible for him to gauge it as close as that. What the section does mean, in my opinion, is, that he can take such a quantity as will reasonably secure his claim; the quantity which a reasonable man would consider sufficient. The reasonableness of the amount—under the circumstances of each particular case—is the test. The thresher is obliged to know the market price of the grain he takes, and the number of bushels necessary to satisfy his claim. If he does not have at hand the means of ascertaining the exact number of bushels he is taking, he would not be held strictly to the amount, but allowance would be made for his inability to ascertain the proper quantity. He would also be entitled to protect himself against a drop in the market, if the market was fluctuating. *Rudy* v. *Sonmore* (1916), 29 D.L.R. 40, 9 S.L.R. 267.

If the market at the date of the seizure was in a panicky condition he would probably be entitled to a greater margin, but the circumstances, in my opinion, would have to be very extraordinary indeed which would justify a margin of 50%. *Primâ*

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facie, such a margin is unreasonable. Under the circumstances of this particular case, it is so unreasonable as to lend colour to the argument of the plaintiff that the excess was deliberately taken to cover the other claims which the defendant alleged he had against the plaintiff.

The defendant Dow makes no claim that the market was not in a stable condition. The distance from the car from which he took the grain to the elevator, where he weighed it, was only ten paces. He could, therefore, have easily weighed out the amount necessary to cover his claim. But even if that had not been so, any thresher, farmer or grain man could, in my opinion, estimate the amount necessary to secure a claim without taking anything like a margin of 50%. A farmer is not compelled by the Act to permit a thresher to take 50% more grain than is necessary to satisfy the thresher's claim and, in lieu thereof, accept a judgment against a man who may be (as is contended here) of no substance.

The taking of the extra 17 bushels by Dow not being justifiable, there was a conversion of that amount. The appeal should, therefore, be dismissed with costs.

On the argument before us no question was raised as to the jurisdiction of the court to hear this appeal. As I have already reached the conclusion that the appeal should be dismissed upon its merits, it is unnecessary that I pass upon the question of jurisdiction, which I do not wish to do without first hearing counsel.

ELWOOD, J. A., concurred with LAMONT, J. A.

MACDONALD, J.:—In this action the plaintiff sued both defendants for $100 general damages and for $106.08 special damages, for conversion of certain grain. The trial judge gave judgment against both the defendants for $35 and the costs of the action, and against the defendant Dow for $16.75 and costs, on the counterclaim. The Saskatchewan Western Elevator Co. appeals from said judgment against it. The plaintiff does not cross appeal.

I am of opinion that no appeal lies. S. 56 of The District Courts Act (R.S.S. c. 53, as amended 1915, c. 11, s. 2) reads, in part, as follows:—

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In every civil action in the district court where the amount in controversy is over fifty dollars an appeal shall lie:

(*a*) In the case of an interlocutory order, judgment or decision, to a judge of the Supreme Court of Saskatchewan in chambers;

(*b*) In the case of a final order, judgment or decision, to the Supreme Court *en banc*.

This section, in my opinion, is in effect the same as sub-s. (*c*) of s. 46 of the Supreme Court (of Canada) Act, before the addition to said Act of sub-s. 2. It then read as follows:—

46. No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy . . .

(*c*) amounts to the sum or value of two thousand dollars . . .

In *Joyce* v. *Hart* (1877), 1 Can. S.C.R. 321, it was held, Strong, J., dissenting, that, in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment This was the jurisprudence of the court on the point until the Judicial Committee of the Privy Council held in *Allan* v. *Pratt* (1888), 13 App. Cas. 780, that it was the amount in controversy in the appeal as disclosed by the judgment against the proposed appellant in the court below which determined the jurisdiction. The decision in *Allan* v. *Pratt* was followed by the Supreme Court of Canada until sub-s. 2 was added to s. 46 by 54-55 Vict. c. 25, s. 3. See cases collected in Cameron's Supreme Court Practice and Rules, 2nd ed., p. 269 *et seq.*

The amount in controversy here is, therefore, $35.

The costs of the action cannot be added in estimating the amount in controversy. *Labrosse* v. *Langlois* (1908), 41 Can. S.C.R. 43.

This court has, therefore, no jurisdiction to entertain this appeal, and the same should be dismissed. The respondent should have moved to quash the appeal. As he did not do so, nor raise the point at any stage, there should be no costs.

Appeal dismissed.

SASK.

K. B.

ADVANCE RUMELY THRESHER Co. v. COTTON.

Saskatchewan King's Bench, Bigelow, J. March 3, 1919.

SALE (§ I B—13)—*Of goods—Failure to comply with terms—Re-sale—Action for balance due—Foreclosure.*]—Action to recover balance due on machinery sold and for an order for sale or foreclosure of defendant's lands.

R. Hogarth, for plaintiff.

R. Hartney, for defendants.

BIGELOW, J.:—On November 14, 1911, defendants ordered from the M. Rumely Co. a separator and engine, for $4,000. The machinery was delivered to defendants, and notes signed for the amount due. As collateral security, the defendant, Samuel Cotton, mortgaged to the company the north-west quarter of section 12-41-9, west 3rd meridian, for $4,000, on November 16, 1911, and the defendant, John Harold Cotton, mortgaged to the company the south-east quarter of section 12-41-9, west 3rd, for $3,958.24, on April 1, 1913. The company re-possessed the machinery on September 27, 1915, and resold it at auction on November 27, 1915, for $2,000. The expenses of re-possessing and selling were $124.75, and the net proceeds of the sale $1,875.25, which the company credited on the account. This action is brought to recover judgment for the balance, and an order for sale or foreclosure of the lands. All of the interests of the M. Rumely Co. were duly transferred to the plaintiff.

The defendants first claim damages for delay in delivering the machinery. Apparently there was an agreement made on November 3, 1911, which was afterwards substituted by an agreement dated November 14, 1911, which was the agreement put in evidence. On November 14, 1911, defendants signed and sealed this document:—

> I hereby acknowledge to have this day received and accepted all the machinery described in the agreement dated November 14, 1911; that the said agreement has been read over and explained to me fully, and that I have a copy of the same; and I further agree that the said agreement shall be substituted for a certain other agreement made by me with the M. Rumely Co., and dated November 3, 1911.

So the machinery was delivered the same day as the agreement, and I cannot see that the defendants have any possible claim for late delivery.

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Defendants further contend that the company in reselling did not comply with the Act respecting Lien Notes and Conditional Sales of Goods. R.S.S. c. 145, and that therefore the company's action amounts to a rescission of the contract. *Sawyer-Massey* v. *Dagg* (1911), 4 S.L.R. 228; *American Abell Engine Co.* v. *Weidenwilt* (1911), 4 S.L.R. 388; *Northwest Thresher* v. *Bates* (1910), 13 W.L.R. 657; *Harris* v. *Dustin* (1892), 1 Terr. L.R. 404; *Boucher* v. *Lunn* (1911), 18 W.L.R. 624.

The pleading of the defendants alleges that the machinery was not retained for a period of 20 days, and that no notice, or no 8 days' notice was given to the defendants of the sale. The plaintiff answers this contention by saying:—(1) That defendants contracted themselves out of the statute as to the separator, and (2), that the burden is on the defendants of shewing that the plaintiff did not comply with the Act.

There were two contracts; one for $1,500 for the separator, and one for $2,500 for the engine. Under the contract for the separator, the purchaser waives all his rights under the Conditional Sales Act. Plaintiff claims to have appropriated all payments that have been made to the other contract. Whether a vendee can contract himself out of the statute seems to me a nice question. It is not necessary for me to decide that question in view of my opinion on the other question, but I am inclined to the opinion that a vendee can contract himself out of this statute. In 27 Hals. 196, the author says:—

> Persons for whose benefit statutory duties have been imposed may, in the absence of express words in the statute, to the contrary, contract with those on whom such duties are laid not to lay claim to the performance of them.

It seems to me that where it is intended to prevent parties from contracting themselves out of the statute, the legislature has so expressly stated. See the Farm Implements Act, 1917, 2nd sess., c. 56, s. 28; Volunteer and Reservists Act, 1916, c. 7, s. 23 (*a*), as amended by 1917, c. 34, s. 48.

Then the question arises: On whom is the burden of shewing whether the Act was complied with? The facts shew that the machinery was retained for a period of 20 days, but the only evidence of notice is John H. Cotton's, who says he received a

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notice of sale, which is dated November 5th, 1915, for a sale on November 27, 1915. There is no evidence that this notice was served personally 8 days before the sale, or sent in a registered letter 10 days before the sale. Plaintiff relies on the decision of Elwood, J., in *Mount* v. *Holland*, [1917] 1 W.W.R. 1188, at 1189, who says:—

> It was further contended on behalf of the defendant that it was incumbent on the plaintiff to shew affirmatively that all of the conditions of the Act Respecting Lien Notes and Conditional Sales of Goods had been complied with. I am of the opinion that if there had been any failure on the part of the plaintiff to comply with those provisions, it was incumbent upon the defendant to affirmatively plead and prove such failure. There was a general plea of a sale in contravention; no particulars were given, and no attempt made at the trial to prove the particulars in which there had been a contravention.

Against this there is the opinion of Stuart, J., in *Sawyer and Massey* v. *Bouchard* (1910), 13 W.L.R., 394. At p. 400 he says:—

> The defendants contend that the provisions of the Conditional Sales Ordinance as to retention for 20 days and notice to the purchaser applies to the agreement, notwithstanding the provision for a private sale. I think this contention is correct. In my opinion, the effect of the provisions of the ordinance is to force the vendors to treat the agreement as a mortgage and to provide certain procedure analogous to the procedure imposed by the court in mortgage actions, which must be observed by the vendor. In my opinion, also, the burden of proving that these provisions have been complied with lies upon the vendors, the plaintiffs. They are attempting now, after the lapse of eight years, to collect the deficiency and interest thereon. In effect, they are asking for personal judgment for a deficiency arising under a mortgage sale. The onus of proving a proper sale is upon the mortgagee, and should here, I think, be placed upon the vendors. Having failed to shew compliance with the provisions of the ordinance, I think they cannot succeed.

I have a great deal of doubt as to which of these opinions is correct. It does seem hard that a defendant should have to prove a negative, especially when all the information is or should be in the possession of the plaintiff. I am much inclined to the opinion of Stuart, J., but I think I should follow the decision of Elwood, J., of our own courts, until such a point should be settled by the court of appeal.

Then the defendants contended that the sale was false and illusory. The sale was for $2,000. The following year, plaintiff resold the machinery for $2,460 after putting on repairs of $367, netting $2,092. So if defendants were allowed $1,875 at the time of the sale, it would amount to about the same as the

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proceeds of the resale the following year, for if plaintiffs have to account for the $2,092 they would also be entitled to receive interest up to the time they received the $2,092. While I am of the opinion that if a purchaser can prove that the goods were resold unfairly or at an under price he would be allowed their full value, (Jones on Chattel Mortgages, s. 708), still, in this case, I must hold that the sale was *bonâ fide* and at a fair price.

There will be a reference to the local registrar at Battleford, to ascertain the amount due, and plaintiff will have judgment for that amount, and costs of the action.

Plaintiff asks for sale or for foreclosure, at its option. Plaintiff has not yet exercised any option, and I presume that a sale is desired as it is first mentioned. Unless the amount of the judgment is paid within 3 months from the date of the local registrar's certificate, there will be a sale of defendant's interest in the lands, at the Court House at Battleford under the direction of the sheriff of Battleford; plaintiff to have leave to bid. Terms of sale to be 25% cash, and the balance on delivery of transfer within 2 months from date of sale; sale to be advertised for 5 weeks in the newspaper nearest the land, and also to be advertised by posters published in 10 conspicuous places, in each of the following places: Langham, Radisson, Borden, North Battleford and Saskatoon.

Judgment accordingly.

MYKLEBUST v. GALEY.

C. A.

Saskatchewan Court of Appeal, Lamont and Elwood, JJ. A. and MacDonald, J. ad hoc. March 20, 1919.

SALE (§ A III—52)—*Cheque—Warranty—Sickness—Failure of consideration—Breach of warranty.*]—Action to recover the balance of a cheque given as the purchase price of a cow, and for protest fees thereon.

C. Schull, for appellant.

W. A. Beynon, for respondent.

The judgment of the court was delivered by

ELWOOD, J. A.:—This is an action brought to recover the balance of a cheque given by the defendant to the plaintiff as the purchase-price of a cow sold by the plaintiff to the defendant,

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and for protest fees thereon, and, in the alternative, for the purchase-price of the cow sold by the plaintiff to the defendant.

The defendant alleges that at the time of the purchase of the cow there was a warranty given by the plaintiff to the defendant that said cow was in a healthy condition and was a good butter cow, and was in all respects all right; that said cow was, at the time of said sale, sick and was suffering from a fatal disease, from which she died, and that she was worthless. As a counterclaim, the defendant repeats the above allegations, and alleges that he was put to $24.75 veterinary expenses in treating said cow, and $3 for burial fees in connection with the burying of said cow.

The district court judge found, in effect, that the above warranty was given; but held that the sale took place in October, when the defendant's wife had a conversation with the plaintiff with regard to the purchase of said cow, and further held that there was no evidence that the cow was ill when the purchase took place, or when the delivery took place, which was on December 19, and gave judgment for the plaintiff for the amount of the claim and dismissed the defendant's counterclaim.

The statement of claim alleges that the sale took place on December 19, the day before the giving of the cheque, and in his evidence at the trial the plaintiff stated that he sold the cow to the defendant in December, on the same date as the cheque. It is true that the wife of the defendant says that she bought the cow in October, but the action is brought against her husband, who says he bought it in December. He is the person who is being sued, and there was no evidence that she had any authority to make a contract binding her husband. There was no contract that she made that was enforceable against her husband, and the contract, at any rate, is treated by the plaintiff in his pleadings and in his evidence as having been one with the husband on December 19, and I hold that that is the date that the sale was made.

The evidence shews that, from the date that the cow was taken to the defendant's home until it died, it was never well, and, from the condition in which it was at the time it was taken home, I have no hesitation in holding that the cow was not in good health at the time of the sale, and that she was, in fact, worthless.

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That being so, there was a total failure of consideration for the cheque. The defendant was entitled to set up a breach of warranty in diminution of the purchase-price, and there should, therefore, be judgment dismissing the plaintiff's claim with costs. The defendant is, in consequence of the breach of warranty, entitled to the damages which he claims, and, therefore, is entitled to judgment against the plaintiff for $27.75 and costs of counterclaim. The defendant is also entitled to the costs of this appeal. *Judgment for defendant.*

ONT.

S. C.

Re MONKMAN AND CANADIAN ORDER OF CHOSEN FRIENDS.

Ontario Supreme Court, Meredith, C.J.C.P. March 18, 1918.

INSURANCE (§ IV B—172)—*Change of beneficiary—Preferred class—Declaration in writing—Insurance Act, R.S.O. 1914, c. 183, s. 171—Will—Printed form—Personal estate—Inclusion of insurance moneys.*]—Motion by Ellen M. Monkman, widow of John Wesley Monkman, deceased, for an order for payment out of court of a sum paid in by the Canadian Order of Chosen Friends representing an insurance on the life of the deceased.

A. R. Hassard, for the applicant.

J. M. Godfrey, for the mother, father, and a brother of the deceased.

F. W. Harcourt, K.C., Official Guardian, for an infant and for one Orr Monkman.

MEREDITH, C.J.C.P.:—The single question involved in this case is:—whether John Wesley Monkman duly changed the beneficiaries of the insurance money in question: and whether such a change was made or not depends upon the question: whether, in that which he did, he complied with the provisions of the Ontario Insurance Act respecting such a change.

Originally his mother, father, and a brother were the beneficiaries. The writing which the applicant contends effected the change is in the following words:—

"*Form of Will.*

"I, John Wesley Monkman (Name in full) Regimental number 800007, serving in.....of the Canadian Expeditionary Force, do hereby revoke all former Wills by me made and declare this to be my last Will.

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"I bequeath all my real estate unto my wife,

"Ellen Monkman "45 Morse St. "Toronto, Can.	Name and Address of person or persons to whom it is to go.

"absolutely, and my personal estate I bequeath to my wife,

"Ellen Monkman "45 Morse St., "Toronto, Can.	Name and Address of person or persons to receive personal estate*

(see note) .....

"Important Note this 1 day of Aug. A.D. 1916.
"this must be
signed and dated by
The Soldier Himself. (Sgd.) J.W. Monkman Signature of Soldier.

"Signed and acknowledged by the Testator as and for his last Will in the presence of us both present at the same time, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as witnesses.

"Signature of first Witness (Sgd.) G. Heighington Lt.
"The Two "Address of Witness.....134 Overseas Battalion (48 Highlanders) C.E.F.
Witnesses "Occupation of Witness.....Soldier.
Must Sign "Signature of second witness (Sgd.) R. S. Dunlop Lt.
Here." "Address of witness.....134th Overseas Battalion (48th Highlanders) C.E.F.
"Occupation of Witness.....Soldier."

The man's signature—as will be observed—is above the *nota bene* sentence.

But neither that circumstance, nor any question as to the validity or effect of the writing as a will, is material, if otherwise the writing be sufficient to effect the change.

The Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171, sub-sec. (5), provides that:—

"(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

*"N.B. Personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate.

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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."

This sub-section was added to the Act to counteract, it is said, the effect of a ruling of a Divisional Court, giving effect to a somewhat strict interpretation of sub-sec. 3 of sec. 171, in the case of *In re Cochrane* (1908), 16 O.L.R. 328.

The result of all which is:—that, if it appear from the words used by the man in this writing that he desired to change the beneficiaries of these moneys from his mother, father, and brother to his wife, effect must be given to it accordingly.

And there can be no doubt that such was his intention: because the words which he was, and we are, in print, required to note well, say so:—"personal estate includes . . . insurance policy, in fact everything except real estate."

In the concurrence of the words of sub-sec. (5), which I have quoted, and these words in the will, it seems to me to be made very plain that (1) the intention of the man was to give to his widow this insurance money; and that (2) in law, under sub-sec. (5), she takes it.

The case is not like that of *In re Jansen* (1906), 12 O.L.R. 63, in which the will was invalid, and, if it were, it would be necessary to consider whether, having regard to the important change in the law on the subject caused by the introduction of sub-sec. (5) since that case was decided, that case has now any binding effect: see *per* Riddell, J., in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, 28 D.L.R. 424.

The sub-section (5) is not limited to wills—it comprises a declaration in writing in any form—and so it may be that, although contained in what was intended to be a will, it may be good though for some reason the writing may not be valid as a will: for instance, a declaration dealing with an insurance fund independently ought to be good under sub-sec. (5) though in the form of a will which is not duly executed so as to take effect as a will. In such a case there can be no doubt of the intention of the insured, and the Act does not require an expression of that intention in a will—any writing will do—but, when the declaration is dependent on other things provided for in the will, but which cannot be given effect

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because of the invalidity of the will, the declaration should fail, not because of the insufficiency of the writing, but because the insured has failed to give legal expression to his whole intention regarding the insurance; he has left incomplete and insufficient his declaration respecting the money.

I hold that the declaration in question is a sufficient compliance with the provisions of sec. 171 of the Act so as to substitute the widow as sole beneficiary, of the insurance money in question, for the former beneficiaries, the respondents in this motion.

It is not necessary, therefore, that the widow should rely upon the will as a testamentary document to support her claim to the money; but, if she had to take that position, I am not able to agree with Mr. Godfrey that she should fail.

Mr. Godfrey's main points are: that the "*nota bene*" clause is not part of the will because it is below the testator's signature: the Wills Act, R.S.O. 1914, ch. 120, sec. 12 (2)*; and that, without it, the words "personal estate" are not comprehensive enough to embrace the insurance money in question, because, especially, of the interpretation clauses of the Wills Act, sec. 2, in which it is provided that, in that Act, the words "personal estate" "shall include leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real

*(2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, shall be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature shall be operative to give effect to any disposition, or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

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estate, which by law devolves upon the executor or administrator, and any share or interest therein;" words not wide enough to embrace these moneys, which would not devolve on executor or administrator.

I agree that the *nota bene* sentence is not part of the will, but not so much on the ground relied upon by Mr. Godfrey as on the ground that it was not intended to be an integral part of it. It was plainly, I think, only part of the information and instructions regarding a will and its execution, intended to be imparted by those who drafted and those who printed and sold such forms, just as, in other respects, there are the guides, for the benefit of the unlearned in legal knowledge, printed in other parts of the body of the will, instead of being printed, as would be perhaps more usual, in the margin of it.

But it does not follow that because the *nota bene* clause was printed in the form of the will for that purpose only, it is to be ignored altogether. It was printed for a purpose which it performed; and the commonest of common sense requires that it be taken into account; and, if the words "personal estate" are capable of comprising all that is set out in the dictionary or explanatory clause, they should be held to include it. It is erroneous to say that the interpretation clauses of the Wills Act prevent that; for, in the first place, they are not exclusive, they are inclusive only; then they are applicable only to the Act, not to this or any other will; and then, the 30th section* gives them a further inclusive effect so as to embrace any personal estate which the testator has power to appoint in any manner he may think proper: so that, under this section, the will would carry with it, in any case, at the least, all the money in question except the $500 of which the testator's mother was beneficiary; and it must be added that the testator had much more power over and concern in this insurance than a mere power of appointment of the insurance moneys. That was pointed out in the case of *Baeder*, 28 D.L.R. at pp. 427, 428.

30. . . . a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will.

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The contract was his contract; and, as far as he had any power over it, and all that might come from it, it was his personal property.

So there is nothing to prevent the moneys in question passing under this will to the sole devisee and legatee named in it—the testator's widow; there is everything to require it. Nor can I think there would be if the *nota bene* clause should be deemed to have been intended to be part of the will; for, in that case, there is authority for treating it as an interlineation, self-evidently made before the execution of the will and above the attestation clause: see *In the Goods of Kimpton* (1864), 3 Sw. & Tr. 427; *In the Goods of Birt* (1871), L.R. 2 P. & D. 214; *In the Goods of Wilkinson* (1881), 6 P.D. 100. But, treating it as a nuncupative will, under sec. 14 of the Wills Act, the applicant is not aided, because that legislation authorises a disposal of "personal estate" as interpreted by that enactment only.

However—looked at in more than one way—the money in question is now the personal property of the applicant, and should be paid out to her.

The case is not one in which any order as to costs should be made, except that the applicant, having brought the Official Guardian here for precautionary purposes only, should pay his fee upon this motion.

BANK OF OTTAWA v. HAMILTON STOVE AND HEATER Co.

Ontario Supreme Court, Latchford, J. November 22, 1918.

GUARANTY (§ I—1)—*Company—Incorporated by Dominion authority—Guarantee of account of another company with bank—Special clause in charter—Absence of direct authorization of directors—Liability of company.*]—An action upon a guarantee.

Wentworth Greene, for the plaintiffs.

H. A. Burbidge, for the defendants.

LATCHFORD, J.:—This action is upon a guarantee, dated the 22nd March, 1917, made by the defendants to secure advances etc. by the plaintiffs to the Tilden-Gurney Company Limited, a corporation organised to sell the goods manufactured by the defendants.

The defendants were incorporated in 1910 by a charter of the Dominion of Canada. Among the powers conferred were:—

"(b) To manufacture, buy, and sell hardware and kindred goods and articles."

"(i) To enter into . . . any arrangement for . . . union of interests, co-operation, joint adventure, reciprocal concession, or otherwise, with any company carrying on or about to carry on or engage in any business or transaction which this company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company; and to guarantee the contracts of or otherwise assist any such person or others having dealings with the company."

It is to be noted that the powers set forth in this paragraph are identical with those stated in sec. 23 (1) (*d*) of the Ontario Companies Act, R.S.O. 1914, ch. 178, as incidental and ancillary to any powers set out in the letters patent incorporating a company under the Ontario Act.

The Tilden-Gurney Company was incorporated under the laws of the Province of Manitoba. It had the same directors and officers and "approximately the same shareholders," and conducted from Winnipeg a business which the defendants were authorised to engage in. That business was capable of being conducted and was in fact conducted for the benefit of the defendants. It sold throughout the western Provinces the articles manufactured by the defendants in Ontario. The guarantees were given as directly for the benefit of the defendants as for the benefit of their selling agency. By securing and maintaining credit with the plaintiffs for the subordinate company, collections made in the west were forwarded to the defendants, instead of being applied, as the manager of the Tilden-Gurney Company contended they should be, in reduction of the liability to the plaintiffs. To what extent the defendants so profited it is impossible to determine, but that they did so profit is beyond question. In one of his letters to Mr. Carrick, the defendants' president and general manager, Mr. Thompson, the manager of the Tilden-Gurney Company at Winnipeg points out that the company's credit was impaired owing to the fact that in less than two years it had paid the defendants $22,000 in excess of its purchases.

In 1911 the Winnipeg company was indebted to the plaintiffs. The defendants offered a guarantee of the account, but the bank required and was given a mortgage on the Winnipeg warehouse.

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More security was sought in 1914, and the giving of a guarantee for $100,000 was authorised and approved by the defendants' directors and shareholders. The form of this guarantee was not satisfactory to the bank, which submitted to the defendants' general manager a guarantee for the same amount, which was duly executed under the seal of the defendants and the hands of the general manager and secretary.

This document was duly delivered to the plaintiffs, and on the security believed to be afforded by it credit was continued and extended to the Tilden-Gurney Company.

For some reason not disclosed, the bank, on the 22nd March, 1917, prepared and had forwarded to Hamilton for execution the guarantee of that date. When delivered to the bank more than three months later, it was signed only by Mr. Carrick. The bank returned it to the manager of the Tilden-Gurney Company at Winnipeg, on the 4th July, and two days later that gentleman sent it on to Mr. Carrick. On the 9th July Carrick returned it to Winnipeg, signed by Mr. Bews, acting secretary of the Hamilton company, at the same time expressing the hope that it would be found satisfactory.

The satisfaction was manifestly that of the plaintiffs, though Mr. Carrick deposed at the trial that his manager at Winnipeg had no authority to deliver the document.

Before it was delivered, Mr. Carrick had an interview with the plaintiffs' manager at Winnipeg and promised that the Hamilton company "would restore the amount by which the capital of the Tilden-Gurney Company had been impaired." He rescinded his promise on the 20th July, relying on the circumstances that the directors of the Hamilton company had not expressly ratified the guarantee of 1914 in the form in which it was given, and had not at any time formally authorised or approved the guarantee of 1917.

The directors and shareholders had recognised the guarantee of 1914 at the annual general meeting of their company, held on the 22nd April, 1915. It was referred to in the report of their auditor, adopted at that meeting.

But I do not consider that any formal authorisation of the guarantees on the part of the directors or shareholders was necessary.

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The giving of the guarantees was plainly within the powers of the defendants under their charter. The power is express: "to guarantee the contracts of or otherwise assist" any business which the defendants were authorised to carry on, or "any business . . . capable of being conducted so as directly or indirectly to benefit" the defendants.

No help is afforded the defendants by the decisions in *Union Bank of Canada* v. *A. McKillop & Sons Limited* (1913-1915), 11 D.L.R. 449 and 16 D.L.R. 701, 30 O.L.R. 87 and 51 Can. S.C.R. 518, although paragraph (i) of their charter is almost identical with the incidental powers conferred on the McKillop company by R.S.O. 1897, ch. 191, sec. 25 (*e*) and (*f*), now R.S.O. 1914, ch. 178, sec. 23 (1) (*d*). But the company guaranteed in that case had nothing like the same relation to the guarantors as that of the Tilden-Gurney Company to the defendants in this case. Here the Tilden-Gurney Company carried on a business which the defendants were authorised to carry on, and that business was conducted so as directly to benefit the defendants. In fact it was the defendants' business which the Tilden-Gurney Company carried on.

The rule applicable here is stated by Gwynne, J., in *Hovey* v. *Whiting* (1887), 14 Can. S.C.R. 515, at pp. 531, 532: "All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appears by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the Legislature meant that such deed should not be executed; and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden . . . to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with."

Applying this rule to the facts established, and bearing in mind that the directors of the defendant company acted in matters

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incidental to the business of their company through their general manager and secretary or acting secretary, I consider that the defendant company cannot escape liability. An amendment to the writ of summons may be made by the plaintiffs, if so advised, setting up the continuing guarantee of 1914 as an additional basis of their claim.

There will be judgment against the defendants in favour of the plaintiffs for $100,528.42, with interest from the 30th June, 1918, and costs.

Judgment accordingly.

MASON & RISCH Ltd. v. CHRISTNER.

Ontario Supreme Court, Masten, J. December 3, 1918.

SALE (§ III C—70)—*Musical instrument—Agency of vendor for purpose of selection of particular instrument—Revocation by purchaser before appropriation to contract of particular instrument—Subsequent appropriation—Refusal of purchaser to accept—Legally appropriated article not tendered.*]—Action for non-acceptance of goods alleged by the plaintiff company to have been sold by it to the defendant.

J. G. Kerr and *J. A. McNevin*, for the plaintiff company.

R. L. Brackin, for the defendant.

MASTEN, J.:—The relevant clauses of the agreement upon which the action is founded are as follows:—

"Form 5. Agreement No.———

"This contract is subject to the approval of Mason & Risch Limited.

"No salesman or agent is authorised to alter this agreement in any way or to make any promise, verbal or written, other than such as may be contained herein.

"I hereby agree to purchase from Mason & Risch Limited (hereinafter called the 'company')

"One Mason & Risch player piano.....style 70....No..... and combination bench.

"for which I agree to pay.....five hundred.....dollars ($500.00), and in addition to this one upright piano.....by..... Heintzman & Co.....No. 15123.

"with interest at five per cent. per annum on unpaid balances, both before and after maturity, at the office of the said company

at.....as follows: $100.00 cash Sept. 1st, 1918, then $75.00 cash each six months thereafter until paid.....with privilege of paying the whole amount or any portion of the purchase-price .....before maturity of payments.....$10.00 worth of music included.....

"1. Until the whole of said purchase-price and interest is paid, said instrument shall remain the property of the company but shall be at my risk from time of delivery. I agree to insure same, making the loss (if any) payable to the company, and I hereby assign to the company any and all insurance on said instrument which may be taken out by me before the payment to the company of the whole purchase-price.

. . . . . .

"3. In case of default of payment of any of the payments mentioned herein, or any extended payment, or any breach of this contract.....the then unpaid balance of purchase-price.....shall forthwith become due.....".

"7. The company may insert the number of said instrument in the space left above for the purpose.

. . . . . .

"9. This contract is not subject to cancellation and contains the whole agreement between us, and I acknowledge having received a copy of same.

"Dated at Chatham this 29th day of April, 1918.

"Witness.....John Glassford.....

"Signature, Franklin Christner.

"P.O. address, Chatham, Ont."

By letter dated the 14th May, 1918, the plaintiff company accepted the defendant's offer. In the course of this letter it says:—

"We have pleasure in telling you that we went very carefully through a large stock of completed instruments at our factory, and we have selected for you one of the choicest instruments in every way that have ever come through our works. The piano is not only above the high standard which characterises every piano of our manufacture in tone and touch, but the case in this instance is a particularly handsome one . . ."

This letter, taken by itself, would indicate that on the 14th May, 1918, a specific instrument had been set aside and appropri-

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ated, in complete form, ready for delivery, to the fulfilment of this contract. But from the plaintiff's evidence it appears that such is not the case. In the course of the trial, one Winters, an employee at the head office of the plaintiff, was examined and in his depositions says:—

"Q. What did you do about the selection of an instrument, or what did you cause to be done? A. We took it up immediately with the factory and had an instrument selected for Mr. Christner, and as soon as it was finished it was shipped.

"Q. Before it was shipped did you get anything out of the way or out of the ordinary? A. I think we got a telegram from Mr. Christner and a telephone message from Mr. Glassford about it."

It is therefore evident that on the 14th May the piano was not ready for delivery, that something further remained to be done to it in order that it might be completed, and that it was not completed until immediately before shipment, which took place on the 10th June. Meantime, on the 28th May, the defendant had telegraphed the plaintiff as follows:—

"Chatham, Ont., May 28, '18. Mason & Risch, Toronto, Ont. Dear Sir: This is to notify you that I hereby cancel my order for Mason & Risch player piano ordered through your local agent Mr. John Glassford. Franklin Christner."

On the same date, the defendant wrote to the agent of the plaintiff a letter as follows:—

"Mr. John Glassford. Chatham, May 27th.

"Dear Sir: This is to notify you that my order for Mason & Risch piano is hereby cancelled and will not accept it under any conditions.

"Yours truly,

"Franklin Christner."

By his statement of defence (para. 2), the defendant sets up "that he was induced to sign the contract referred to in paragraph 3 of the statement of claim by the representation of the agent of the plaintiff (on the strength of which the defendant signed the said contract and without which he would not have signed the same) that the piano player referred to in the said contract was and would be in all respects exactly the same as the player piano manufactured by Heintzman & Company, which representation the defendant says was and is untrue."

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The defendant further sets up by way of defence (para. 3) that "under the said contract the defendant is to deliver to the plaintiff an upright piano manufactured by Heintzman & Co., which said upright piano the agent of the plaintiff well knew was the property of the defendant's wife. The day following the signing of the said contract by the defendant, the defendant's wife absolutely refused to permit the defendant to deal off her piano in the manner proposed, thereby rendering it impossible for the defendant to carry out said contract, and thereupon the defendant immediately notified the plaintiff cancelling the said contract."

The defendant has, in my opinion, failed to establish the second paragraph of his statement of defence, and I find against him on the issue of misrepresentation.

The allegations of the third paragraph of the defence are established to my satisfaction by the evidence, and I shall hereafter refer to their effect.

The contract is proved and established. It bound the defendant, who had no right to rescind or refuse acceptance.

The plaintiff is therefore entitled to damages for breach, but I am unable to agree with the contention of counsel for the plaintiff respecting the measure of damages.

That claim as put forward is as follows:—

September 1st—Total cash price due.....	$500.00
Interest at 5% from date of contract.....	8.40
Damages for conversion of upright piano.....	350.00
	$858.40

It is therefore a claim for the full purchase-price as in an action for goods bargained and sold.

I observe, in the first place, that the agreement in question is not strictly an agreement of sale, but an agreement of exchange or barter. The essence of a sale is a transfer from the buyer to the seller for a money consideration, called the price, which the buyer pays or agrees to pay; but, if the consideration for the transfer is, wholly or in part, other goods, the total price not being fixed in money, the transaction is an exchange or barter. That being so, the plaintiff can enforce the contract according to its terms only by an action for specific performance.

But here specific performance is wholly impossible, because

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the defendant had no title to the Heintzman piano mentioned in the agreement. The plaintiff could therefore recover damages only.

This, however, does not fully determine the question, because as a rule such damages are estimated in the same way as at common law.

The common law principles governing the rights of the parties in the case of a sale of goods are well settled.

"An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple, whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. Thus, by an agreement to sell a mere *jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer makes default in payment, the seller may sue for the contract price, but where an agreement to buy is broken, usually the seller's only remedy is an action for unliquidated damages:" Halsbury's Laws of England, vol. 25, para. 225.

Unless it is otherwise agreed, the price of the goods is not payable unless and until the property has passed and they have been delivered, where a delivery thereof is part of the consideration for payment, unless delivery has been excused, but the parties may make any bargain they please varying such conditions.

In the present case it was specially agreed that the property in the player piano should not pass to the defendant until the purchase-price was paid in full, and such a provision does not enable the buyer to repudiate the contract, refuse to receive possession of the article sold when duly tendered, or absolve him from payment of the purchase-price: *Tufts* v. *Poness* (1900), 32 O.R. 51.

In that case the Court says (pp. 54, 55):—

"The stipulation in the contract by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff has given up possession to the defendant, so far as he can, take the case out of the general rule which prevents the vendor from recovering the price where he has not parted with the property in the goods."

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But the Court does not discuss or negative in any manner the general rule of law that no action for the price of goods bargained and sold can be maintained unless delivery has been tendered of a specific article which has been legally appropriated to the fulfilment of the contract.

In the case of a contract for the sale of goods to be manufactured, unless it be otherwise specifically agreed, no property can pass, and there can be no appropriation to the contract until the goods have been completed and are in a deliverable state.

In the present case if the manufacturer (the plaintiff) had, in the process of finishing the piano which was selected by it on the 14th May, spoiled it in any way, could he have compelled the defendant to accept the spoiled piano? Would the plaintiff not have been under obligation to complete another piano in a proper manner in fulfilment of the contract?

It is clear that on the 28th May no specific piano had been appropriated to the fulfilment of this contract. I am of opinion that the defendant originally appointed the plaintiff company as his agent and authorised it to select for him out of its stock a piano to fulfill the contract. It is to be noted in this connection that it is specifically provided that the written memorandum of contract "contains the whole agreement between us." The authority to select was therefore no part of the contract. It was outside the written agreement just as much as if the defendant had appointed a third party to select the piano, and such an appointment is revocable.

I think that up to the 28th May the plaintiff company was authorised to select, finish, and ship the piano, but on that date its authority so to do was revoked; it was no longer the agent for the defendant for that purpose; and, if the piano was to be effectively appropriated to fulfilment of the contract, the usual rule must apply, i.e., there must be an appropriation to the contract by the plaintiff, assented to by the defendant.

The result of the authorities in regard to appropriation is summarised in Halsbury's Laws of England, vol. 25, para. 301, as follows:—

"Unless a different intention appears, where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with

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the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. But when the appropriation made by one party is not made by the previous authority of the other, a subsequent assent thereto by the latter party is necessary."

This leads me to the conclusion that the piano which was by the plaintiff company completed after the repudiation, and which the plaintiff company assumed to appropriate to the contract after that date, never became a specific article sold to the defendant and which could be effectively tendered to him; the reason being that the defendant never assented to the plaintiff's appropriation.

As no action for the price is maintainable until tender by the seller and refusal by the buyer of a specific article legally appropriated to the contract, the only remedy of the plaintiff is for breach of an executory contract, and its recovery can only be for the actual damages resulting from breach of the contract. This result agrees with the rule as stated in Benjamin on Sale, 5th ed., p. 805:—

"Where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery—the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer [as a general rule] is for damages for non-acceptance. He can in general only recover the damage that he has sustained, not the full price of the goods."

In Sedgwick on Damages, 9th ed., para. 752, the rule is laid down that where the defendant repudiates the contract before the manufacture is completed, we have to fall back on the general rule that the measure of damages is the net profits of the contract, that is, the difference between the contract price and the cost of manufacture, after making due allowance for the value of materials on hand etc.

This is supported by the judgment of the Pennsylvania Court of Appeal in the case of *Unexcelled Fire-Works Co.* v. *Polites* (1890), 130 Penn. St. 536. In that case the defendant ordered from the

agent of the plaintiff certain fire-works and celebration goods, to be manufactured by the plaintiff and shipped to the defendant, at specified prices. The goods were shipped on the 15th and 16th May respectively, but on the 6th April the defendant wrote to the plaintiff to cancel the orders, as the defendant did not want the goods, and subsequently he refused to accept them. The Court held that: "When an accepted order for goods, to be shipped to the buyer, amounts simply to a bargain and sale of goods not specific, and before they are separated from the bulk and set apart to the vendee, he notifies the vendor not to ship them, such notice is a revocation of the carrier's agency to receive the goods, and a subsequent delivery of them to the carrier will not charge the vendee with their price, his only liability being for damages for refusing to accept them."

But counsel for the plaintiff seeks to avoid this result by suggesting that in the present case the claim arises on a special contract whereby the sum of $100 became due and payable in any event on the 1st September, 1918, irrespective of anything else. Supplementing this, he relies on the 3rd paragraph of the agreement, whereby, on default in payment of any instalment of the purchase-price, the whole of the unpaid balance becomes forthwith due and payable.

I do not think that argument can prevail. The whole basis of the contract is, in my opinion, the delivery by the plaintiff company to the defendant of a piano. It is true that the contract does not name a date when such delivery must be made—but in such case the law implies a delivery within a reasonable time. I find as a fact that in this case the reasonable time which the law implies did elapse at some time prior to the 1st September, and that delivery on the 1st September would have been unreasonable. I hold that it was a condition precedent to the payment of $100 on the 1st September that there should have been a delivery or tender of delivery to the defendant, before that date, of a specific piano legally appropriated to the contract. For the reasons already stated, this had become impossible; the piano which was tendered had not been sold to the defendant, and hence the $100 never became payable.

The contract here under consideration is broadly distinguishable from cases like the shipbuilding cases where the parties have

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clearly agreed that the buyer shall pay instalments of the price during construction.

I therefore hold that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract.

At the trial I invited counsel for the plaintiff company, without prejudice to its contention, to give evidence upon which such damages might be estimated, but he declined so to do, preferring to rest his case strictly upon the pleadings as drawn.

I therefore direct judgment for the plaintiff declaring that the contract has been established, that the defendant has committed a breach of his contract, and referring it to the Master at Chatham to take an account of the loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract.

On confirmation of the Master's report, judgment will be entered in the action for the amount found due by the report without any motion on further directions.

The plaintiff company will recover from the defendant its costs of the action down to and inclusive of the trial, and no costs of the reference will be allowed to either party.

BANK OF MONTREAL v. STAIR.

Ontario Supreme Court, Rose, J. November 18, 1918.

FRAUDULENT CONVEYANCES (§ VI—30)—*Conveyance from husband to wife—Absence of intention to defeat, hinder or delay creditors—Circumstances negativing fraud—Action to set aside conveyance.*]—Action to set aside conveyances of lands from the defendant F. W. Stair to his wife, the other defendant, as fraudulent and void as against the plaintiffs, execution creditors of F. W. Stair.

Wallace Nesbitt, K.C., and *J. A. Worrell*, K.C., for the plaintiffs.

H. J. Scott, K.C., and *T. R. Ferguson*, for the defendant Della M. Stair.

G. W. Mason, for the defendant F. W. Stair.

ROSE, J.:—In the year 1901, the defendant F. W. Stair, who had had experience as the manager of theatres in various cities, heard that there was for sale in Toronto a building

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which might be made suitable for a theatre in which to give performances of burlesque. He and his wife, who had also had theatrical experience, came to Toronto to make investigations, and it was decided to buy the building. Apparently, F. W. Stair was without means, but his wife had some money, and paid the amount which had to be paid in cash, $5,250. The conveyance was taken in the name of F. W. Stair, and he executed a mortgage for $10,250, the balance of the purchase-price, Mrs. Stair joining in it to bar her dower. About a month later, F. W. Stair conveyed the land, subject to the mortgage, to Mrs. Stair, the deed reciting that she had advanced the moneys required to effect the purchase, upon the understanding and agreement that F. W. Stair should forthwith convey the land to her. No very satisfactory explanation as to why the conveyance from the vendors was taken in the name of F. W. Stair is forthcoming.

The theatre was soon opened. F. W. Stair was known as manager, but Mrs. Stair took an active part in the business. At first she sold the tickets and did other work; but, after a time, the work in the box-office was handed over to a paid employee, and Mrs. Stair ceased to perform services in the theatre itself, although it is probably true that she continued to discuss with her husband the affairs of the business and to advise him as to the course to be followed. The bank-account was in the name of F. W. Stair, but Mrs. Stair had a power of attorney from him to sign cheques; and, apparently, each of them drew moneys from the bank at will.

The business was very prosperous. Out of the profits the mortgage was paid off, and the properties in question in this action and other properties, *inter alia*, a dwelling-house, were bought. One of the properties in question is a leasehold interest in a piece of land near the theatre, upon which there was a warehouse. This was acquired in 1905, as an investment. The other is land adjoining the theatre, acquired in 1906, as a site for an extension to the theatre, which extension was built in due course. The conveyances of both of these properties were taken in the name of F. W. Stair, for some reason which does not appear, or for no reason at all, as Mrs. Stair says, except that F. W. Stair was her husband. Mrs. Stair asserts that she often asked her husband for conveyances to herself, and that when she spoke to him he

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always said that he was going away, but would attend to the matter upon his return.

Some differences arose between the two defendants, and they ceased to live together. After the separation, Mrs. Stair consulted Mr. Charles Millar about her rights. She knew that her husband was interesting himself in a new theatrical venture known as the Progressive Circuit, and she feared, as she admits, that he might lose money in that new venture, and that if the lands continued to stand in his name they might fall into the hands of his creditors; but she says that she did not know that he had, in connection with the new business, bought land in Montreal. (The plaintiffs' judgment is upon a mortgage of this Montreal land.)

Mr. Millar sent for F. W. Stair, questioned him, had searches made in the registry office, and demanded conveyances. The deeds in question are the result. Concurrently with them there was executed an agreement by which Mrs. Stair engaged F. W. Stair as manager for five years, at a salary of $5,000 a year, and released him from all liability to account for his past dealings.

It does not seem to me to be necessary to decide whether, as a matter of law, lands acquired and held as these lands were would, in the absence of special agreement, belong to the wife or to the husband or to the two as partners; because I think it is clear upon the evidence that, whatever the law is, both defendants believed Mrs. Stair to be the owner and to be entitled to a conveyance.

If there was no agreement that the husband should be the owner, there would be nothing unnatural in a belief that lands paid for out of the profits of a business conducted in premises bought with the wife's money were the wife's lands; and such a belief would be very natural indeed if, as in this case, one of the pieces of land was acquired and used as a site for an extension to the building originally purchased and promptly conveyed to the wife. I recognise the fact that in a case like this it would probably be unsafe to hold upon the evidence of the parties alone that, natural as such a belief might be, it actually existed: see *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554; but I unhesitatingly accept the evidence of Mr. Millar, and his statement of the circumstances under which the conveyances were made con-

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vinces me that F. W. Stair was telling the truth when he said in the witness-box that, when he had thought about the demand made upon him, he came to the conclusion that he "had not a leg to stand upon," and that he had better make the best bargain possible. I do not believe that he was actuated by any desire to defeat, hinder, or delay the plaintiffs or any other creditor.

It was argued that the conveyances were voluntary, notwithstanding the release of F. W. Stair from liability to account and the engagement of him as manager. It may be that the release did not amount to much; it might well be found that F. W. Stair's drawings from the bank were with the consent of Mrs. Stair, and that there was really a gift to him of the moneys drawn or of her interest in such moneys, and, therefore, that he was under no liability to account; but, however that may be, there does not seem to be any reason for holding that the agreement to employ him was fictitious, and I do not see why it should not be looked upon as consideration for the conveyances. It is true that he did not serve as manager for any time after the agreement was made; but it seems to be true also that Mrs. Stair had perfectly good grounds for dismissing him. For these reasons, I am not prepared to deal with the case upon the footing that there was no consideration for the conveyances: but, upon my finding as to the reason why the conveyances were made, it appears to me that it makes no difference in the result whether there was or was not consideration. It is true that there are in the cases many very broad statements to the effect that if, after deducting the property which is the subject of a voluntary conveyance, the grantor's remaining assets are insufficient for the payment of his debts, it must be presumed that his intent was to defraud his creditors. Such a case is *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538; but, as was said by Meredith, J.A., in *Ottawa Wine Vaults Co.* v. *McGuire* (1912), 8 D.L.R. 229, 27 O.L.R. 319, 324, "rules, based on certain circumstances, as to when a transaction should be, and when it should not be, considered fraudulent, must always give way if they conflict with the very truth regarding the question of intent. In short, the single question in such cases as this always has been, and must always be, whether the transaction impeached was actually made with intent to defeat, hinder, or delay creditors. The means of proving the intent is another thing."

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A case in which the general rule as to inferring the fraudulent intent where the conveyance is voluntary gave way, because it conflicted with the very truth, as disclosed by all the evidence, is *Carr* v. *Corfield* (1890), 20 O.R. 218. The conveyance there attacked was the spontaneous act of the grantor. She thought that she was a trustee of the land, and the conveyance was to the supposed *cestuis que trust*. In fact, there was no valid trust, but the circumstance that the belief existed was held to negative any intent upon her part to defraud her creditors. That case seems to me not to be distinguishable from the present one, and it is quite in accord with other cases. For instance, in *In re Vingoe & Davies, Ex p. Viney & Norton* (1894), 1 Mans. B.C. 416, Vaughan Williams, J., said (p. 419): "If a debtor makes a payment under the belief that he is under a legal obligation to make it, that will prevent the payment being a fraudulent preference; but doing so under a sense of honour or moral obligation alone will not, any more than a mere motive of kindness." That was a case of an attack upon a conveyance as a preference, void under the Bankruptcy Act, but the words quoted seem to be quite applicable here. See also *In re Fletcher, Ex p. Suffolk* (1891), 9 Morr. B.C. 8; *In re Vautin, Ex p. Saffery*, [1900] 2 Q.B. 325; and as to the effect of the existence of a desire upon the part of Mrs. Stair to prevent the property falling into the hands of her husband's creditors, see *Gibbons* v. *Tomlinson* (1891), 21 O.R. 489, at p. 497.

The action fails; but the circumstances were such as to arouse suspicion and to justify an inquiry, and I think the dismissal ought to be without costs.

Action dismissed without costs.

BARR v. TORONTO R. Co. and CITY OF TORONTO.

Ontario Supreme Court, Middleton, J., December 8, 1918.

STREET RAILWAYS (§ III, B—33)—*Injury to Person in Highway by outward Swing of Rear Steps of Car—Negligence—Proximate Cause of Injury—Liability.*]—Action by a man and his wife to recover damages arising from an injury to the wife, upon McCaul street, in the city of Toronto, after she had alighted from a car of

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the defendant railway company, by reason, as the plaintiffs alleged, of the negligence of the servants of the company or of those of the defendant city corporation in charge of a waggon, owned by the corporation, standing in the street.

William Proudfoot, K.C., for the plaintiffs.

H. H. Dewart, K.C., and *G. S. Hodgson*, for the defendant railway company.

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

MIDDLETON, J.:—McCaul street is very narrow. A double line of tracks runs from the north and turns east on Queen street. The distance from track to kerb is 12 feet, and, as the cars round the curve, the steps at the rear swing some 6 feet over this narrow roadway.

On the day of the accident, a team and large waggon, owned by the defendant city corporation, was removing snow from McCaul street, and at the time of the accident was standing on the road just above Queen street while being loaded.

The plaintiff and her sister-in-law had been passengers on the car and had alighted for the purpose of making a transfer to a Queen street car, and would have gone from the McCaul car west to the walk and then across Queen street, had the conditions been normal. There was, however, a foot of water and slush between the place where they alighted from the car and the walk, and to avoid this they passed north between the car and the waggon to reach ground from which snow and slush had been removed. The space between the car and the waggon was between 3 and 4 feet. When they were about the middle of the waggon, the car started round the curve, and the rear steps swinging sideways passed a few inches from the waggon, and before the plaintiff could escape she was struck and injured.

The obligations of the railway company to the plaintiff as its passenger were ended when she reached a place of safety upon the road, and the liability of the railway company to her must be based upon its obligations to individuals lawfully upon the street.

The conductor says that his duty begins and ends with seeing that passengers make safe ingress and egress by the rear door—that he has no duty toward pedestrians upon the road.

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The motorman cares for passengers at the front door, and takes care that he does not run any one down by the forward motion of the car.

No one takes any precaution against the obvious danger to persons on the road by reason of the sideward swing of a car which has a wheel base much shorter than its length when it goes round a curve. The railway company must not run down persons who are in a dangerous position in front of a car; and there seems to me a precisely similar obligation toward persons who are in danger from the lateral motion. The conductor might well be called upon to see that all is safe before he signals the motorman to round a curve. The proximate cause of this accident was the negligence of the railway company in starting its car when the plaintiff was in such a position that it was plain that there was no escape from the swing of the rear steps.

No case was made against the city corporation.

There was a serious injury, but I think the recovery will be as substantially complete as it can be in cases of this description.

I award the plaintiff $1,000, and her husband, who joins in the action, $350, with costs against the railway company, and dismiss the action with costs so far as the city corporation is concerned.

Judgment accordingly.

[Affirmed on appeal, June 23rd, 1919.]

PETERSON LAKE SILVER COBALT MINING Co., Limited, v. DOMINION REDUCTION Co., Limited.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A., December 6, 1918.

MINES (§ II—34)—*Deposit on, of Tailings, by Neighbor, with Permission of Owner—Property in Tailings—Evidence—License—Conduct of Parties*]—Appeal by the defendant company from the judgment of Middleton, J., 41 O.L.R. 182. Affirmed.

Wallace Nesbitt, K.C., and *R. McKay*, K.C., for appellant company.

I. F. Hellmuth, K.C., and *McGregor Young*, K.C., for the plaintiff company, respondent.

The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 29th November, 1917, which was directed to be entered by Middleton, J., after the trial before him, sitting without a jury at Toronto on the 11th day of October, 1917.

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The respondent is a mining company, and the appellant a mining and ore milling and reduction company. The respondent is the owner of the land covered by water known as Peterson Lake and of a strip of land "33 feet in perpendicular width adjacent to the water's edge of the 66 feet road allowance" reserved along the shores of the lake. The appellant is the owner of a mill for treating, milling, and reducing ore, situate on land adjoining the land of the respondent.

The property of the appellant had belonged to the Nova Scotia Cobalt Silver Mining Company, and had been acquired by D. M. Steindler from the assignee of that company, and Steindler had conveyed it to a company referred to in the statement of claim as the old Dominion Reduction Company, and it was acquired by the appellant from that company.

The reduction mill was a custom mill for the treating of the ore of its customers, erected by the Nova Scotia company in or about the year 1909, and in it was treated ore from the respondent's property and from other customers. The directors of the two companies were practically the same until the Nova Scotia company assigned.

Peterson Lake is a body of water having a considerable area, and in some places, according to my recollection of what was stated in the argument, a depth of about 30 feet.

The tailings from the reduction mill were discharged through a pipe into Peterson Lake. They consisted of a sludge composed of slime and the other residue and material which remained after the ore had been treated in the mill, and this sludge probably contained particles of silver which had then, owing probably in part to the then value of silver and the only known processes for extracting the ore from the rock, no commercial value.

No distinction was made between the tailings from the respondent's ore and the other ones, but all were discharged into the lake. Whether or not it will be possible to separate the tailings from the respondent's ore, from the other tailings, does not appear—though it was stated by counsel for the appellant at the trial that it could be done.

The contest between the parties is as to the ownership of the tailings from the mill which were discharged into the lake, the claim of the appellant being that they have always been and are

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its property and that it is entitled to remove them, while the respondent claims that they belong to it.

The arrangement under which the tailings were discharged into the lake was a verbal one, made in 1909 or 1910. Permission was then given to the appellant to discharge them into the lake.

Nothing appears to have been said as to the ownership of the tailings, though an attempt was made at the trial to shew that the understanding of the parties was that they were to remain the property of the appellant.

The evidence as to the arrangement was that of Jacob D. Jacobs and David M. Steindler. Jacobs was secretary-treasurer of the Nova Scotia company, and was also interested as a shareholder in the Peterson Lake company. According to his testimony, there was a discussion between Edward Steindler, the president of the Peterson Lake company, Mr. Kirby, the manager of the appellant company, D. M. Steindler, and himself, at which those who represented the Nova Scotia company "asked permission to put their tailings in the lake," and that Mr. Edward Steindler "consented as president of the Peterson Lake," as he himself also did, and that nothing was then said or arranged as to the ownership of the tailings.

No minute appears to have been made in the books of either company of this arrangement, but the Nova Scotia company acted upon it, and, when the mill began to operate, commenced to discharge the tailings into the lake, and continued so to discharge them while the company continued to operate the mill.

David M. Steindler testified that when the Nova Scotia company was considering where its mill should be located, Edward Steindler gave permission to dump the company's tailings into the lake, and that nothing was then said as to the Nova Scotia company removing them. According to his testimony, that was first spoken of after Sir Mortimer Davis became associated with him in the appellant company. Steindler also spoke (p. 51 of the notes of evidence) of his company having the right to dump the tailings in the lake, and having to "stop dumping them after they gave us notice."

On the 26th October, 1914, a letter was written by Mr. Kirby to the respondent (p. 12), stating that the appellant company for some time past had been "discharging the residue from its mill

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into what is known as the Nova Scotia arm of Peterson Lake, which property is owned by your company; that it has long been understood between us by past verbal agreement on the matter that your company had no objection to this company discharging its residue in this arm of Peterson Lake, the surface of your property as occupied by this residue not being of any use to you at this time, and no damage being done by our residues on the surface of the same;" also stating that his directors felt that their company should have some written confirmation of the agreement on its files to shew that it had not encroached on the respondent's property without permission, and asking for this permission in writing.

On the following day a resolution was passed at a meeting of the directors of the respondent company instructing the secretary to "advise Mr. Kirby that this company would allow the Dominion Reduction Company to discharge their residues into the Peterson Lake until advised to the contrary," and on the next day the terms of this resolution were communicated by the secretary to Mr. Kirby. In his letter the secretary did not follow the terms of the resolution, but said that the appellant company was to discontinue discharging residues into Peterson Lake on one month's notice from his company.

On the 2nd November, 1914, Mr. Kirby replied saying that his company would comply with the request to cease depositing the residue in the lake upon 30 days' notice from the respondent.

It is probable that what led to this correspondence and the action taken was the interviews which Mr. Eugene M. Steindler, the secretary of the appellant company, testified that he had had with Mr. Morrison, the secretary of the respondent company, and Sir Henry Pellatt, its president; and it is, I think, safer to treat what was done as carrying out the arrangement said to have been made than to rely upon Mr. Steindler's recollection as to what that arrangement was.

At a later period Sir Mortimer Davis, who had become interested in the appellant company, pressed David M. Steindler to get the terms of the arrangement entered in the minutes—i.e., of the respondent company. What that arrangement was Steindler stated as follows (p. 51):—

"I had taken Sir Henry Pellatt's word for it for two or three

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years that we had a perfect right to dump these tailings in the lake and we should stop dumping them after a certain time after they gave us notice."

Mr. Steindler and Sir Mortimer Davis would seem to have been ignorant of the correspondence in 1914 and of the resolution of the 25th October, 1914, which did that which Sir Mortimer Davis thought should be done. On the 14th May, 1915, Kerr, Bull, Shaw, Montgomery, & Edge, who were then acting as solicitors for the appellant company, wrote to the respondent asking for a letter from it signifying its assent to the deposit of tailings from the appellant's mill in the bay of the lake immediately adjoining the works of the respondent, on the understanding that if these tailings should ever prove to be of any value, the respondent should be at liberty to remove them. They then went on to say: "We understand this matter has been discussed several times between Mr. Steindler, the president of the Dominion Reduction Company, and different officers of your company, and that your company is agreeable to extend this privilege to Mr. Steindler's company;" and they ask for a letter confirming the understanding.

That letter was replied to on the 2nd July, 1915, by the secretary of the respondent company, in a letter in which he stated that at a directors' meeting held on the 30th June, 1915, he was instructed to write the solicitors stating "that it would be satisfactory to the directors of the Peterson Lake company for the Dominion Reduction Company to deposit their tailings in the bay of Peterson Lake provided that the Peterson Lake company had the right to deflect the point of deposit should they so desire."

The resolution that had been passed was that the secretary should write to the solicitors stating that what they had proposed would be satisfactory if the respondent had the right to deflect the point of deposit of the tailings.

It was said by counsel for the respondent that the right thus stipulated for was an important one, as the removal of the tailings if deposited in some parts of the lake might injuriously affect the respondent's mining operations under the lake.

It is not disputed by the respondent that the appellant has the right to remove the tailings which were deposited in the lake after the making of this arrangement, and the trial Judge has held that the respondent has that right.

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At a later period the appellant company came to the conclusion that it would be advisable to drain the lake in order to reclaim the tailings. This was in the early part of the year 1917, and it led to a proposition being made to the respondent looking to that end.

A meeting of the directors of the respondent company was held on the 15th February of that year, at which the company's consulting engineer and Mr. Eugene M. Steindler were present.

The minutes of this meeting record that the president stated that the meeting was called to consider an agreement with D. M. Steindler for draining the lake, a tentative form of which had been prepared; that Mr. Steindler was asked for some remarks, and that he stated that "it was their intention to drain a portion of the lake, putting a dam across the narrow part, and either draining all the water out of the lake or lowering the water sufficiently to recover their tailings which had been dumped into same . . . that they were just considering the proposition at the present time, and they would of course have to obtain permission from the Dominion (*sic*) Government both as to the draining and placing of the water, and this had not been done."

A resolution was then passed:—

"That the period of time that the agreement should run would be five years and if required by the Dominion Reduction Company a further extension of three years."

It is also recorded that the engineer could not see that "the draining of the lake could be a detriment to Peterson Lake, but that it might be a decided advantage, as in the draining of other lakes in Cobalt the shores of the lake had shewn veins that would not have otherwise been known to exist."

The tentative agreement contains a recital that the respondent company had been using and was desirous of having the appellant company continue its permission to use the shaft on that company's property, for the mining operations of the respondent company, and that the appellant company was desirous, "for the purpose of treating certain tailings deposited in Peterson Lake, to drain, either by pumping or by such other method as they may deem advisable, that portion of Peterson Lake coloured . . . on the plan attached hereto."

The agreement then grants a license to the respondent company to use the shaft on certain conditions, and grants to the

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appellant company the right, so far as the title, interest, and right of the respondent company is concerned, to drain that portion of the lake coloured . . . on the plan, and for that purpose to build or construct dams in, under, or across the lake, and such other works as might be necessary for the purpose of the drainage, "and to pump, excavate, use, and deal with all tailings from ores deposited in or found upon the said area, it being agreed that said tailings are the property of the said Dominion Reduction Company;" and it is provided that the license to the respondent company may be revoked on 6 months' notice in writing being given, but nothing is said as to the revocation of the license to the appellant company.

This proposed arrangement fell through. Why it fell through was not explained. It was, however, stated by counsel for the appellant at the trial, and was apparently not disputed, that it fell through owing to a change in the directorate of the respondent company.

This agreement is relied on by the appellant as containing an admission that all the tailings belonged to the appellant. To give to it that effect would be, I think, unreasonable. It may well be that, as a term of the arrangement that was proposed to be entered into, the respondent was willing to give to the appellant a right which it did not then possess, especially as in the view of the respondent's engineer the draining of the lake would be of advantage to the respondent.

I concur in the view of the trial Judge that the question to be decided is, "whether, when the defendant" (the appellant company) "returned this ore, won from the earth and earthy in its nature, to the bosom of the earth, the right to regard it as chattel property was lost, and it became part of the land owned by the plaintiff" (41 O.L.R. at p. 186).

I also agree with the conclusion of the learned Judge and the reasoning upon which it is based, and have little to add to what he has said.

That there was no express agreement between the parties as to the reclaiming of the tailings is clear, and the question therefore is, what, in the circumstances of the case, is the proper inference to be drawn as to the intention of the parties?

That the appellant is not entitled to any of the tailings which

were discharged into the lake by the Nova Scotia company, is clear. No transfer of them was made by the company, and, if it was the owner of them, it still owns them.

With regard to some things the inference to be drawn would be clear. If they had been lumber or coal or ore of commercial value, the proper inference would be that they remained the property of the person who deposited them on the land of another; while, on the other hand, if they had been earth or débris which was discharged into a hole or depression on the land of another, the contrary inference would be drawn.

In my opinion, the tailings in question, when discharged into the lake, ceased to be the property of the appellant. I refer of course only to the tailings which were so discharged before the 3rd July, 1915, when the arrangement was made that the appellant should have the right to remove them.

The tailings were of no commercial value, and it was problematical whether they would ever have any such value.

It is quite consistent, I think, with the testimony of the appellant's witnesses that it was not in the contemplation of the parties, or either of them, that the tailings which were discharged into the lake should be reclaimed by the appellant, but that the true position was that the appellant was finally getting rid of them, though it was thought that in the future tailings might have some commercial value and was contemplated that when that time should arrive persons who had tailings produced in the course of their operations would dispose of them otherwise.

No witness ventured to say that it would be commercially practicable, even if at all practicable, to take the tailings from the lake without pumping out the waters of the lake or otherwise draining it. The lake was of considerable depth, and if, after dumping into it sufficient to cover the bottom of it to the depth of 8 or 10 feet, the tailings would be many feet below the surface of the lake, the difficulty that there would be of removing them is obvious. The tailings went into the lake in the form of sludge, consisting of water and particles of rock and earth, and much of this would probably spread for a considerable distance beyond the point at which it was discharged into the lake.

The arrangement that was proposed in 1917 affords reasonable ground for concluding that it was only by draining the lake that

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it would be practicable to remove the tailings except those on, above, or very little below the surface of the lake—when I say practicable, I mean commercially practicable.

What was said by Steindler at the meeting of the 15th February, 1917, when the proposed arrangement was being considered, shews, I think, that his view was that it was essential in order to recover the tailings that all the water should be drained out of the lake or that the water in it should be lowered.

If, as the appellant contends, there was always a right to remove the tailings from the lake, it must follow that there was a reciprocal obligation upon it to remove them when required by the respondent to do so. The license that was given was determinable on notice by the respondent, and I cannot conceive that any one dreamed that, if it should be determined, when tailings that had been discharged into the lake lay at the bottom of it with many feet of water over them, the appellant or its predecessor in title should be bound to remove them.

It is important also to observe that it was not until the 14th May, 1915, that the appellant sought to obtain the right to remove the tailings from the lake, and that, when agreeing that the appellant should have that right, the respondent stipulated that it should have the right "to deflect the point of deposit."

The letter of the appellant's solicitors of the 14th May, 1915, appears to be inconsistent with the view that the appellant had or that it thought that it had the right to remove the tailings that were then in the lake. What is asked is the consent of the respondent to the tailings from the appellant's mill being discharged into the lake, on the understanding that if they should ever prove to be of any value the appellant should be at liberty to remove them. This obviously applied only to the future, and it is most significant that there is no suggestion that the privilege to remove should extend to the tailings then in the lake.

This letter affords, I think, ground for concluding that the appellant thought that it was necessary to provide for the right to remove, and that, unless that permission were given, the tailings when discharged into the lake would cease to belong to the appellant; and, if that be the case, it leads to the conclusion that its view was that the tailings which had been discharged into the lake without any such permission having been stipulated for

had ceased to be the property of the appellant. The fact that the permission applied for was in respect to future deposits, and was not asked for as to the tailings then in the lake, is, I think, cogent evidence that the view of the appellant then was that it did not own those tailings.

It is also a cogent circumstance making against the contention of the appellant that, when the assignee of the Nova Scotia company sold its property to David M. Steindler, the appellant's predecessor in title, the tailings then in the lake were not treated as an asset of the company or transferred to him, and that no suggestion appears to have been made by Steindler, who knew that the tailings were in the lake and the circumstances under which they had been discharged into it, that they belonged to the company, or any complaint because they were not being transferred to him.

I am of opinion that the judgment should be affirmed and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

McCALLUM v. COHOE.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland and Kelly, JJ. December 21, 1918.

HUSBAND AND WIFE (§ IB—26)—*Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Duress—Threat of Prosecution—Implied Promise not to Prosecute—Agreement Made—Estoppel—Evidence—Appeal—Undue Influence of Husband—Want of Independent Advice.*]—Appeal by the plaintiff from the judgment of Falconbridge, C.J.K.B., 42 O.L.R. 595, in so far as the judgment dismissed the action as against the defendant Martha Cohoe, and in so far as it failed to require the defendants to execute two mortgages.

G. N. Shaver, for appellant.

J. W. Payne, for defendants, respondents.

MULOCK, C.J.Ex.:—This is an appeal from the judgment of the Chief Justice of the King's Bench, who dismissed the action. The action was brought against Harry G. Cohoe and his wife, Martha K. Cohoe, to recover $500 and for a mandatory injunction directing them to execute and deliver to the plaintiff a mortgage of certain real estate as security for $1,000 and interest.

There is, I think, no conflict of evidence which affects the issues. The material facts are as follows:—

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The plaintiff, who resided at Burford and there carried on a partnership business under the name of the Burford Coal and Grain Company, entered into an agreement with the defendant Harry G. Cohoe, who resided at Norwich, whereby the latter agreed to buy wheat on commission for the plaintiff, and was to be entitled to draw on the plaintiff from time to time, through the branch of the Royal Bank at Norwich, for funds wherewith to purchase the wheat. Mr. McLachlin was the manager of this branch, and the plaintiff's firm, the Burford Coal and Grain Company, guaranteed payment to the bank of Cohoe's drafts on the plaintiff.

Cohoe was also personally a customer of the Norwich branch of the bank. Under this agreement Cohoe purchased considerable quantities of wheat for the plaintiff, drawing upon him through the Norwich bank from time to time for funds, and these drafts were duly met by the plaintiff. The bank-account in respect of these transactions was kept in Cohoe's name. In December, 1917, the plaintiff discovered that Cohoe was short in his delivery of wheat, and pressed Cohoe for payment of the deficiency. The extent of Cohoe's indebtedness to the plaintiff was uncertain, owing to Cohoe not having kept accurate accounts, and during the plaintiff's investigations as to the state of the account he discovered that Cohoe, contrary to his agreement with the plaintiff, was also buying grain on his own account. He also ascertained that certain real estate which Cohoe had told the plaintiff was his own was his wife's.

The plaintiff made frequent efforts to secure a settlement of the indebtedness, the amount of which was uncertain. The plaintiff, however, told Cohoe that, in his (the plaintiff's) opinion, it much exceeded $1,500, but that he would accept that amount in full satisfaction, and Cohoe made promises of payment on account, which, however, he did not keep, and at last the plaintiff, knowing that Cohoe was a customer of the Norwich bank and thinking that Mr. McLachlin was familiar with Cohoe's dealings, called upon McLachlin with a view to ascertaining Cohoe's financial position and obtaining a settlement. During the conversation that ensued the plaintiff made reference to a possible criminal prosecution against Cohoe. McLachlin and he differ as to the precise words used, but they were such as to cause McLachlin to think that, unless there was a settlement, Cohoe would probably

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be prosecuted criminally. McLachlin at this interview expressed his belief that Cohoe would settle, and the plaintiff then suggested an appointment with Cohoe at the bank; shortly afterwards, such a meeting took place, the plaintiff, McLachlin, and Cohoe being present. After a conversation in regard to the matters in question, the plaintiff said to Cohoe as follows: "I will limit your liability to $1,500. You put up a note signed by Mrs. Cohoe and yourself, depositing it with Mr. McLachlin, and we will choose a board of arbitrators of three; make your own choice, right in Norwich, and I will submit my books to them, you submit yours to them, and their finding is final. If they find you owe me only $600, we will take $600. If they find you owe me $2,400, I will make the limit $1,500 to shew that I want to settle;" and at this interview the plaintiff expressed a willingness to allow two years for payment. On the following day, McLachlin went to the home of Mr. and Mrs. Cohoe and discussed the matter with them. Mrs. Cohoe at first was unwilling to sign the proposed note, and Mr. McLachlin then informed her that the plaintiff "was going to have Mr. Cohoe arrested if he did not settle." Mrs. Cohoe then appeared greatly troubled, and her husband said to her: "You need not sign that if you don't want to; do not sign on my account." She said, "I am placed in the position where I can hardly do otherwise." After some further conversation, she said: "Well, call up Mr. McCallum and see if he will extend the time of payment for the $1,000 over three years, and I will sign." Cohoe then called up Mr. McCallum on the telephone, and McLachlin then told him that Mrs. Cohoe was willing to sign, provided that payment of the $1,000 was extended over a term of three years, and the plaintiff agreed to such extension, whereupon she signed the note in question, being the joint and several note of herself and her husband for $1,500, payable to the order of the plaintiff, and delivered the same to Mr. McLachlin, who took it away with him. At this interview McLachlin referred to the proposed arbitration proceedings, whereby Cohoe was to have two years in which to pay the $1,000; and it was, no doubt, well understood by Mrs. Cohoe and her husband at the time of the giving of this note that arbitrators were to be appointed to determine the amount owing by Cohoe, and that it was to be a term of the arbitration that $500 was to be paid in cash and the remaining $1,000 within three years. McLachlin explained how it happened that he went to the Cohoes. He emphatically denied having been sent there by

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McCallum or that he was McCallum's agent in the matter. He said: "Mr. Cohoe had been engaged to purchase grain and produce for him (the plaintiff), and Mr. McCallum supplied us with a letter of guarantee saying he would accept all Cohoe's drafts on presentation, and Mr. Cohoe had independent transactions outside of the grain that he was supposed to buy for McCallum; and he claims that, as there was a loss in connection with Cohoe's business, the bank was responsible for those losses on account of holding that letter of guarantee, that we should not have had independent transactions with him."

"Q. Is that why you were interested in getting the thing settled? A. Yes."

In furtherance of the understanding between all the parties, the plaintiff and defendant, by instrument under seal, submitted it to three arbitrators to determine the amount of Cohoe's indebtedness to the plaintiff, and that submission contains the following recital: "Whereas the parties hereto of the first part" (that is, Mr. and Mrs. Cohoe) "have delivered to J. R. McLachlin, as aforesaid, their promissory note in favour of the party of the second part" (that is, the plaintiff) "for the sum of $1,500, to be held by him and disposed of as is hereinafter set forth;" and the submission, among other things, provides as follows:—

"Should the said arbitrators or the majority of them find and declare that the parties of the first part" (the defendants) "or either of them is or are indebted to the party of the second part in a greater amount than the sum of $1,500, the party of the second part" (the plaintiff) "agrees to accept the sum of $1,500 in full satisfaction of the indebtedness of the parties of the first part."

"Should the said arbitrators or a majority of them find and declare that the parties of the first part" (the defendants) "or either of them are or is indebted to the party of the second part" (the plaintiff), "such indebtedness shall be paid in the following manner:" then follows a provision that, to the extent of $500 of the indebtedness, the amount shall be paid at once, and, as to any excess over the $500, the same is to be paid in three yearly instalments, and that in neither circumstance shall the defendant Cohoe be required to pay more than $1,500. The submission also provides for the defendants giving a mortgage of all their real estate as security for the amount found due.

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The arbitrators found the defendant Cohoe indebted to the plaintiff in the sum of $1,826.18, which, because of the agreement, they reduced to $1,500.

Mrs. Cohoe's defences are: (a) duress on the part of the plaintiff; (b) undue influence of her husband and the absence of independent advice; (c) no consideration for the note.

There is no evidence that, in procuring the note from Mrs. Cohoe, McLachlin acted as the plaintiff's agent. On the contrary, the evidence clearly established the absence of agency. McLachlin knew that Mrs. Cohoe's joining in the note would save the bank from any claim by the plaintiff, and his intervention was solely in the interests of the bank. As said in Leake on Contracts, 6th ed. (Canadian notes), p. 285, duress, to affect a contract, "must be the act of the party himself, or imposed with his knowledge and taken advantage of by him, for the purpose of obtaining the agreement; duress by a third person would not avoid a contract made with a party who is not cognizant of it: 1 Rolle, Abr. 688."

It was not until several days after the note had been given to McLachlin for the plaintiff that the latter learned of what occurred at the Cohoe house which induced Mrs. Cohoe to sign the note. In his reasons for judgment, the learned trial Judge, who did not find agency, said (42 O.L.R. at p. 597): "The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule." The moment the note was delivered to McLachlin, it became the property of the plaintiff, and the contract between the plaintiff and Mrs. Cohoe was then complete. McLachlin not having been the plaintiff's agent to obtain the note, the plaintiff was not affected by any duress which he may have exercised upon Mrs. Cohoe; and I am unable to understand how his subsequently ascertaining from McLachlin the circumstances of the interview can affect the validity of the note, which up to that time was, I think, unassailable. Thus, in my opinion, the defence of duress fails.

As to that of undue influence by the husband and the absence of independent advice, the onus was on Mrs. Cohoe to establish that defence: *Hutchinson* v. *Standard Bank of Canada*, (1917), 36 D.L.R 378, 39 O.L.R. 286. This she has not attempted to do, nor could

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she hope to establish it, for her husband told her before she signed the note: "You need not sign that if you don't want to; do not sign on my account."

As to the defence of no consideration: Mrs. Cohoe agreed to sign the note if the plaintiff would agree to extend the payment over three years, and he agreed to do so, and this constituted valuable consideration.

The note was intended to operate as collateral security that the husband would pay the amount of his liability, limited to $1,500, when ascertained by the arbitrators; the plaintiff should have based his claim on the note as well as the submission and award, and should have leave so to amend his statement of claim.

For these reasons, I think the appeal should be allowed and the judgment set aside and judgment be entered for the plaintiff for $500 and ordering the defendants to execute and deliver to the plaintiff a mortgage as claimed in the statement of claim; the plaintiff to be entitled to costs throughout, including those of this appeal.

SUTHERLAND and KELLY, JJ., agreed with Mulock, C.J.Ex.

RIDDELL, J.:—An appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench so far as it relieves the defendant Martha K. Cohoe from liability and fails to order the defendants to execute certain mortgages.

The plaintiff, residing at Burford, is a member of the Burford Coal and Grain Company, which carries on business, *inter alia*, as a grain buyer. Cohoe, living at Norwich, was employed by the plaintiff to buy wheat on a commission of 2 cents per bushel. The financial arrangement is not quite clear—that Cohoe was to pay for the grain is certain: that he was to draw upon the plaintiff or his company for what he needed is also certain; but whether he was to draw in advance and apply that money in buying grain, or whether he was to pay for the grain first and then draw for his disbursements, is not clear. The plaintiff, in order that Cohoe might be certain of receiving the proper amount of money, had McLachlin, manager of the Norwich branch of the Royal Bank (which was Cohoe's bank), guarantee that drafts drawn from time to time by Cohoe on the plaintiff's company for the purpose of buying produce, would be accepted.

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In December, Cohoe fell behind; he drew over $50,000, but the price of the grain he had bought and forwarded fell considerably short of the amount sent him. The plaintiff went north and saw him at Dublin, Ontario, charged him with being $4,800 short; and they finally went together to Norwich. They checked over their accounts, and, after examining the cars at various places, they seem to have come to the conclusion that there was a shortage of about $2,400. There was some talk about Cohoe paying $2,000: the plaintiff inquired about his property and Cohoe told him the property was in his own name. Cohoe failed to pay the $2,000; the plaintiff got suspicious and searched the title to Cohoe's property, finding it in Mrs. Cohoe's name.

Apparently he then went to McLachlin "with a view of getting settlement with Mr. Cohoe . . . because he was Mr. Cohoe's banker."

The evidence as to the time of this interview at the hotel in Norwich is confused and perhaps conflicting, and it may be that this interview took place before the plaintiff saw Cohoe about the accounts; I do not think the particular time is material.

The plaintiff had apparently the thought that he had a claim against McLachlin's bank; he told McLachlin that if the matter were not settled he intended to bring an action against the bank as well as against Cohoe.

The plaintiff had his solicitor working on the case, and had in his mind the possibility of taking criminal proceedings against Cohoe: he told McLachlin (according to McLachlin) that, unless Cohoe settled, he was going to have Cohoe arrested. As the plaintiff puts it, he did not say so in so many words, but, "I said there was a possibility of criminal action being taken against Mr. Cohoe," "criminal proceedings might be taken," this was when "simply discussing the account and a possibility of a settlement, going over it carefully."

McLachlin said, "I think Mr. Cohoe will settle;" the plaintiff said, "Make an appointment," and "we made an appointment in Mr. McLachlin's office . . . Norwich . . . in the bank."

The three met in McLachlin's office; the plaintiff accused Cohoe of not keeping his agreement and said: "If you will give me evidence of good faith that you will stay, you put me up a note of $1,500; I will limit your liability to $1,500, because with

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the $950 mortgage on it $1,500 is about all that it is worth . . . that is, the property" (referring to the real property which he had found to be in the name of Mrs. Cohoe with a mortgage upon it of $950).

From the evidence of McLachlin it is clear that the note for $1,500 was to be signed by both Mr. and Mrs. Cohoe.

It was agreed that the liability of Cohoe should be determined by three named arbitrators, McLachlin being one of them, but that the amount should in no case exceed $1,500. Nothing was said at the time about Mrs. Cohoe being a party to the arbitration.

The note was not drawn up at that time, nor was a submission to arbitration, the arbitration being conditional on the note being furnished. Then the plaintiff left McLachlin and Cohoe—again quoting McLachlin's evidence, "he left, and he said he must have that security as an evidence of good faith that Mr. Cohoe would go on with the arbitration.

"Q. And was it agreed to? A. Yes, and he wanted that arranged at once.

"Q. Mr. McCallum wanted it arranged at once? A. Yes, that is, the security must be given at once; and he went home and he left it over till noon of the following day.

"Q. That is to sign the note? A. Yes."

The following morning, the 11th January, 1918, McLachlin went to see Mrs. Cohoe; she hesitated about signing the note, and finally said she would not sign. McLachlin says: "I saw that she was not going to sign, so I says, 'I may tell you this, that Mr. McCallum told me he was going to have Mr. Cohoe arrested if he did not settle.' Well, she appeared greatly troubled and worried about it, and Mr. Cohoe said: 'You need not sign that if you don't want to; do not sign on my account.' . . . I just simply made the statement, that is all. So she said—Mr. Cohoe said, 'You do not need to sign that on my account.' She said, 'I am placed in the position where I can hardly do otherwise,' and she said, 'I wish I could see the boys so I would know what to do.' . . . I thought at the time she meant Mr. Cohoe's brothers. Perhaps she meant her own brothers; I do not know; I did not ask them; and so finally, after some deliberation, she said: 'Well, call up Mr. McCallum and see if he will extend the time of payment for the $1,000 over three years, and I will sign.'

"Q. What was the original agreement? A. Two years.

"Q. You left her then? A. No.

"Q. They have a 'phone in the house? A. Yes. Mr. Cohoe sent in the call and I talked with Mr. McCallum and told him that Mrs. Cohoe was willing to sign providing the $1,000 was extended over a term of three years, and I made the remark at the time that it was a very serious thing for her to sign; and he agreed to that; he agreed to extending the terms of the payment, and she signed the note, and I came away."

Mrs. Cohoe's account is not materially different; she but makes assurance doubly sure that she was frightened into signing the note: "Mr. McLachlin told me that Mr. McCallum said that Mr. Cohoe would be arrested if I did not sign it.

"Q. Who were present at that time? A. Mr. Cohoe and Mr. McLachlin.

"Q. And yourself? A. Yes, just the three of us.

"Q. Why did you sign it? A. Because I was frightened into it.

"Q. In what way? A. I did not want Mr. Cohoe arrested. He said if I did not sign it that he would arrest him.

"Q. Did anybody advise you at all? A. No.

"Q. Any lawyer? A. No.

"Q. Anybody else? A. No, no one."

Mr. McLachlin said: "I don't want to make you angry, but Mr. McCallum told me if you did not sign that note he would arrest your husband." The note, the essential prerequisite, being thus obtained, McLachlin set about the arbitration: he went to the bank's solicitor, told him that Mr. and Mrs. Cohoe had signed a note which he (McLachlin) was holding, and that it had been agreed that the whole matter should be submitted to arbitration. The solicitor drew up an agreement for arbitration, making Mrs. Cohoe a party along with her husband and a co-covenantor with him for the payment of the amount to be found due. This was signed by Mr. Cohoe and handed to him for his wife's signature.

Her account—the only account in evidence—is as follows:—

"Q. How did you come to sign the arbitration papers? A. I would have signed anything after I signed the $1,500—it would not have made any difference.

"Q. Was it read over and explained to you by anybody, the arbitration papers, I mean? A. No, it was not.

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"Q. I think your husband took it out and got you to sign it? A. He did not get me to sign it; I signed it myself.

"Q. Did he ask you to sign it? A. No, he did not. He said I could do as I liked about it.

"Q. But you did sign it? A. Yes, I signed it.

His Lordship: "You had no legal advice about this at all? A. No. No explanation by anybody.

Q. As you say, you would have signed anything? A. Yes, I would have."

The arbitration had in the meantime been going on; before its conclusion the agreement had been executed; the result was to find Cohoe indebted to the amount of some $1,800; but, as the plaintiff had agreed to limit his claim to $1,500, the award was made for that sum. The agreement of the 23rd January, 1918, provided for $500 cash and the remainder to be secured by second and third mortgages—nothing has been paid and no mortgage given.

McLachlin says he was not sent by the plaintiff to get the note signed, and was not the plaintiff's agent in obtaining it—the plaintiff agrees. It seems that the plaintiff did not know of the statements made to Mrs. Cohoe until a few days after.

Cohoe having failed to pay the $500, this action was commenced, by a writ issued on the 26th January, against him and Mrs. Cohoe, founded on the agreement of the 23rd January. About the same time, McLachlin told the plaintiff how the note had been procured. The plaintiff says:—

"Q. Did he" (i.e., McLachlin) "tell you on any of those occasions after getting the note signed that he informed Mrs. Cohoe that you intended to institute criminal proceedings against her husband if she did not sign the note? A. No, he did not put it that way. He said, 'I told her there was a possibility.'

"Q. And he told you he had told Mrs. Cohoe that before she signed the notes? A. He said he just mentioned it."

McLachlin's account is substantially the same:—

"Q. And, after you got the note signed, did you at another time see McCallum in regard to getting the note? A. Yes.

"Q. Did you tell him what you had said to Mrs. Cohoe? A. Yes, in a general way I did.

"Q. What did you tell him? A. I told him that in the first

place she said she would sign for $500, and that I told her that that would not be acceptable to Mr. McCallum, and finally that I had made the statement to her and to Mr. Cohoe that Mr. McCallum had said to me that if he did not settle he would have him arrested.

"Q. And you said that to Mr. McCallum afterwards? A. Yes, I did."

The action was tried before the Chief Justice of the King's Bench at Woodstock, in March, 1918. Judgment was given against Cohoe for $500, interest, and costs, but the action as against Mrs. Cohoe was dismissed with costs.

As against Cohoe it is contended by the plaintiff that there should also have been a mandatory injunction directing him to execute the mortgages as security for the balance as provided for by the agreement. This seems to have been a mere oversight; on the settling of the judgment the attention of the learned Chief Justice should have been called to the omission, and, no doubt, he would have made the correction. It is a wholly vicious and inexcusable practice for a party, who finds any of his claims not dealt with, to enter judgment without reference to such claim and without the attention of the trial Judge being called to the omission. While it cannot be said that the Appellate Division will not on appeal correct the error, no favour should be shewn to such a slovenly practice, by way of costs or otherwise. The claim of the plaintiff should have been allowed; and, no doubt, the learned Chief Justice would have allowed it had his attention been called to it in settling the judgment.

The judgment should be amended accordingly, but no costs should be given on that branch of the appeal.

The substantial defence is on the part of the female defendant —"I was frightened into it;" and it was to prevent the arrest and prosecution of her husband on a criminal charge.

There can be no doubt, I think, that, if these instruments had been obtained by McCallum himself or by his agent, under the circumstances they would have been voidable; and that was conceded by Mr. Shaver in his able and logical argument.

It is said, however, that McLachlin was not the agent of the plaintiff in the transaction, and therefore the acts of McLachlin will not affect the plaintiff.

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It is elementary that a contract procured between A. and B. through fraud of C. is not thereby voided if C. have no relation to A. or B. It is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party: *Smith's Case* (1867), L.R. 2 Ch. 604, at p. 616, *per* Lord Cairns; *Sturge* v. *Starr* (1833), 2 My. & K. 195, 39 E.R. 918; *Wheelton* v. *Hardisty* (1857), 8 El. & Bl. 232, 120 E.R. 86, (the last an exceedingly interesting as well as a "very important, complicated and difficult case," as Lord Campbell calls it); *Masters* v. *Ibberson* (1849), 8 C.B. 100, 137 E.R. 446; *Pulsford* v. *Richards* (1853), 17 Beav. 87, 51 E.R. 965; *Burnes* v. *Pennell* (1849), 2 H.L.C. 497, 9 E.R. 1181; *Barnett* v. *South London Tramways Co.* (1887), 18 Q.B.D. 815.

And, even if the primary wrongdoer is an agent, if the fraud be perpetrated by the agent for his own advantage without the knowledge of the master, the contract is not necessarily void: *Union Bank* v. *Munster* (1887), 37 Ch.D. 51.

I think that there is ample evidence upon which a trial tribunal, Judge or jury, could find that the plaintiff made McLachlin his agent to procure the notes and to make the threat—here the plaintiff, a creditor, a business man, when negotiating with a banker who, in a sense, represents his debtor, informs the banker that he will prosecute unless the matter is settled. He is told by the banker that when he, the banker, was arranging the settlement, he was at Mrs. Cohoe's house—and a few days afterwards he is told by the banker that he has communicated the threat to Mrs. Cohoe.

Taking these facts in connection with all the other facts of the case, the learned trial Judge might well have found McLachlin the agent of the plaintiff, on the ground that the plaintiff must have intended the natural result of his action, must have expected that the threat would be communicated to Mrs. Cohoe and would be used to induce her to sign the required note—in other words, the plaintiff might be disbelieved where his evidence was not consistent with the natural consequences of his conduct.

It is recognised even in the criminal law that it is "an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act:" *per* Lord Ellenborough, C.J., in *R.* v. *Dixon* (1814), 3 M. & S. 11,

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105 E.R. 516. Of course the doctrine must not be carried so far as to compel a Court to find intent as a matter of law where the evidence is convincing that the intent did not exist: *Ex p. Mercer* (1886), 17 Q.B.D. 290, which cleared up what it had been supposed followed from *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538.

Had the learned Chief Justice put his finding of agency on some such ground, I do not think it could be disturbed.

But that does not seem to be the ground upon which the finding of agency proceeds—there is no discrediting of the plaintiff: his story seems to be accepted at its face value, and it is said (42 O.L.R. at p. 597): "McLachlin, on cross-examination, says that he told the plaintiff afterwards what he had told Mrs. Cohoe about his intention to arrest her husband. The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule."

It is clear law that one who desires to become a principal, or whom it is desired to charge as a principal, does not become a principal by any act of so-called ratification unless at the time of the contract the so-called agent was not acting for himself but was intending to bind an ascertainable principal: *Wilson* v. *Tumman* (1843), 6 Man. & G. 236, 134 E.R. 879; *Marsh* v. *Joseph*, [1897] 1 Ch. 213; even if he intended that some unnamed principal shall benefit, if the so-called agent purports to be acting for himself and not for another, the rule applies: *Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240 (which case is of great value as getting rid of some loose expressions in the cases).

The once somewhat prevalent idea that one taking an advantage obtained by a wrong etc. must be held to have ratified the wrong has received its quietus by *Eastern Construction Co. Limited* v. *National Trust Co. Limited*, 15 D.L.R. 755, [1914] A.C. 197.

There can be no pretence of agency by estoppel in the present case.

I do not think that Mrs. Cohoe can succeed on the ground that the banker was the agent of the plaintiff. This, however, by no means disposes of the case.

Here there is more than fraud, there is a threat of a criminal prosecution. "If the note be not signed, McCallum will arrest your husband," to my mind clearly implies, "If the note be

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signed, he will not," and the case comes within *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200; *Brook* v. *Hook* (1871), L.R. 6 Ex. 89, an implied agreement not to prosecute.

"There is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor:" *per* Cotton, L.J., in *Flower* v. *Sadler* (1882), 10 Q.B.D. 572, at p. 576—and it seems to me the note was obtained under an implied promise not to prosecute.

Where this is the case, and the security is obtained by a third party, the test is, "Did the contractee at the time he accepted the contract know that he was getting it by reason of the (non-debtor) contractor fearing the prosecution of the debtor?" *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, at p. 598, affirmed in [1892] 1 Ch. 173: see especially *per* Lindley, L.J., at p. 183; because it is well established that "it is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to 'stifle a prosecution:'" *per* Lindley, L.J., in *McClatchie* v. *Haslam*, (1891), 17 Cox C.C. 402.

There is enough in the evidence, I think, to justify the trial Judge in so finding, but he has not so found, as we have seen. He has held the plaintiff responsible on the ground that, when he received the "information, he never repudiated or disavowed the transaction," and "under these circumstances McLachlin was an agent so as to bring the case within the rule."

I have read and re-read the evidence, and am unable to say that it has been proved that the plaintiff knew when he took the note and the agreement that they had been obtained by the implied agreement not to prosecute.

It seems to me that in order to find it we must disbelieve the plaintiff, who swears that he had not intended McLachlin to repeat it, that he did not make the threat with the object of forcing a settlement, that he did not know till some days afterwards that the threat had been communicated. McLachlin's evidence is *pro tanto* corroborative. I do not think we can find the plaintiff's knowledge as a fact, and accordingly it follows that this defence is not made out.

It remains to consider the defence based upon the facts that Mrs. Cohoe is a married woman and the transaction was for the

benefit of her husband. The proposition that a married woman should be treated differently by the law from any one else is a relic of the times when she was almost a nullity in the eye of the law, the husband and wife were one, and the husband was that one. Equity took charge of her as though she were a babe and protected her from the legitimate consequences of her own acts. How long and how far these equitable principles are to prevail in the wholly changed conception of the capacity of a married woman is for the Legislature; how far in the present state of the law she is protected is for the Courts. And for the present purpose the law has been recently and authoritatively laid down by the Appellate Division in *Hutchinson* v. *Standard Bank of Canada*, 36 D.L.R. 378, 39 O.L.R. 286—this we are bound to follow. The law there laid down is that in "a transaction between husband and wife for the benefit of the husband, there is no presumption of undue influence, and no burden is cast on the person sustaining such a transaction to prove that the wife had independent advice; on the contrary, it lies upon the person attacking the transaction to prove affirmatively undue influence by the husband and knowledge thereof by the creditor:" see *Euclid Avenue Trusts Co.* v. *Hohs* (1911), 24 O.L.R. 447, and cases cited. Here not only was undue influence by the husband not proved: it was disproved. "Mr. Cohoe said to his wife not to sign it on his account" (p. 31 of the notes of evidence). Pressure there undoubtedly was, but that was pressure not by the husband or by the plaintiff but by McLachlin, who was anxious to have the note signed in order that the arbitration might go on, and his bank be free from an action at the suit of the plaintiff; and, as we have seen, the plaintiff did not know of that pressure until after he had received the note and had entered into an agreement on the strength of receiving the note by which he deprived himself of the right to recover more than $1,500 out of a claim which he thought was about $2,400, and which turned out in fact to be $1,800.

This defence also fails.

It will be seen that I have considered the agreement sued on and the note as parts of the one transaction, as Mrs. Cohoe makes them, and as I think they were; but, if the agreement sued on be considered as a separate and independent transaction, the defendant's position is not strengthened, but rather the reverse.

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I would allow the appeal against Mrs. Cohoe and direct the same judgment to be entered against her (in the same terms as against her husband) with costs of action and appeal.

Appeal allowed.

LYNCH-STAUNTON v. SOMERVILLE.

Ontario Supreme Court, Appellate Division, Mulock, C. J. Ex., Clute, Riddell, Sutherland and Kelly, JJ., December, 1918.

COSTS (§ II—26)—*Solicitor—Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914, ch. 159 sec. 34—Services rendered by Plaintiff in Capacity of Solicitor—Reference for Taxation—Lump-sum Charged for Specific Items Set out in Bill—Compliance with Statute—Costs of Action and Appeal—Scale of Costs.*] —Appeal by the plaintiff from the judgment of Masten, J., (1918) 43 D.L.R. 736, 43 O.L.R. 282. Reversed.

RIDDELL, J.:—This action was begun, by writ of summons specially endorsed, "for legal services rendered. The following are the particulars: Dec. 21, 1912, to Dec. 1, 1913, Fees, charges, and disbursements, $1,089.90." The affidavit filed with the appearance—which with the writ the plaintiff adopted as the pleadings—sets up that no proper bill had been rendered as required by the Solicitors Act, R.S.O. 1914, ch. 159, sec. 34*; and this is the sole issue.

The learned trial Judge, Mr. Justice Masten, decided that the contention of the defendants was well-founded, and dismissed the action with costs; the plaintiff now appeals.

At the trial it was admitted that the plaintiff was a barrister and solicitor and that he had been retained by the defendants;

*34.—(1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof subscribed with the proper hand of such solicitor . . . has been delivered to the person to be charged therewith . . . or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

(2) In proving a compliance with this Act is shall not be necessary in the first instance to prove the contents of the bill delivered . . . but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed as required by sub-section 1 . . . was so delivered . . . ; but the other party may shew that the bill so delivered . . . was not such a bill as constituted a compliance with this Act.

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the receipt of the bill sued on was not denied—and the case is one of law, i.e., the proper interpretation of sec. 34 of R.S.O. 1914, ch. 159.

It appears that the defendant Somerville had certain property in Hamilton which he sold, and his purchaser sold to the Canada Grocers Limited. Somerville claimed that he had the right to repurchase within a certain time, and he wished to do so, taking in his co-defendant as an interested party in the repurchase. They saw the plaintiff, who wrote the owners, but they denied the alleged right of Somerville, as did the Dominion Canners, who had an interest with the Canada Grocers. It was determined to issue a writ: the plaintiff told the defendants that he did not practise as a solicitor, and they retained as solicitor Mr. C., who issued a writ. Considerable negotiation took place, which resulted in a settlement, whereby Somerville was to have the property for $30,000; this settlement was carried through; the plaintiff rendered a lump-sum bill, which the defendants refused to pay, whereupon the plaintiff rendered the bill in question; and, after the lapse of more than a year, it not being taxed, he sued—the defendants paid $500 into Court; the plaintiff says: "I have always been willing to have it taxed. I am only insisting upon coming here because I want what I am entitled to by law . . . I . . . am here now to have it taxed."

The bill rendered contains 53 items of ordinary law services for which a fee might be charged; 39 of these have a fee charged; then there are two charges of a kind not quite usual, but in no way extraordinary: "Fee on revising deed, examination of title, closing transfer of property, etc., amount paid on settlement, $30,000;" for which a charge of $165 is made; and a "fee on negotiations as above set out and recovering property of the value of $60,000, subject to a payment of $30,000," charged at $700: there are 14 items against which no charge is made—there are also 7 items which merely state the receipt of letters and the like, which of course have no charge. Of the 14 against which no fee is entered, there are 2 letters, 10 attendances and consultations, etc., 1 draft proposal, and 1 telephoning, all apparently being during the negotiations for settlement and being the "negotiations as above set out," referred to in the $700 item. The plaintiff was offered a judgment for the $500 paid into Court, but declined to accept it:

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he also declined to accept judgment for such part of the bill as is admittedly according to the Act, as that would deprive him of the right to the remainder under the decision in *In re Davy* (1865), 1 U.C.L.J.N.S. 213, which we followed in *Gould* v. *Ferguson*, 29 O.L.R. 161, 14 D.L.R. 17.

I agree with the learned trial Judge that the bill sued on is such as is covered by sec. 34 of the Act; but I am unable to follow him in his decision that the bill as rendered is not a sufficient compliance with the Act.

It is argued that the present case comes within the decisions binding upon us: it will be well to consider the decisions.

The present bill has no resemblance to the bill in question in *Gould* v. *Ferguson*, *supra:* that was almost wholly for conveyancing, attending registry offices, examining deeds, letters, searching executions, etc., etc., all of the most usual kind, and substantially every item the ordinary subject of a charge—nothing depended on ability in negotiation or the like, and the charge should in practically every case be the same whether the land was worth $10,000 or $100,000. In addition to the disbursements, a lump-sum of $250 was charged for all the services rendered.

So, too, in *Philby* v. *Hazle*, 8 C.B.N.S. 647, 7 Jur. N.S. 125, a lump-sum bill was rendered at £50 and disbursements. The plaintiff set up that there was an agreement whereby he was to receive the sum of £50 and disbursements if he succeeded. He did succeed, and rendered a bill with items, every one of which admitted of a charge, but with a lump-sum covering them all. The sum of £50 was sued for as "for business done as per agreement" (8 C.B.N.S. at p. 647). The Court held the agreement not binding, and that the bill was not "in such a shape as will enable the Master to judge of the propriety of the several charges" (p. 653, *per* Williams, J.); the bill did not shew "the several items of charge" (p. 653, *per* Willes, J.); not "in such a form that the Taxing Officer of the Court may judge of their reasonableness" (p. 653, *per* Byles, J.)

In *Wilkinson* v. *Smart* (1875), 33 L.T.R. 573, the solicitor had been employed in five matters, apparently quite distinct—he rendered a bill setting out the work he had done in four of them, and did not place any charge against any of the four items—then as a fifth item he charged "Attending you" etc. (specifying the

business done, and continuing), "when ultimately Mr. C. told us that the matter had been arranged by Capt. F. having given an undertaking to pay you a lump-sum down, such sum to include £25, at which he agreed our costs should be taken, and attending you when you confirmed this statement and instructed me to take no further action in the matter—£25." Another item was: "Letters, messengers, cabs, etc.," but no sum was placed opposite thereto. This was held bad: Coleridge, C.J., says (p. 575): "There is nothing to enable the Master to exercise his discretion as to the propriety of the charges," etc., etc. Grove, J.: "If the items are not distinguished, how could the client make up his mind whether the charges were reasonable and such as he would pay without objection, or whether he would have the bill taxed? The Master would have to ascertain if he could how much of the amount ought to be disallowed; in fact he would have to find the value of each item by making some multiple (measure?) of £25." Archibald, J., says: "The object of . . . the Act . . . was to secure a mode by which the items of which the total sum was made up should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not, and to give the Master an opportunity of taxing it."

Nearly all the English cases lay down the rule, and are based upon the rule, that the bill must shew sufficient to enable both the client to exercise a reasonable judgment as to whether he will pay without taxation and the Master to ascertain how much, if any, is to be disallowed.

The next case shews how this rule works out:—

In *Blake* v. *Hummell* (1884), 51 L.T.R. 430, the bill, so far as material, read: "The Rev. F. H. Hummell to Edwd. F. Blake. 1881.—Oct. and Nov.—Perusing abstract of the title to Wilcot Lodge, Shanklin. Instructions for requisitions on the title and drawing same, and fair copy. Perusing Mr. Harper's replies thereto. Instructions for assignment. Drawing same, and fair copy for perusal. Engrossing same, and journey to London to examine the abstract, and completing purchase, including attendances, and correspondence with you and Mr. Harper and Messrs. Dean and Taylor, including travelling and hotel expenses . . . £38 10s. 1882.—April 1.—Yourself ats. Urry. Attendances on you in refer-

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ence to this case on which you were summoned for an assault, and conferring thereon and receiving your instructions to attend the petty sessions on the hearing of the case, and attending accordingly on your behalf, when the magistrates considered an assault had been committed, and fined you in the penalty of 2s. 6d. and costs . . . £2 2s." The remaining items of the bill were properly described, and a distinct charge placed against each item, and as to them no objection was raised.

Denman, J., says (p. 431) as to the £2 2s. charge being "in reality a lump-sum for a number of services rendered," "It appears to me to be sufficiently specific, and it is a charge that can be fairly taxed by the Taxing Master." It will be seen that there were included in this charge: (1) an attendance on client when retained; (2) instructions to defend before the magistrates; (3) attendance before the magistrates at the trial.

It seems to me that the charge "Fee on revising deed, examination of title, closing transfer of property, etc. . $165," is just as specific and as fairly taxable as that passed upon favourably by Denman, J.

Mr. Justice Denman, in reference to the other items for what are in reality conveyancing charges, says: "The items . . . are numerous, and it is impossible to see from the bill what particular sums ought to be charged against each particular item." Dealing with a conveyancing bill in which it was possible to affix a charge to each item, he decided as we did in *Gould* v. *Ferguson*—but that is no authority for saying that no lump-sum charge is in accordance with the Act.

In *Gould* v. *Ferguson* we did not—and did not affect to—overrule *Re R. L. Johnston* (1901), 3 O.L.R. 1. There, there was a bill charging ordinary fees and disbursements in other proceedings, and also shewing in full the negotiations conducted by the solicitor resulting in a settlement and charging a lump-sum to cover all the services rendered by him in the negotiations out of Court—the Taxing Officer allowed $3,200 for such services, and this allowance was approved by the Chancellor and the Divisional Court, leave to appeal to the Court of Appeal being refused. It is true that the objection was not expressly raised that the bill was insufficient: but the decision implied that the client had all he required, and the Taxing Officer could fairly tax it.

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Taking the lump-sum of $700 in the present bill, there is a detailed chronological account of what was done by the plaintiff in his negotiation leading up to settlement, so set out that the client could have no difficulty in exercising a judgment whether to pay the bill or to have it taxed: there was ample to enable the Taxing Officer to determine what (if anything) ought to be taxed off; and therefore, in my view, it is sufficient.

We are referred to a judgment, *Re Solicitor*, 12 O.W.N. 191, by Mr. Justice Middleton, in which that learned Judge thought himself bound by authority to hold that the bill did not conform to the statute—although he said, "with reference to the matter under discussion, common sense and case-law had long since parted company." We have been furnished with a copy of the bill there under consideration, and find that it is for fees for attending on an arbitration, just such fees as would be charged by solicitor and counsel in an ordinary action before the change of the tariff in 1913, attendances at the registry office and on persons named, conferences with counsel, and the like, to every item of which a fee could with perfect facility be affixed—then a lump-fee of $7,000 is charged.

In this bill I am unable to see the least difficulty in making a charge for each item: and there is nothing in the way of continued negotiations resulting in a settlement. The case is not at all like that now under consideration: I know of no case binding upon us at all like the present in which it has been held that a lump-sum charged for a series of negotiations or the like has been held improper. If case-law and common sense have parted company, it is the function of an appellate Court—and I humbly conceive its duty—to reconcile them, unless absolutely prohibited from doing so by binding decisions.

Common sense, I venture to think, indicates that the amount of remuneration a lawyer should receive depends to some extent on the magnitude of the interests concerned, and more upon the skill which he manifests in his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another: nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the

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lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed.

I entirely agree in what has been said in *Re Solicitor*, 12 O.W.N. at p. 192: "Where a professional man is called upon to advise upon a complicated situation and to take charge of investigations and negotiations, his fee can be better estimated by the result attained and the care and skill shewn in what was done than by any summation of items each attached to an individual move in the game played with living persons;" and, finding no case binding upon us which precludes me from so holding, I am of opinion that this bill answers the statute.

I would allow the appeal with costs here and below, direct the bill to be taxed by the proper officer, who will deal with the costs of taxation, and order that judgment be entered for the plaintiff for the amount found due by the Taxing Officer, with costs as above.

MULOCK, C.J. EX., and CLUTE and SUTHERLAND, JJ., agreed with Riddell, J.

KELLY, J.:—At the close of the argument the only difficulty which appeared to me to stand in the way of the appellant was in respect of the charge of $165 for "Fee on revising deed, examination of title, closing transfer of property, etc., amount paid on settlement $30,000," as to which I was inclined to the opinion that we were bound by the decision in *Gould* v. *Ferguson*, 29 O.L.R. 161. That case was decided in appeal by the other members composing this Divisional Court; and, as they now unanimously state that the bill now under discussion has no resemblance to the bill in question in the *Gould* case, I see no reason why the appellant should not succeed.

I readily subscribe to what was said by Middleton, J., in *Re Solicitors* (1911), 2 O.W.N. 596, 18 O.W.R. 366, that many cases arise in which there are a series of consultations and interviews in the course of negotiation, and it is quite impossible to divide and allocate the sum proper to be paid between the different "items" of work done; and there are other cases where the work in its nature is an "entire" thing incapable of intelligent subdivision; and again: "When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken

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and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemised bill would give him greater remuneration."

It can readily be conceived that in many instances the solicitor is sought out and retained because of his experience and his skill in attaining the desired result without unnecessary expenditure of time.

The appeal should be allowed, the bill referred to the proper officer for taxation, and judgment be entered for the plaintiff for the amount taxed, with costs of the appeal and of the action, including the costs of taxation if the Taxing Officer find the plaintiff entitled.

After the delivery of judgment as above, the defendants moved the Court to vary the minutes of the judgment as settled, in respect of the costs.

The direction at the end of the reasons for judgment of RIDDELL, J., was: "Allow the appeal with costs here and below, direct the bill to be taxed by the proper officer, who will deal with the costs of taxation, and order that judgment be entered for the plaintiff for the amount found due by the Taxing Officer, with costs as above."

White, for the defendants, pointed out that the bill might be reduced so that the amount recoverable upon it would be within or beneath the jurisdiction of a County Court, and asked that the costs should not be taxed and paid forthwith nor until the conclusion of the taxation.

Robinson, for the plaintiff.

THE COURT held that the trouble which arose in *Avery & Son* v. *Parks* (1917), 35 D.L.R. 71, 39 O.L.R. 74, ought not to be allowed to arise again; that the ordinary rule for the payment of costs such as these was that they should be taxed on the scale of the Court in which the action was brought, and paid forthwith; and that, therefore, the costs should be taxed on the Supreme Court scale and paid forthwith after taxation.

Order accordingly.

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